

SOUTH AFRICA / JUDGMENT

Solidarity obo Kern v Mudau and Others (JR987/05) [2007] ZALCJHB 25 (19 January 2007) [2007] ZALCJHB 25

COURT

Labour Court Johannesburg

BEFORE

Mokgoatlheng

CASE / FILE NUMBER

JR987/05

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IN

THE LABOUR COURT OF SOUTH AFRICA

(HELD

AT JOHANNESBURG)

CASE

NO. : JR 987/05

REPORTABLE

In

the matter between:

SOLIDARITY
obo J F KERN
Applicant
And
R
MUDAU
First
Respondent
COMMISSION
FOR CONCILIATION,
MEDIATION
AND ARBITRATION
Second
Respondent
LOCAL
MUNICIPALITY OF LEKWA
Third
Respondent

JUDGMENT

MOKGOATLHENG A.J.

Introduction

[1] This is an application in terms of section 145 of the Labour Relations Act No 66 of 1995 (“the Act”) to review,

correct or set aside the award made by the First Respondent (“arbitrator”) on the 16th March 2005, when he determined that JF Kern was not demoted or subjected to an unfair labour practice as contemplated within the

meaning of section 186(2) (a) of “the Act”. The application is opposed.

[2] The review application was preceded by an application for condonation of the late filing of the Applicant’s replying affidavit. The replying affidavit was filed approximately 3 weeks out of time. The application was opposed by the Third Respondent. The third Respondent did not proffer any substantive reasons for such opposition.

[3] The Applicant alleges that reason for the late filing of its replying affidavit is that after the receipt of the Third Respondent’s

answering affidavit in December 2005, it handed same to its legal advisor for settlement and reply.

[4] The Applicant alleges that his replying affidavit was not settled timeously by its legal advisors due to the fact that the latter’s

offices were closed on the 14th December 2005 for the Christmas and New Holiday Festive season.

[5] The Applicant alleges that the law offices were re-opened on the 9th January 2006. Subsequent thereto the replying affidavit was settled and was served on the Third Respondent on the 13th January 2006.

[6] The Applicant states that the dispute between itself and the Third Respondent essentially concerns the interpretation and application of a Collective Agreement regulating the placement of employees’ in posts. The Applicant’s submission is that the placement of JF Kern as a Committee Officer was a demotion. The Applicant contends that it has good prospects of success

- [7] The Applicant states that the Third Respondent has not suffered any prejudice as a result of the late service of its replying affidavit and argues that if the application for condonation is not granted its member JF Kern will suffer irreparable harm and prejudice in that he would be permanently denied the opportunity to have his case ventilated. The Applicant submits that it has shown good cause.
- [8] After considering the extent of the delay, the explanation proffered and the prospects of success, I am of the view that the Applicant has shown good cause. The application for condonation is granted.

Factual

Background

- [9] JF Kern was employed by Standerton Municipality as a Senior Personnel Officer from 1st September 1992 until the 5th December 2000, when the Standerton and Morgenzon Municipalities were disestablished and merged to establish the Local Municipality of Lekwa (“the Third Respondent”) in terms of the provisions of;
- (a) the Organised Local Government Act 1997,
 - (b) the Local Government Municipal Demarcation Act 1998,
 - (c) the Local Government Municipal Systems Act 2000, and
 - (d) the Local Government Municipal Structures Act 2000.
- [10] The disestablishment of the Standerton and Morgenzon Municipalities resulted in JF Kern’s employment being transferred to the Third Respondent in terms of section 197 of “the Act”.
- [11] The Third Respondent passed a resolution on the 2nd December 2002 adopting a document, “the Policy Guidelines on the Placement of Staff” (“PGPS”) regulating the transfer and placement of employees into its employ.
- [12] The Third Respondent concluded a Collective Agreement incorporating the “PGPS” with the South African Municipal Worker’s Union (“SAMWU”) on the 24th January 2003. The latter represented the majority of the former’s employees.
- [13] The “PGPS” made provision for establishment of;
- (a) a Placement Committee, seized with the classification of posts and the placement of employees, and
 - (b) an Objection Committee seized with the resolution of objections arising from the placement of employees.

