

SOUTH AFRICA / JUDGMENT

Department of Health v Dladla and Others (1132/13) [2016] ZALCD 28 (7 November 2016)

[2016] ZALCD 28

COURT

Labour Court Durban

BEFORE

Cele

CASE / FILE NUMBER

1132/13

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IN

THE LABOUR COURT OF SOUTH AFRICA

(HELD

AT DURBAN)

Not

Reportable

Case

No: 1132/13

In

the matter between:

DEPARTMENT
OF
HEALTH Applicant
and
D K DLADLA &
OTHERS Respondents

JUDGMENT

7 OCTOBER 2016

CELE J

Introduction

[1] Even though on different grounds both parties in this matter seek to review and correct the decision of the Third Respondent in his arbitration award dated 14 September 2013.

[2] This application is one brought in terms of section 158(1)(g) of the Labour Relations Act[1] hereafter referred to as the Act. I prefer to refer to the parties as the employer and the employees and similarly the employers

and the employees applications. In the case number D1132/13 the employer is seeking a review of the arbitration award in its entirety. Whilst in the case D1200/13 the employees are seeking a review of the same award in so far as the exclusion of the employees appearing on numbers 788 to 913 of Annexure A to the award are concerned. Put differently the employer is seeking a review of paragraph 22 of the award whilst the employees are seeking a review of paragraph 22, in part paragraph 23 and the ancillary relief on paragraph 24 of the award. Case number 1200/13 is a counter review application to case number D1132/13. The application in D1132/13 is opposed by the employees, whilst D1200/13 is but for the main application unopposed.

The factual background.

[3] The facts of this matter are by and large common cause between the parties. All employees are nurses stationed at various hospitals

under the Department of Health hereafter referred to as the department. A collective agreement called resolution 2/2004 was

reached between the labour and the department. In terms of the collective agreement employees stationed at a graded institution

qualified to be paid certain allowances such as the rural allowance. Such employees were described in the circular as professional nurses.

The issue before Court.

[4] Simply stated the issue to be decided in this case by the Third Respondent was whether the interpretation of the collective agreement 2/2004 and thus whether the other employees other than those listed in numbers 700 up to 728 were entitled to receive a rural allowance. The department took the position that the rural allowance was only payable to graded nurses called professional nurses which it understood to mean the nursing sisters only. That approach was to the exclusion of staff nurses, ancillary nurses, midwives and ancillary midwives.

- [5] An unfair labour practise dispute was referred for conciliation and thereafter for arbitration. An award was issued by a different

commissioner on 7 December 2006 which award favoured the employees thus indicating to the department that the nurses that the department wanted to exclude from the allowance had to be paid that allowance meaning the collective agreement was not only applicable to the nursing sisters, but had to include the other various categories such as the staff nurses, ancillary nurses, midwives and ancillary midwives.

- [6] The department was aggrieved by that finding of the Commissioner. It then filed a review application in this court. It came under case number D67/07. Once the application was filed the only development that took place thereafter was an application to intervene in the proceedings and that application by the national minister to intervene was filed as far back as 24 October 2007. I have a file before me. Nothing else took place in those review proceedings. What then happened is that Mr Dladla together with his group decided to refer yet another dispute for conciliation, conciliation failed to resolve it. It was then referred to the third respondent for arbitration and the third respondent was appointed to arbitrate that dispute. The Third Respondent issued an award which is being assailed presently.

- [7] The chief findings of the Third Respondent are relevant here. Before I go to that let it be indicated that during the arbitration

proceedings the employees led evidence through Mr Dladla who was the only witness to testify. The department was given a chance to cross examine Mr Dladla through its representative and once the case of the employees was closed the Commissioner granted the department an opportunity to lead its evidence. The representative of the department decided to close the case of the department without evidence led. That representative asked that an opportunity be granted to the parties to file written submissions. The opportunity was indeed so granted.

- [8] Notwithstanding such period of time given to the parties, only the employees representative made written submissions. The department

failed to make any written submissions. Effectively the Commissioner was limited to rely on the facts as were brought to him by the employees. But then he was to interpret the collective agreement viz using the facts before him.

