

SOUTH AFRICA / JUDGMENT

Gala v Daniel Seopela N.O and Others (JR 597/17) [2022]

ZALCJHB 26 (17 February 2022)

[2022] ZALCJHB 26

COURT

Labour Court Johannesburg

BEFORE

D Mahosi

CASE / FILE NUMBER

JR 597/17

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IN THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR

597/17

In the matter between:

JUDAS JABULANI
GALA
Applicant
and
DANIEL SEOPELA
N.O.
First Respondent
DEPARTMENT OF AGRICULTURE AND
RURAL
DEVELOPMENT Second
Respondent
GENERAL PUBLIC SERVICE SECTOR
BARGAINING
COUNCIL
Third Respondent

Delivered:

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website and released to SAFLII. The date and time for hand-down is deemed to be 17 February 2022.

JUDGMENT

MAHOSI J

Introduction

- [1] The applicant brought an application in terms of section 145 (1) of the Labour Relations Act[1] (LRA) for an order to review and set aside the arbitration award dated 09 August 2016, issued by the first respondent (the arbitrator) under the auspices of the General Public Service Sector Bargaining Council (the GPSSBC), under case number GPBC 2764-2015.
- [2] The application was filed out of the prescribed period. Having had regard to the pleadings filed as well as the record, I am of the view that the applicant has reasonable prospect of success and that the interests of justice requires a full determination of the matter. As such, condonation application is granted.

Background

- [3] The applicant commenced working for the second respondent on 24 November 1989, as an Agricultural Technician. On 01 October 1997, he was promoted to the position of Chief Agricultural Technician. On 01 April 2009, the second respondent changed the post of Agricultural Technician and Agricultural Scientists to Agricultural Advisors. The employee currently holds the position of Senior Agricultural Advisor.
- [4] On 09 April 2014, the second respondent issued a circular providing guidelines for the implementation of Occupation Specific Dispensation (OSD) in line with Resolution 3 of 2009 (the Resolution) which was passed by the General Public Service Sector Bargaining Council (GPSSBC) on 07 August 2009. The purpose of the Resolution was to introduce OSD for Quantity Surveyors, Professional Surveyors, Architects, Town and Regional Planners, GIS Professionals and Scientists who fell within the General Public Service Sector.
- [5] On 03 November 2014, the second respondent took a decision that the applicant did not qualify under the OSD on the basis that he was not employed as a scientist nor performing the duties of a scientific. Aggrieved by the second respondent's decision, the applicant referred an unfair labour dispute in terms of section 186(2)(a) of the LRA to the bargaining council contending that he qualified for translation of pay progression in terms of the Resolution.
- [6] The dispute could not be resolved through conciliation. As a result, it was referred to arbitration hearing, which was set down for 01 June 2016. During the arbitration, the parties agreed that the matter was to be decided based on their written heads of arguments.

The arbitration

- [7] The issue before the arbitrator was whether or not the applicant qualified to be translated in terms of Resolution 3 of 2003.
- [8] The applicant's case was, in summary, that to an extent that he is currently employed as a Senior Agricultural Advisor performing and rendering scientific and technical duties and also registered as a Natural Scientist and Agricultural Scientist with South African Council of Natural Scientific Professions (SACNASP), he qualifies to be translated in terms of the Resolution.
- [9] The second respondent argued that although both the Agricultural Technicians and Agricultural Scientists were translated to the posts of Agricultural Advisor and Senior Agricultural Advisor, the applicant is still

performing the duties of a Technician and not that of a scientist. It was also brought to the arbitrator's attention that the outcome of the Task Team that was appointed to assess whether employees qualify to be translated found that the applicant did not qualify because his key area were not scientific in nature.

- [10] On 09 August 2016, the arbitrator issued an arbitration award in terms of which he found that the applicant did not qualify to be translated as the post he occupied did not fall within the field stated in clause 1c of the Resolution. Accordingly, he dismissed the applicant's claim. It is this award that is the subject of this application.