- [14] The Placement Committee, on the 10th March 2003 placed JF Kern in the post Committee Officer on the same terms, conditions and remuneration applicable to his former post as Senior Personnel Officer. JF Kern objected to his placement contending that it was a breach of the “PGPS” and a demotion.
- [15] Pursuant to its establishment the Third Respondent created an organogram of its employment and management structure reflecting, new posts, unchanged posts, minor changed posts and major changed posts.
- [16] The “PGPS” stipulates that;
- (a) the placement of staff must not be used to promote or demote employees.
 - (b) the intention is to firstly place existing employees from disestablished municipalities transferred in terms of section 197 of “the Act” into existing or newly created posts before external applicants are considered for posts,
 - (c) in placing employees in the new structure, employees shall be placed on close - match basis. In close – matching a post, the job content of the new post must be compared with the existing job content of the employees.
 - (d) The focus should be on the crux of the job. The close match is done on the job content and not on designation,
 - (e) The salary of an employee shall play no role in the placement, only qualifications and minimum requirements,
 - (f) Where more than one employee can be close matched to a post and there are more employees than there are posts, affirmative action and employment equity shall have preference over length of service,
 - (g) the placement committee is obliged to classify posts in the new structure into four categories, namely;
 - (i) unchanged posts, which are posts that have no change in their schedule of duties, that is their job content,
 - (ii) major changed posts, which have undergone a major change in duties and responsibilities, and
 - (iii) new posts, which carry duties and responsibilities that do not exist in any form in the present structure, these posts had to be submitted for evaluation before appointment,

JF Kern's Objection

- [17] The Objection Committee is enjoined that, it shall consider any objection and shall within 5 working days from receipt of the

objection in considering same apply the same criteria, processes and procedures as the Placement Committee.

- [18] JF Kern contends that the designation of his post as Senior Personnel Officer by the disestablished Standerton Municipality and the Third Respondent was a misnomer in nomenclature in that the duties and responsibilities the post encompassed were in essence Human Resources related functions.
- [19] JF Kern states that since the 1st September 1992, he has been a Senior Personnel Officer with Standerton Municipality and the Third Respondent executing Human Resources related functions, and says that he was the Third Respondent's most senior Human Resources employee and its de facto Manager Human Resources.
- [20] JF Kern contends that the post Senior Personnel Officer is a level four senior post with managerial responsibilities, that in contrast the post Committee Officer is a junior level grade post, with less status, functions and responsibilities.
- [21] The Third Respondent, on the 4th February 2003, decided to advertise the post Manager Human Resources. The post was advertised internally and externally. JF Kern applied for the post, was short listed, but not interviewed.
- [22] JF Kern declared a dispute with the Third Respondent on the 2nd December 2003; the dispute was referred to the Commission for Conciliation, Mediation and Arbitration ("CCMA"). The

matter remained unresolved, and was referred to arbitration.

- [23] The arbitrator determined on the 16th March 2004, that the Third Respondent did not subject JF Kern to an unfair labour practice, that he was not demoted when it appointed him to the post Committee Officer. JF Kern took early retirement on the 31st March 2004.

The Applicant's Grounds of Review

- [24] The Applicant assails the arbitrator's award on the basis that;
 - (a) The arbitrator misdirected himself in finding that the JF Kern was not demoted because in his view he did not suffer any financial loss or benefits.
- [25] The Applicant submits that the arbitrator did not properly apply his mind to the facts, that he has failed to appreciate that the juridical concept demotion does not necessarily require that one should suffer financial loss or benefits for a demotion to eventuate, that demotion may also occur where status, job content, responsibility and promotion prospects are prejudiced.

The Applicant's Submissions

- [26] The Applicant argues that there was a very real possibility that when the post Committee Officer was evaluated at an uncertain future time, it would in all probability have been degraded to a lower level with less remuneration than the post Senior Personnel Officer.
- [27] The Applicant contends that it was patent that the Third Respondent had no intention of placing JF Kern in accordance with the behest of the “PGPS” to the post Manager Human Resources, and states that his placement as Committee Officer was final.
- [28] The Applicant argues that the arbitrator misdirected himself because he found that JF kern’s placement as Committee Officer was a breach of the Collective Agreement, yet concluded that no unfair labour practice had been perpetrated against him.

The Third Respondent’s Submissions

- [29] The Third Respondent contends that there is no basis for JF Kern’s contention that his placement as Committee Officer was a demotion, and argues that JF Kern did not suffer any loss in remuneration or benefits, that in any event at the time when took early retirement the post Committee Officer had not yet been evaluated or graded.
- [30] The Third Respondent contends that JF Kern could not be placed in the post Manager Human Resources because this was a newly created, that the appointment criteria had to be made in terms of the provisions of the Employment Equity Act, The Skill Development Act and Affirmative Action Policy, and submits that these were the overriding factors in determining his placement, that the preference was to appoint a designated person.