- [9] Now, even before I go to the chief findings I need to reflect for a moment on this collective agreement. The relevant portion of the agreement falling under the Public Health Welfare Sectoral Bargaining Council is under paragraph 3.1(a)(i) which reads:

“A non pensionable rural allowance to the value of 22 percent, 17 percent and 12 percent respectively of the relevant annual salary notch be payable to identified personnel in the occupational groups that are identified and who are actually involved on a fulltime basis with clinical works.”

There is then a categorisation of such employees. They are listed and at the bottom of that list we have professional nurses excluding students and professional nurses and there they would be entitled to 12 percent. Below this entry lies an entry which reads:

“Community service workers and interns are included. Professional nurses generically refers to nurses registered with the SANC and not to rank.”

[10] The Commissioner having looked at the evidence before him and having considered the contents of the collective agreement continued when it came to the interpretation in paragraph 17 of the award onwards to say the following:

“Paragraph

17. In terms of the resolution rural allowance of 12 percent is effective from the 1 July 2003, granted to professional nurses excluding student professional nurses. Professional nurses is defined generically as referring to nurses registered with the South African Nursing Council and not to rank. Refer to paragraph 3.1 and 5 of the resolution. Further as per Annexure B to the resolution the rural allowance is applicable to the public sector professionals working in specifically identified hospitals and institutions. Therefore the criteria for nurses to be covered by the resolution is a registration with SANC and working in the identified hospitals or institutions.

Paragraph 18. It is trite that in the interpretation, words are to be given their plain ordinary and popular meaning unless it appears clearly from the contract that the parties intend them to bear a different meaning or the document is vague and ambiguous. Therefore one must ascertain and follow the intention of the parties.

Paragraph 19. As indicated above the parties to the resolution intended to award a non pensionable rural allowance to professional nurses registered with SANC working in the identified workplace. I find that the applicants proved that they are registered with SANC either as nursing assistants or staff nurses. They have also proved some of them working in Mbongolwane Hospital, work in the institution identified in the resolution. Further, in the absence of any evidence to the contrary I find that there are indeed professional nurses. I therefore find that the correct interpretation is that the resolution does cover the applicants working in Mbongolwane Hospital.

“Paragraph

20. The term application of collective agreement refers to whether the agreement applies to a particular set of facts or circumstances referred to Wallace Employment and Labour Law volume 3 Jutas. Therefore in line with my foregone finding the applicants working in Mbongolwane Hospital are entitled to the rural allowance as provided for in the resolution in my finding.”

He then granted the relief as appears in the award.

[11] The Applicant initiated the review proceedings. Essentially the Applicant, on the grounds for review suggests that the Commissioner

misdirected himself by interpreting the collective agreement as he did. And that had he properly applied his mind he would have found that the collective agreement excludes any other nurse other than a professional nurse meaning a nursing sister.

[12] Secondly, the Applicants contend that the Commissioner misdirected himself to the extent that only one employee signed the referral form for conciliation namely Mr Dladla, and that therefore only Mr Dladla's dispute should have been considered to the exclusion of the rest of the other group. And then thirdly, the Applicant contends that if there is any debt that arose between it and its employees such a debt has since prescribed because a period longer than three years has since expired without any interruption of prescription.

[13] I prefer to deal with the last two issues and then the first issue. The first issue is about Mr Dladla being the only person who signed. The CCMA rules which are a guide to the Bargaining Council as well applicable to them indicate clearly how a dispute should be referred. I need here to read Rule 4(2), Rule 3 is headed who must sign documents, 4(2) reads:

"If proceedings are jointly instituted or opposed by more than one employee documents may be signed by an employee who is mandated by the other employees to sign documents. A list in writing of the employees who have mandated the employee to sign on their behalf must be attached to the referral document."

[14] This is precisely what happened at the conciliation level. Mr Dladla signed it. There was a list attached of those employees who appeared to have been represented by him. Mr Dladla testified and indicated under oath that he represented all those employees whose names appeared in the attached list. Therefore the first ground for review should fail at this stage. The second ground talks to prescription. Section 15 of the Prescription Act[2] to the extent relevant reads thus:

"15.1. Running of prescription shall subject to the provisions of subsection 2 be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt."

15.6. For the purposes of this section "process" includes a petition, a notice of motion, a rule nisi, a pleading in reconvention, a third party notice referred to in any rule of Court and any document whereby legal proceedings are

commenced."