Point in limine

- [11] The second respondent opposed this application and in their answering affidavit, they raised a point in limine relating to the applicant's failure to cite the MEC of Agriculture and Rural Development as the Executive Authority of the

second respondent.

- [12] The applicant has subsequently filed an application to join the MEC of Agriculture and Rural Development as the fourth respondent. Having had regard to the submissions, particularly section 2(1) of the State Liability Act[2], I am inclined to grant the joinder application.

Submissions

- [13] The grounds on which the applicant challenged the award was that the arbitrator erred by failing to take into account the following factual evidence:

13.1 The Memorandum of Understanding between the applicant and the second respondent, which states that the applicant's job is to render scientific advice,

13.2 Clause 13 of the Resolution, which states that the translation is to be effected in accordance with the relevant post occupied by the applicant at the time of the translation and not the duties he was performing,

13.3 The job summary for the position of Senior Agricultural Advisors, item C of which states that the Senior

Agricultural Advisors deliver scientific advice and take part in research activities and item F which requires any candidate for such post to have the appropriate 4 year degree or BTech degree.

[14] The applicant submitted that the arbitrator erred in stating that a job evaluation should be done to determine whether the post of Agricultural Advisor is scientific in nature or not, as this was already done in the job summary provided and memorandum of agreement.

[15] It was the applicant's further submission that the arbitrator placed undue amount of weight on his employment history as a Technical Advisor, which was no longer his post or job description at the time the resolution was to be implemented. He avers that at the time of the translation, he was a Senior Agricultural Advisor, a post that requires a four-year degree and which includes scientific and research functions. It was on the basis of the above submissions that he held the view that the finding of the arbitrator was not reasonable or rationally connected to the evidence before him.

[16] In opposition, the second respondent denies that, based on the material before him, the

conclusion

of the arbitrator was one that a reasonable decision-maker could not have made. It persisted with the contention it made at the

arbitration that the applicant did not qualify for the translation. The basis for its contention was that he was not employed as a scientist nor performing the duties of a scientist.

[17] The second respondent attached, to its answering affidavit, the applicant's performance agreement he entered into with his supervisor Mr C. S. Maringa, which lists his key outcomes as school gardens establishment, tomato production and backyard gardens establishment.

[18] In his replying affidavit, the applicant submitted that, as a Senior Agricultural Advisor, he holds a post that is scientific in nature and that he is appropriately qualified to perform the duties of that nature. He further submitted that, in accordance with his job description, it was open for the second respondent to utilise his skills and order him to perform scientific functions at any time it deems fit.

[19] The applicant submitted that it was within the second respondent's discretion to determine his duties and that the manner in which it utilises his skills has no impact on the nature of his position. On the performance agreement relied upon by the second respondent, the applicant submitted that it was not relevant in the interpretation of the Resolution as it did not reflect his appointment position but merely the duties the second respondent decided to allocate to him.

Applicable law and analysis

[20] The arbitration awards are reviewable in terms of section 145 of the LRA, which provides that

any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the commission or council may apply to the Labour Court for an order setting aside the arbitration award.

[21] Section 145(2) defines a defect as the commissioner's misconduct in relation to the duties of the commissioner as an arbitrator, gross irregularities in the conduct of the arbitration proceedings, exceeding the commissioner's powers or improperly obtaining an award. The key question is whether the commissioner's decision is one that a reasonable decision-maker could not reach.

[22] At the core of the applicant's case is that the arbitrator failed to properly interpret the collective agreement, that is the Resolution. The manner in which the arbitrators are required to interpret collective agreements was dealt with in *Western Cape Department of Health v MEC Van Wyk and Others*, where the LAC stated as follows:

'In interpreting the collective agreement the arbitrator is required to consider the aim, purpose and all the terms of the collective

agreement. Furthermore, the arbitrator is enjoined to bear in mind that a collective agreement is not like an ordinary contract. Since the arbitrator derives his/her powers from the Act he/she must at all times take into account the primary objects of the Act. The primary objects of the Act are better served by an approach that is practical to the interpretation and application of such agreements, namely, to promote the effective, fair and speedy resolution of labour disputes. In addition, it is expected of the arbitrator to adopt an interpretation and application that is fair to the parties.'

