

SOUTH AFRICA / JUDGMENT

Kenoshi v Commissioner Matshaka and Others (JR 531/2019) [2022] ZALCJHB 233 (17 August 2022)

[2022] ZALCJHB 233

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

JR 531/2019

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case

No: JR 531/2019

In

the matter between:

MOEPENG
JOYCE MIRIAM KENOSHI
APPLICANT
and
COMMISSIONER L
MATSHAKA
FIRST RESPONDENT
PUBLIC
HEALTH & SOCIAL DEVELOPMENT
SECTORAL BARGAINING
COUNCIL
SECOND RESPONDENT
DEPARTMENT OF
HEALTH-GAUTENG
THIRD RESPONDENT
Heard: 04 August 2022
Delivered: 17 August
2022
(This

judgement was handed down electronically by circulation to the
parties' legal representatives, by email, publication

on the Labour Court's website and released to SAFLI. The date on which the judgment is delivered is deemed to be 17 August 2022.)

JUDGMENT

VAN NIEKERK, J

- [1] The applicant seeks to review and set aside an arbitration award issued by the first respondent (the arbitrator) on 11 March 2019. In the award, the arbitrator found that the third respondent had not committed an unfair labour practice in relation to the applicant's demotion by lowering her rank from PN-B4 to PN-A7, resulting in a reduction in remuneration.
- [2] The material facts are recorded in the award. The applicant was employed as a professional nurse in the trauma and emergency unit. In 2007, she applied for appointment to the position of assistant manager ICU, and after an interview was recommended for appointment. On 8 December 2008, the applicant received a letter of appointment, appointing her to the post, at the PN-B4 level. At the time of her appointment, the applicant was a registered nurse with a four-year degree in nursing, a diploma in midwifery and a six-month trauma certificate that she obtained in 1996.
- [3] On 20 November 2017, the hospital's chief executive officer addressed a letter to the applicant stating, amongst other things, that after an audit, 'we have noticed that your trauma and emergency nursing qualification is six months instead of one year.' In particular, the applicant was advised that in terms of the applicable bargaining council resolution and Government Notice an assistant manager in a specialised area was required to have a basic qualification in the form of a diploma or degree in nursing or equivalent qualification that allows registration as a professional nurse and in addition, a post basic nursing qualification with duration of at least one year in the relevant speciality. On the basis that the applicant did not meet this requirement (her post basic qualification was a six-month qualification and not a year), her rank was reduced from PN-B4 to PN-A7 (assistant manager: general) and the third respondent demanded that she refund an amount of R 303,740.50 being an alleged overpayment of salary.
- [4] The applicant referred a dispute concerning an alleged unfair labour practice relating to demotion to the bargaining council, and the matter was ultimately referred to an arbitration hearing before the arbitrator. In his award, the arbitrator considered the third respondent's submission that the applicant had not been demoted rather than correctly placed into a position that she was qualified to occupy. The arbitrator recorded that the applicable bargaining council resolution required an assistant manager in the specialised area to have a basic, accredited qualification and in addition, one year's post-basic nursing qualification in the relevant speciality. The arbitrator clearly acknowledged that the applicant's appointment

has been the subject of what he referred to as ‘an obvious litany of errors’. However, given the common cause fact that the applicant did not have a one year post basic qualification in trauma and emergency nursing, that her appointment was erroneous and that the terms of the letter addressed to her in November 2017 constituted a correction of the placement and not a demotion. Then came to the following conclusion:

43. What is clear is an obvious litany of errors that is characterised the appointment of the applicant.
44. Firstly, the advert reflects the post correctly as assistant manager (emergency) but wrongly giving the code as PN-P4, instead of PN-B4.
45. Secondly, early registration with SANC is a registered nurse and midwife, diploma/degree and 3 to 5 years in emergency department are mentioned as requirements. Yet this is a post in speciality nursing where a post basic qualification listed in Government Notice R 212 is an inherent requirement to perform the duties attached to the post. This also includes similar post basic qualifications with duration of at least one (1) year the relevant speciality recognised by the SANC. Why such important information was omitted from the advert baffles me to say the least.
46. Thirdly, the appointment letter of the applicant dated 11 December 2008 reflects: “application for a post of assistant manager PN-B4” and not “PN-P4”.
47. It was only after audit in November 2017 that the respondent discovered that the applicant has a six-month trauma and emergency nursing qualification instead of one (1) year post basic qualification, when her rank was lowered from PN-B4 to PN-A7 resulting in the reduction of her salary from R 596 976. 00 to R 546 315.00.
48. I therefore have to accept the respondent’s submission that the applicant was appointed erroneously into the assistant manager’s post: PN – B4 (speciality) without having a required one (1) year post basic qualification which is an inherent requirement and therefore she has not been demoted but has been correctly placed to a post of an assistant manager: PN-A7, which is a post she qualifies for.
- [5] On this basis, the arbitrator dismissed the applicant’s referral.
- [6] The applicant contends that the arbitrator has misconducted himself, committed gross irregularities and exceeded his powers and that his decision is one to which no reasonable decision-maker could come on the available evidence. In particular, the applicant submits that the arbitrator failed to appreciate that once an appointment had been made by the third respondent, this constituted an administrative act which remained binding until set aside on review; and that the salary

correction on which the third respondent relied was not a correction rather than an act of self-help consequent on what the third

respondent considered to be a wrongful promotion.

- [7] The test to be applied in review applications is well-established. This court may intervene if and only if the applicant establishes that the arbitrator committed a reviewable irregularity and that the decision to which the arbitrator came was so unreasonable that no reasonable decision-maker could come to it. In a matter such as the present, where the applicant relies on what are contended to be reviewable irregularities in the assessment of the evidence, the court must be cautious to ensure that the line between an appeal and a review is not crossed. In *Gold Fields Mining SA (Pty) Ltd v CCMA*
- [2007] ZALC 66; [2014] 1 BLLR 20 (LAC)), the Labour Appeal Court noted that a review court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each factor and then determine whether a failure by the arbitrator to deal with one or more factors amounted to a process related irregularity sufficient to set aside the award. The court cautioned against adopting a piecemeal approach since a review court must necessarily consider the totality of the available evidence (at paragraph 18 of the judgment). Specifically, the questions for a review court to ask are whether the arbitrator gave the parties a full opportunity to have their say in respect of the dispute, whether the arbitrator identified the issue in dispute that he or she was required to arbitrate, whether the arbitrator understood the nature of the dispute, whether he or she dealt with substantial merits of the dispute and whether the decision is one that another decision maker could reasonably have arrived at based on the evidence (see paragraph 20). But, as the court emphasised, this is to be considered on a totality of the evidence and not on a fragmented, piecemeal analysis (at paragraph 21).
- [8] The issue on which the arbitrator was required to make a determination was whether or not the third respondent had committed an unfair labour practice when it lowered the applicant's rank from PN-B4 to PN-A7 after an audit process found that the applicant did not possess a one-year trauma and emergency nursing qualification. In essence, the arbitrator's reasoning was that there had been no demotion, rather than a correction of an erroneous appointment.
- [9] It was not in dispute that Resolution 3 of 2007 was adopted by the bargaining council to give effect to an occupational specific dispensation for nurses, or that posts in speciality nursing required a post basic qualification of at least one year, recognised by the SANC. At the time of the advertisement of the post to which the applicant was published, the provisions of Resolution 3 of 2007 had been applicable, from 1 July 2007. All posts subsequently advertised had to comply with the requirements of the resolution, as it was given expression in GN R212 and in particular, the post-basic qualifications relating to posts in speciality nursing (a year-long qualification) constituted a minimum requirement for appointment.
- [10] It is also not in dispute that the applicant applied for the vacant and funded post of assistant manager in the trauma and emergency unit, at the level of PN-B4, as advertised by the Kalafong Tertiary Hospital. The advertisement made no mention of any post-basic

qualifications. The applicant was the only candidate and was recommended for appointment. It is further not in dispute that the applicant was advised in November 2017 that she did not meet the requirements attached to the post and that her salary would be lowered from PN-B4 to PN-A7.

