

SOUTH AFRICA / JUDGMENT

Khunou and Another v South African Local Government Bargaining Council and Others (JR175/2016) [2017] ZALCJHB 385 (19 October 2017) [2017] ZALCJHB 385

COURT

Labour Court Johannesburg

BEFORE

Prinsloo

CASE / FILE NUMBER

JR175/2016

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Source record

THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JR 175 /2016

In

the matter between:

ONICA
KHUNOU
First Applicant
REUBEN
TSHABANE
Second
Applicant
and
SOUTH
AFRICAN LOCAL GOVERNMENT
BARGAINING
COUNCIL
First
Respondent
LUNGILE
MATSHAKA N.O
Second
Respondent
CITY
OF JOHANNESBURG
METROPOLITAN

MUNICIPALITY
Third Respondent

Heard: 12 October 2017

Delivered: 19 October 2017

Summary: Review application. Unfair labour practice dispute relating to placement on specific salary level. Arbitrator accepted that the error was made and rectified and there was no unfair labour practice committed. Application dismissed.

JUDGMENT

PRINSLOO, J

Introduction

[1] The Applicant seeks to review and set aside an arbitration award issued on 11 November 2015 under case number: JMD080803. The application is opposed.

Background facts

[2] The brief history of this matter is as follows:

[3] The Applicants were employed by the Third Respondent (the City or employer) as an accounts assistant and administrative assistant

respectively on salary level 8. Around October 2004 the employer contemplated a new business plan which introduced a new department

called ‘credit control: staff accounts’. The proposed business plan was approved in January 2005 and with effect from 1 April 2005 the Applicants were transferred from where they were employed to the newly created credit control department. The

Applicants were transferred as ‘accounts specialists’.

[4] The Applicants were under the impression that their transfer to the new position was a promotion and that their salaries would be adjusted and they assumed that the increase in their salaries would be effected in July 2005 at the start of the employer’s new financial year. When their salaries were not corrected after July 2005, the Applicants lodged a grievance in April 2006.

[5] A grievance hearing was held on 12 June 2006 and the recommended outcome was inter alia, that the employer should do a job grading of the accounts specialist position and adjust the Applicants’ remuneration accordingly.

[6] On 13 December 2007 the employer’s assistant director: human resources, Mr Jones (Jones), wrote a letter to the Applicants

informing them that a job grading was done as per the recommendation that followed from the grievance process, and that the job title of accounts specialist was changed to accounts officer and that the position was graded at level 6. Jones further stated that approval would be sought for the adjustment of salary from level 8 to 6.

[7] The Applicants' salaries were never adjusted to salary level 6 and on 17 June 2008 another letter was addressed to the Applicants

informing them about their position upgrade and salary increase. The Applicants were informed that they would be paid an acting allowance for the period the position was not graded and that, based on the grading results, the level of their positions as accounts officers were graded at level 7 and their salaries would be increased with effect from 1 November 2007.

[8] The Applicants were graded on level 7 and not level 6, as they were previously advised. The employer explained that the job level of an accounts officer is at level 6 and that the grade for the job was grade 7.

[9] The Applicants subsequently referred an unfair labour practice dispute in respect of promotion to the First Respondent and the dispute was arbitrated on 27 August and 21 October 2015.

[10] The Second Respondent (arbitrator) found that the employer did not commit an unfair labour practice in not effecting the appointment of the Applicants as accounts officers at level 6 and he dismissed the Applicants' case.

The arbitrator's findings

[11] It is evident from the transcribed record that Mr Seepamore, the Applicants' representative during the arbitration, identified

the dispute in his opening statement as an unfair labour practice relating to promotion in that the Applicants' posts were graded at level 6 and that the City is refusing to implement the grading on level 6 and to pay the Applicants accordingly.

[12] The issue to be decided, as recorded by the arbitrator, was whether or not the City committed an unfair labour practice by not placing the Applicants at salary level 6.

[13] There was a letter written to the Applicants on 13 December 2007 informing them that their positions were graded at level 6 and another letter to them dated 17 June 2008 wherein they were informed that their positions were graded at salary level 7. The arbitrator identified the bone of contention as whether level 6 mentioned in the December 2007 letter was an error or not.

[14] During the arbitration proceeding Jones testified that he had signed the letter dated 13 December 2007 wherein the Applicants were notified that their positions as 'account specialists' were changed to 'account officer' and that it was graded at level 6. Jones explained that there was an error in the letter as the job level, which is the same as the

reporting level, was graded at level 6 and the salary grade was at level 7. The job level and the grade level were incorrectly interpreted and it was incorrectly reflected in the letter. Jones explained that the Applicants' placement on salary level 6 was never implemented as it was a mistake due to the misinterpretation of the job grading results.

