

SOUTH AFRICA / JUDGMENT

Moodley v South African Police Services (D134/20) [2022] ZALCD 17 (3 June 2022)

[2022] ZALCD 17

COURT

Labour Court Durban

BEFORE

Whitcher

CASE / FILE NUMBER

D134/20

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IN

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Case

No: D 134/20

Not

Reportable

In

the matter between:

Z

MOODLEY

Applicant

and

SOUTH

AFRICAN POLICE SERVICES [CITED PARTIES]

Respondents

Heard:

21

February 2022[1]

Delivered:

This judgment was handed down electronically by circulation to the parties and/or their legal representatives by email. The date and time for handing-down is deemed 14h 00 on 03 June 2022. (Electronically)

JUDGMENT**WHITCHER J**

- [1] The Applicant joined the South African Police Services (SAPS) in May 2002 and was promoted to the rank of Sergeant on 1 July 2009.
- [2] Following an unfair dismissal dispute in 2018 and a review of the arbitration award, Cele J issued an Order on 9 February 2021 which granted the Applicant full reinstatement inclusive of all benefits and conditions of employment that would have applied to the Applicant but for his dismissal.
- [3] In August 2021 the Applicant filed a contempt application in relation to the Order.
- [4] As the matter progressed, the SAPS then began to implement the Order, but a dispute arose regarding the interpretation of paragraph 5 of the Order which reads as follows:

“The Applicant’s benefits granted shall be inclusive of the automatic promotion round from level 6 Sergeant to level seven

Warrant Office rank as it fell due, but for [his] dismissal.”

- [5] After hearing argument on the matter, I found that issue arose from a genuine and bona fide disagreement about the interpretation of the paragraph 5 of the Order, at least on the part of the accused (the SAPS) in the matter, and ruled that the SAPS is not guilty of contempt of a court order in that respect.
- [6] I was then asked to interpret paragraph 5 of the Order and make a

ruling

on it.

Promotion

- [7] The Applicant’s initial contention was that the Order granted him an automatic promotion to the rank of Warrant Officer from the date of his dismissal being the 11 May 2018, which was clearly an

incorrect and opportunist interpretation.

- [8] The Applicant now accepts that the Order does not provide an automatic promotion to the Applicant. It merely seeks to put him to the position that he would have been, but for his dismissal, and that

his promotion like all members of the SAPS is regulated by SSSBC Collective Agreements, in particular Collective Agreement 2/2018.

[9] The relevant clauses of Collective Agreement 2/2018 are quoted below (emphasis added).

[10] Clause 3.2:

The grade progression for the 2018/2019 financial year of the following members will be considered and the grade progression for the qualifying and suitable members will be implemented with effect from 1 March 2019: ... Sergeants with eleven (11) years and more uninterrupted service in the rank of Sergeant on 31 March 2018.

[11] Clause 5:

The current backlog experienced in the grade progression of Constables and Sergeants (41152 members excluding those covered in paragraph 3.1 to 3.5 above) with 7 years' service or more in the service/rank respectively on 31 March 2018, will be eradicated over the next three (3) financial years (2019/2020 to 2022/2023).[2]

[12] Clauses 6 and 7 respectively:

This agreement suspends 5.1 of SSSBC Collective Agreement 3/2011 for the 2018/2019 to 2022/2023 financial year; and the provisions of clause 5.1...will be re-negotiated before the end of the 2021/2022 financial year. [Clause 5.1 of SSSBC Collective Agreement 3/2011 stated that a member that had 7 years in the rank of Sergeant would qualify for promotion to the rank of Warrant Officer.]

[13] Clause 8:

The implementation of this Agreement shall be effected through the issuing of a Circular by the SAPS.

[14] The Circular (8/1/1) was issued on 11 March 2020. The relevant clauses of the Circular are quoted below.

[15] Clause 2:

Due to financial constraints, parties to the [SSSBC] concluded [Collective Agreement 2/2018]. In terms of the Agreement, members of the [SAPS] who qualified to be considered for grade progression before or on 31 March 2018, will be considered in phases in the financial years up to, and including, the 2022/2023 Financial Year.

[16] Clause 3:

The grade progression of members who met the requirements as contemplated in Clause 3 of [Collective Agreement 2/2018] was accordingly approved and implemented during the 2018/2019 Financial Year.

[17] Clause 5:

The grade progression of...Sergeants who completed 9 and more years' service in the rank of Sergeant on 31 March 2018...is conditionally approved with effect from 1 December 2019.

[18] The Respondents contend that in light of the above, the Applicant's promotion to the rank of Warrant Officer only fell due as of 1 December 2021 as he met the 9 year requirement at the time. On 31 March 2018 the Applicant had only 8 years and 9 months in the rank of Sergeant.

[19] The Applicant contends that the matter falls to be determined in terms of Clause 5 of Collective Agreement 2/2018 which (as stated above) reads as follows:

The current backlog experienced in the grade progression of Constables and Sergeants (41152 members excluding those covered in paragraph 3.1 to 3.5 above) with 7 years' service or more in the service/rank respectively on 31 March 2018, will be eradicated over the next three (3) financial years (2019/2020 to 2022/2023).