[23] In the current matter, the arbitrator did not properly interpret the collective agreement in that he failed to consider the aim, purpose and all the terms thereof, in particular clause 13.1 which states that employees will translate to appropriate post and salary grades in accordance with the post that they occupy at the time of translation. The commissioner also failed to properly interpret Annexure B, which is the Occupational Specific Dispensation – Scientists and Related Professionals and which includes Agricultural Science as a field of practice applicable to the OSD.

- [24] Instead of interpreting the collective agreement, the arbitrator simply looked at the categories mentioned in clause 1 of the Resolution and concluded that “it goes without saying that the applicant’s post did not fall within these categories.”
- [25] In addition, the arbitrator ignored Clause 3 of Memorandum of Understanding on Performance entered into between the applicant and the second respondent, which states that the applicant’s job function is to, inter alia, render scientific and technical advice to internal and external clients to ensure sustainable development.
- [26] The arbitrator further ignored the applicant’s job information summary, which also states that the applicant’s key performance areas include, inter alia, rendering scientific and technical advice to internal and external clients to ensure sustainable development and involvement in research activities. It further states that the minimum appointment requirement is, inter alia, an appropriate four-year degree or BTech in agricultural extension.
- [27] Had the arbitrator properly interpreted all the terms of the collective agreement and considered all the documentary evidence before him, he would have found that the applicant qualified to be translated because the post description of a Senior Agricultural Advisor includes scientific functions, the applicant is registered with SACNASP and the Resolution states that a translation must occur according to the post that the employee occupied, not specific duties allocated to him.
- [28] The second respondent’s contention that the applicant did not qualify for translation, as he was not performing the duties of a scientist does not hold any water. Further, the document it sought to rely on, that is the applicant’s performance agreement, was not helpful as it only outlines the duties allocated to him, not the job description or the key performance area of the position of a Senior Agricultural Advisor. As such, it is not relevant for the interpretation of the Resolution.
- [29] The applicant correctly submitted that if the second respondent’s contention were to be allowed, the employers could determine who may be promoted by arbitrarily allocating duties. This is clearly contrary to the purpose and objectives of the Resolution.
- [30] In light of the above, it is my view that the arbitrator committed a gross irregularity, which resulted in him reaching a decision that is not legally justifiable. Therefore, his award stands to be set aside.

Costs

- [31] With regard to costs, I am of the opinion that the requirements of law and fairness dictate that there should be no order as to costs.
- [32] In the circumstances, the following order is made:

Order

1. The application to condone the late filing of the review application is granted.
2. The MEC of Agriculture and Rural Development: Limpopo Province is joined in the proceedings as a fourth respondent and all the papers exchanged in the matter must be served on him/her in terms of the Rules of this Court.
3. The arbitration award dated 09 August 2016, issued by the first respondent under the auspices of the General Public Service Sector Bargaining Council, under case number GPBC 2764-2015 is reviewed, set aside and substituted with the following order:
 - 3.1 The applicant qualifies for translation in terms of Resolution 1 of 2009.
 - 3.2 The second respondent is ordered to implement the translation within 30 days hereof.
4. There is no order as to costs.

D. Mahosi

Judge of the Labour Court of South Africa

Appearances

For the applicant:

Advocate L. Mgwetyana

Instructed by:

The State Attorneys, Pretoria

For the third respondent: Advocate A.C Diamond

Instructed by:

Johan Steyn Attorneys

[1] Act 66 of 1995 as amended.

[2] Act 20 of 1957, as amended.

[3]

[2014] 11 BLLR 1122 (LAC) at para 22.

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