- [11] The applicant's primary ground for review was that her appointment constituted an administrative act, and that it could only be set aside by way of an application for review. There is no merit in this submission. The applicant did not make out a case to this effect in the arbitration hearing and it is more likely than not, having regard to the relevant facts, that the third respondent's conduct did not amount to the exercise of a public power (see *Transnet Ltd v Chirwa* (2008) 29 ILJ 73 (CC)).
- [12] In any event, in *Khumalo v Member of the Executive Council for Education: Kwazulu-Natal* 2014 (5) SA-579 (CC), the Constitutional Court dealt with the duties of public functionaries. It was held that the rule of law is a founding value of our constitutional democracy and that it is the duty of the courts to insist that the state, in all its dealings, operates within the confines of the law and, in so doing, remains accountable to those on whose behalf it exercises power. Reference was made to section 195 of the Constitution which compelled the MEC, in the public interest, to avoid and eliminate illegalities in public administration and the fact that the MEC was not only entitled, but also duty-bound to set aside irregular administrative acts. It was held that:

Section 195 provides for a number of important values to guide decision-makers in the context of public-sector employment. When, as in this case, a responsible functionary is enlightened of a potential irregularity, section 195 lays a compelling basis for the founding of a duty on the functionary to investigate and, if need be, to correct any unlawfulness through the appropriate avenues. This duty is founded, inter alia, in the emphasis on accountability and transparency in section 195(1)(f) and

- (g) and the requirement of a high standard of professional ethics in section 195(1)(a). Read in the light of the founding value of the rule of law in section 1(c) of the Constitution, these provisions found not only standing in a public functionary who seeks to review through a court process a decision of its own department, but indeed they found an obligation to act to correct the unlawfulness, within the boundaries of the law and the interests of justice.

Public functionaries as the arms of the state, are further vested with the responsibility, in terms of section 7(2) of the Constitution, to "respect, protect, promote and fulfil the rights in the Bill of Rights." As bearers of this duty, and in performing their functions in the public interest, public functionaries must, where faced with an irregularity in the public administration, in the context of employment or otherwise, seek to redress it. This is the responsibility carried by those in the public sector as part of the privilege of serving the citizenry who invest their trust and taxes in the public administration. In the context of public-sector employment, this is fortified by section 5(7)(a) of the PSA which provides:

“A functionary shall correct any action or omission purportedly made in terms of this Act by that functionary, if the action or omission was based on error of fact or law or fraud and it is in the public interest to correct the action or omission.”

Section 5(7)(a) undoubtedly includes the possibility of a functionary seeking recourse in the courts.

[13] In other words, the third respondent was obliged in law to correct the error that it had made; an application to review and set aside its decision being but one means by which this end might be achieved.

[14] In so far as the applicant submits that the arbitrator failed to have regard to the evidence that served before him, the award discloses that on the contrary, the arbitrator was alive to the material facts and that he empathised with the applicant, who through no fault of her own, was found to have been irregularly appointed. The record discloses no reviewable irregularity on the part of the arbitrator, and in any event his decision that the applicant had not been demoted but that a correction had been made to her erroneous appointment is one that a reasonable decision-maker could make on the available evidence. The application thus stands to be dismissed.

[15] For the purposes of section 162, the requirements of the law and fairness are best served by each party bearing its own costs.

I make the following order:

1. The application is dismissed.

André van Niekerk

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

A Mohulatsi, Mohulatsi Attorneys

For the Respondents:

N Rambachan-Naidoo

Instructed by:

State attorney

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