[15] Jones explained that after the mistake was picked up, a meeting was held with the City's labour relations department and it was realised that the grading results were incorrectly interpreted. The mistake was rectified and a letter was addressed to the Applicants on 17 June 2008 wherein the correct grading was reflected and the Applicants were informed that their positions were graded on salary level 7. Jones explained that a mistake was made when the Applicants were informed that their positions were graded at level 6 and the mistake had to be rectified and the Applicants were placed on level 7.

[16] In his analysis of the evidence the arbitrator held that it was crucial to determine whether an error was made and had to be rectified. It was common cause that, as a result of a grievance hearing, that the Applicants' positions had to be graded and their remuneration

adjusted accordingly. The arbitrator accepted that there was an error in the communication sent to the Applicants on 13 December 2007 and that it was understandable as the grading document reflected the job level as 6, which could give the impression that it was the grade of the post, but the grading was actually at salary level 7. The executive director never approved salary level 6 for the Applicants.

[17] In conclusion the arbitrator found that the City's conduct in not effecting the appointment of the Applicants to positions at level 6 did not constitute an unfair labour practice.

The test on review

[18] The test that this Court must apply in deciding whether the arbitrator's decision is reviewable is well established[1]. It is ultimately a test of reasonableness. The arbitrator's decision must fall within a range of decisions that a reasonable decision

maker could make.

[19] In *Goldfields Mining South Africa v Moreki*[2] the Labour Appeal Court held that:

"In short: A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts

presented at the hearing and came to a conclusion that is reasonable."

[20] These are the principles this Court should apply in consideration of the review application.

The grounds for review

- [21] In the heads of argument filed on behalf of the Applicants, two grounds for review were raised. The first ground for review is that the arbitrator committed gross misconduct and failed to apply his mind to the evidence placed before him when he found that the Applicants are on salary level 7 when the evidence was clear that they are indeed on level 8.
- [22] It was submitted that if the arbitrator found that the Applicants did not make out a case to be placed on level 6, he should have ordered that they be placed on level 7.
- [23] There are a number of difficulties with this ground for review. Firstly, the arbitrator was never mandated to determine the salary level of the Applicants or to decide on which level they should be placed, if not level 6. The issue to be decided was whether or not the City committed an unfair labour practice by not placing the Applicants at salary level 6.
- [24] Secondly, the submission that if the Applicants did not make out a case to be placed on level 6, the arbitrator should have ordered that they be placed on level 7 is an entirely different issue to the issue the arbitrator had to consider and decide.
- [25] In argument before Court it became evident that the Applicants' real issue is that they were informed that they were placed on level 7, but they are not paid on level 7 and are still paid a level 8 salary and that they are effectively underpaid.
- [26] Mr Seepamore correctly abandoned the first ground for review.
- [27] The second ground for review as set out in the Applicants' heads of argument and persisted with in Court is that the arbitrator relied on and attached considerable weight to Jones' testimony that the letter written on 13 December 2007 was an error, notwithstanding that such testimony was hearsay evidence as Pumeza Sundu (Pumeza) did not testify.
- [28] In his examination in chief, Jones relied on the job grading document wherein the post of accounts officer was graded at salary level 7. With reference to the document he explained that there was an error in the letter as the job level, which is different from the salary level, was graded at level 6 and the salary grade was at level 7 and those were incorrectly interpreted and reflected in the letter of 13 December 2007.
- [29] Jones further explained that the Applicants' placement on salary level 6 was never implemented and after the mistake was picked up, it was rectified and a letter was addressed to the Applicants on 17 June 2008.
- [30] In cross-examination it was put to Jones that the letter dated 13 December 2007, which Jones claimed was a mistake, was written by Pumeza and as she was the author of the document, his evidence was hearsay. Jones disputed that and testified that he was the authorised person to sign the document, he indeed signed it, he was familiar with the contents of the letter and he took responsibility for the mistake that was made in the letter and he made it clear that he was in a position to testify to the document in terms of the responsibility he had in that regard. Jones testified that he was the HOD and he remained accountable.