[15] I have already indicated here that as far back as 2006 a dispute similar to the present was referred by the employees for conciliation

and arbitration. An award was issued on the 7 December 2006 in favour of the employees. In my view those proceedings did amount to a process as is envisaged in the Prescription Act. It is trite that for purposes of the Act it is normal for a dispute firstly to go through conciliation and where

it fails in terms of section 191 of the Act it then has to be referred either to arbitration or to this court depending on the nature of that dispute. Conciliation is therefore an important step for a referral of a dispute to this court. There will be exceptions where certain matters can be referred directly to this court such as those disputes that come by way of section 77 of the Basic Conditions of Employment Act.[3]

[16] But in my view for prescription to be interrupted in this case it was necessary that conciliation had to take place and only thereafter would further steps take place. So in my view therefore the referral to conciliation did amount to a process. And here I rely on section 15(6) where it says:

“Any document whereby legal proceedings are commenced.”

[17] Prescription was accordingly interrupted by the referral of the initial dispute. Whilst that dispute was not finalised through a review application a further dispute was referred to this Court and I have not been told that prescription had to run again after that case. So, in my view, that first interruption was relevant and therefore the ground for review based on prescription should also fail.

[18] That leaves me with whether or not the Third Respondent correctly interpreted the collective agreement. My view is that the review test as is espoused in the various decisions of this court and the Labour Appeal Court and the rest of the courts is not applicable. I am referring to the review test set down in *Sidumo and another v Rustenburg Platinum Mines Ltd and others*. [4] So that decision together with various others decisions such as *Herholdt v Nedbank Ltd and others* [5] the test is not applicable. A proper test will be the one as would be used when for instance a condonation ruling is being challenged on review. The question being whether or not the commissioner correctly applied his mind into the issues that served before him or her.

[19] Mr Pillay suggests the commissioner misdirected himself in that he should have been guided by the Act, particularly the Nursing Act [6] in interpreting the agreement. And if he had done so he would have found that there is different categories of nurses and that a specific group under section 31 of the Act breaks down professional nurses – in fact gives a definition of a professional nurse and it distinguishes a professional nurse from that of midwife, staff nurse, ancillary nurse and ancillary midwife. He says the agreement is clear it merely restricts itself to professional nurses to the exclusion of the other categories of nurses.

The commissioner paid particular attention to the note underneath 3.1(a)(1) which again I will read for purposes of this record:

“Community service workers and interns are included. Professional nurses referred to nurses registered with SANC and not to rank.”

[20] No definition has been given to me what the community service worker means. But one can understand a community worker would probably be a person who is really not qualified because if it is a person who is a professional and is qualified, there would be no need to refer to such an employee as a community service worker. One begins to wonder why a community service worker should be included who probably would not be qualified to the exclusion of a qualified nurse whatever that category should be.

[21] The second concern about the interpretation which I think the Commissioner picked up correctly is this, the note says professional

nurse generically means or refers to nurses registered with SANC and not rank. This particular clause is important, it doesn't say refers to professional nurses registered, but it says nurses registered with SANC. It specifically says leave out their rank. In my view, that rank is not limited to the classification as alluded to by Mr Pillay namely a professional nurse, a senior professional nurse and a chief professional nurse to accord that meaning to this interpretation would be erroneous. It must follow that the ranking of nurses generically is not being referred to here. In other words any nurse who is so qualified and is registered with the South Africa Council or Nursing Council. It must follow therefore that the commissioner did not misdirect himself when he gave the interpretation that he did. He appears to have given the interpretation to the collective agreement as was intended to by the parties themselves.

[22] It must follow therefore that the third ground for review in this case must fail because the Commissioner did not misdirect himself in the interpretation accorded to this collective agreement. Therefore the application for review of this award by the Applicant which is the department should similarly fail. There is an application by the employees which is unopposed. Necessarily that application stands to succeed. There is a continuous employment relationship between the parties. I think that harmony should be kept in that relationship. I think if I were to order a costs order it would be to strain that continuous relationship.

[23] I will therefore issue the order in that respect.

· That the application to review the arbitration award in this matter filed by the Department of Health is dismissed.

· The application to partly review the award filed by the employees succeeds.

· No costs order is issued.

Cele J

Judge of the Labour Court of South Africa -

[1] 66 of 1995.

[2] 68 of 1969.

- [3] No 75 of 1997.
- [4] 2007 BLLR 1097 (CC).
- [5] 2013 (11) BLLR 1074 (SCA)
- [6] Act No 33 of 2005
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