[20] Applicant contends the Clause is clear: Sergeants who met the 7 year requirement on 31 March 2018 will be paid over the next 3 financial years. The Applicant met the 7 year requirement on 1 July 2016 and he should have been promoted on 1 January 2019.

[21] The Applicant contends that the Circular is not in compliance with Collective Agreement 2/2018 as Clause 5 of the Agreement stipulates 7 years in the rank of Sergeant on 31 March 2018 (and not 9 years).

[22] In response, the Respondents explained the matter as follows. Clause 3 of Collective Agreement 2/2018 (see above) indicates that members with 11 years in the rank of Sergeant on 31 March 2018 will grade progress with effect from 1 March 2019. If one accepts the Applicant's claim to be grade progressed on 1 January 2019, this will result in him being placed in a more advantageous position than members with 11 years in the rank on 31 March 2018 (at which date he only had 8 years and 9 months in the rank).

[23] Clause 5 of Collective Agreement 2/2018 indicates that the backlog in grade progression of members (41152 members) will be eradicated in the Financial Years ending 2022/2023, and does not indicate the effective dates of such grade progression. The employer (SAPS) was therefore given a prerogative in dealing with the backlog provided that it does not go beyond the 2022/2023 Financial Year (ending 31 March 2023).

[24] In view of budgetary constraints, members who had 9 years' service and more in the rank of Sergeant on 31 March 2018 were grade progressed with effect from 1 December 2019. The members who had 8 years' service and more in the rank of Sergeant were grade progressed with effect from 1 December 2021, and the Applicant formed part of this group of members.

[25] No grade progression process was concluded during the 2020/2021 Financial Year. The grade progression of members who had 7 years in the rank of Sergeant on 31 March 2018 will be the last group covered by Collective Agreement 2/2018.

[26] As alluded to in Collective Agreement 2/2018, a total of 69219 members of the SAPS were affected by the above arrangements, and the Applicant was not treated different than any of his counterparts.

[27] The Applicant in response, inter alia, now seeks to introduce new evidence, alleging selective treatment. He contends that he has located six personnel records of “promotes dates of promotion to Sergeant salary level 6 and thereafter Warrant Officer salary level 7 with different periods between the ranks of Sergeant to Warrant Officer and that such confirms that the grade progression had no queuing system. He contends that according to this evidence, a member De Kock and Nzama were Sergeants on 1 April 2017 and promoted to Warrant Officer on 1 December 2019 whereas he was a Sergeant on 1 July 2009 and as such he should have been promoted on 1 January 2019 in the first promotional phase as per Clause 5 of the Collective Agreement 2/2018.

Analysis

[28] In drafting this judgment, a matter of jurisdiction occurred to me. As indicated above, this case came before me as a contempt application, which I dismissed on the basis that the evidence did not disclose on the part of the SAPS a wilful and mala fide defiance of the order in question. Instead their omission to promote the Applicant at the date appointed by him arose from a genuine disagreement regarding the interpretation of the SSSBC Collective Agreements referred to above. [The submissions above confirm this].

[29] On reflection, the matter before me should have ended there because the case before me was a contempt application. I have now become

embroiled in in effect a promotion and thus an unfair labour practice dispute, with the collective agreements serving as a supporting

document (evidence) for both parties.[3] The matter has also become impractical to consider because of the Applicant wanting to introduce further evidence and factual disputes, the nature of which requires an evidentiary hearing. In light of this, the proper thing to do is decline to adjudicate the matter and advise the Applicant to refer the matter to the Bargaining Council as an unfair labour practice dispute. In actual fact, once the Applicant realised that the matter was not a contempt of order matter, he should have followed this route. I cannot engage section 158(2) of the LRA, because the matter did not come before me as a referral, but an application.

[30] The dispute regarding the pension also arose as a genuine and bona fide disagreement about the pension effective start state, considering the Applicant withdrew his pension and has not paid it back. This matter too falls to be determined as an unfair labour practice about benefits.

[31] The above is fortified by this: if I was to determine the promotion dispute, what standard do I use? The only standard mentioned in the LRA in respect of promotion disputes is fairness, which brings one right back to the jurisdiction point explained above and the problem that it did not come before this court as a referral.

[32] Basically, the Applicant cannot through a contempt application secure relief on what was strictly speaking unfair labour practice disputes, and not a contempt application.

[33] I am therefore constrained to strike this matter off the roll.

[34] Most of the issues, evidence and submissions have been fully explained and ventilated in this judgment, which should facilitate a speedy arbitration.

Order

1. The contempt application is dismissed.
2. The issue of the Applicant's promotion and pension is struck from the roll.

Benita Whitcher

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant:

Angeni Naidoo Law Firm (ANLF)

For the Fourth and Fifth Respondents: Adv S Tshangana, instructed by State Attorney, KwaZulu-Natal

An.legalpractioner@gmail.com

sibusisotshangana@yahoo.com

fseedat@justice.gov.za

sdlungele19@gmail.com

[1] The date the final heads filed.

[2] In other words over a three year period starting in the 2019/2020 Financial Year.

[3] See: Hospersa obo Tshambi v Department of Health, KwaZulu-Natal

[2016] 7 BLLR 649 (LAC); (2016) 37 (ILJ) 1839 (LAC).

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