- [31] Mr Seepamore stated that as the content of the letter was written by someone else, it was hearsay evidence. He further submitted that the document relied on by Jones graded the position of 'accounts officer' and not the Applicants' position of 'accounts specialist' and as Jones was not in possession of a grading document for 'accounts specialists', the arbitrator admitted and relied on irrelevant evidence.
- [32] The version the Respondent presented during the arbitration should be considered holistically. It is evident from the letter addressed to the Applicants on 13 December 2007 that the position of accounts specialist was sent for grading and the grading committee changed the title to 'accounts officer' and they were informed that their role description of 'accounts specialist' was changed as aforesaid. This can only mean that no other or separate grading was done for 'accounts specialist' as the title was changed and that the grading that was done for 'accounts officer' is the grading applicable to the Applicants. The grading document Jones referred to was for 'accounts officer' and it reflected a salary level 7.
- [33] Jones' testimony was not only based on Pumeza's mistaken understanding of the correct salary level. Jones was able to explain the mistake that was made and how it was made and in doing so he acknowledged that he signed the letter in which a mistake was made and he explained it by making reference to the grading document and the incorrect interpretation thereof.
- [34] The other factors that became clear from the evidence is that the Applicants' grading on level 6 was never implemented, it was never approved and it was not possible as the level they report to, which should be a higher level, is graded at level 6.
- [35] The only document that indicated that the Applicants positions were graded at level 6, is the letter of 13 December 2007, which the employer testified was issued in error. All other documents and communication to the Applicants indicate that their positions were graded at salary level 7.
- [36] The arbitrator found that the grading that came out at salary level 7, as was evident from the grading document as well as the change in titles, enabled him to come to the conclusion that there was indeed an error when the employees were informed that their positions were graded at salary level 6.
- [37] It is evident from the arbitrator's findings that he considered the documents placed before him and that he considered those as well as the explanation tendered by Jones holistically and that he did not attach weight to Pumeza's version or Pumeza's understanding or interpretation of the grading report.
- [38] The Applicants' submission that Pumeza wrote the letter and only Pumeza could testify about it has no merit in the context that the arbitrator attached no weight to Pumeza's version, but considered the evidence that was adduced and placed before him and that he decided the dispute on the totality of the facts and material before him.

[39] Having considered the evidence adduced at the arbitration proceedings, the findings made by the arbitrator and the grounds for review as raised by the Applicant, I am satisfied that the arbitrator's findings and conclusion fall within a range of decisions that a reasonable decision maker could make.

[40] The award and the findings contained therein are reasonable and are not to be interfered with on review.

Costs

[41] This Court has a discretion in making a cost order, considering the requirements of law and fairness.

[42] I invited both parties to make submissions on the issue of costs. Mr Seepamore for the Applicants submitted that the City is at fault and should pay the costs, more so where the Applicants have limited resources.

[43] Mr Hutchinson for the City submitted that the Applicants should be ordered to pay the costs for a number of reasons. He submitted that the City made a bona fide error and that that was explained and corrected. It was made clear, even in the arbitration award, that the Applicants are free to approach the employer's human resources to have their grades re-evaluated should they wish to do so, but instead they persisted with their dispute to snatch a bargain and insisting that they should be placed on salary level 6, based on a mistake. The Applicants challenged a reasonable award and this application is opportunistic and an abuse of process. Mr Hutchinson further submitted that the Applicants are employed and used an attorney to represent them in their case.

[44] In *Public Servants Association of SA on behalf of Khan v Tsabadi NO and others*[3] it was emphasized that:

".....unless there are sound reasons which dictate a different approach, it is fair that the successful party should be awarded her costs. The successful party has been compelled to engage in litigation and compelled to incur legal costs in doing so. An appropriate award of costs is one method of ensuring that much earnest thought and consideration goes into decisions to litigate in this court, whether as applicant, in launching proceedings or as respondent opposing proceedings."

[45] In casu the employer was compelled to engage in litigation and oppose a meritless application. The Applicants came to Court challenging a reasonable award with the sole aim to be placed on salary level 6 and if that does not succeed, then they want to be placed on salary level 7. There was no consideration of the applicable principles and their prospects of success, causing the City, and effectively the taxpayers, to incur legal costs.

[46] A cost order is a method of ensuring that decisions to litigate in this Court are taken with due consideration of the law and the prospects of success. A review application is not the next automatic step after arbitration and the practice to review arbitration awards where the decision is reasonable, should be discouraged.

[47] I can see no reason to deviate from the general rule that the cost should follow the result.

[48] In the premises I make the following order:

Order

1. The application is dismissed with costs;
2. The Applicants are severally and jointly liable to pay the Third Respondent's costs, the one paying the other to be absolved.

Connie Prinsloo

Judge of the Labour Court

Appearances:

For the Applicants: Mr S Seepamore of Mohlaba & Moshona Inc Attorneys

For the Third Respondent: Advocate W Hutchinson

Instructed by:

Moodie & Robertson Attorneys

[1] Sidumo and Another v Rustenburg Platinum Mines Ltd and Others 2007 28 ILJ 2405 (CC) at para 110.

[2]

(2014) 35 ILJ 943 (LAC).

[3] 2012 33 ILJ 2117 (LC).

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