The Award

- [31] The arbitrator made the following findings;
- (a) “taking into account the number of years the Applicant spent dealing with human resources issues, his educational qualifications and the position he occupied before the municipalities amalgamated, one can safely conclude that he was suitable for the position of human resources management”.
 - (b) “the Applicant was sidelined on the basis of unfair discrimination; that the labour court was the forum to deal with the matter on that basis”.
 - (c) “It is correct to conclude that the Third Respondent did not deal with the Applicant’ case in accordance with the placement policy or collective agreement”.
- [32] From these findings, it is apparent that the arbitrator accepts that JF Kern;
- (a) had the proper qualifications and the experience suitable for the post Manager Human Resources;
 - (b) was a victim of unfair labour practice - which the arbitrator erroneously categorises as unfair discrimination, and

(c) his placement was not in accordance with the “PGPS” or the Collective Agreement.

[33] The arbitrator’s finding that, “it is not correct to conclude that because JF Kern was placed as Committee Officer instead of in a position in the Human Resources

then he was demoted. The position committee officer was not evaluated and graded in terms of salary and benefits at the time of JF Kern’s departure that he would have had a legitimate claim of demotion at the time of the reduction of salary and when other conditions occurred”.

[34] In my view, the arbitrator misconstrued the juridical concept of demotion. JF Kern’s undisputed evidence is that;

(a) since the 1st September 1992 he was a Senior Personnel Officer executing Human Resources related functions until his early retirement on the 31st March 2004,

(b) he was the Third Respondent’s de facto Manager Human Resources as from the 6th December 2000, and

(c) the job content of the post Committee Officer was purely a clerical post different from the job content of the post Senior Personnel Officer.

[35] JF Kern’s undisputed evidence is that the job content of the post Senior Personnel Officer encompassed Human Resources functions.

[36] It is apparent that had the arbitrator properly applied his mind to JF Kern’s evidence he would not have come to the

conclusion

that JF Kern was not demoted when he was placed in the post of Committee Officer.

[37] In my view, the arbitrator, had he properly applied his mind to the evidential material before him, should have found that the status of the post Senior Personnel Officer was higher than that of the post Committee Officer.

[38] It logically follows that at least in status JF Kern was demoted and consequently was subjected to an unfair labour practice within the meaning of section 186(2)(a) of “the Act”.

[39] In *Van Der Riet v Leisure Net t/a Health and Racquet Clubs* [1997] 6 BLLR at 721 (LAC), it was held that, “failure to consult with an employee in a non – disciplinary demotion is an unfair labour practice”. In *Du Toit and Others Labour Relations Law* (4th Edition at 465) the learned authors state that, “In law demotion could also mean a reduction or diminution of dignity, importance, responsibility, power or status even if salary attendant benefits and rank are retained”.

[40] The arbitrator found that, “Much as I see the unfairness in terms of the handling of his case, I do not find the element of demotion and therefore do not find the existence of an unfair labour practice”. Not all unfair acts of an employer may be regarded as one of unfair labour practices. Had the Applicant waited for the evaluation of his position, the grade would definitely be lower. The salary would also be lower, and then there would have been a good case”.

[41] Section 186(2) provides that;

(i) “unfair labour practice” means an unfair act or omission that arises between an employer and employee involving –

(ii) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee.

[42] The arbitrator misdirected himself because having found that when the post Committee Officer was to be evaluated it would have resulted in the post being degraded in level and salary. It follows that the only reasonable conclusion is that JF Kern was demoted.

[43] The evidence shows that JF Kern was demoted. In my view, the time when the grading or evaluation of the post eventuates is not decisive regarding the determination of demotion; in fact such consideration is irrelevant.

[44] In my view, the arbitrator misdirected himself in finding that JF Kern should have waited for the certainty of the evaluation grading of the post Committee Officer, that if he had done so he would have had a good case based on unfair discrimination.

[45] JF Kern’s case is that he was subjected to unfair labour practice by being placed in the position Committee Officer in

contravention of the “PGPS”, that he was demoted within the meaning of section 186(2)(a) of “the Act”. JF Kern’s case is not based on unfair discrimination as postulated in section 6 of the Employment Equity Act 55 of 1998.

[46] In the premises, the arbitrator’s findings are not rationally connected to the evidence before him, this renders his award reviewable. The award is set aside.

The Analysis of Evidence and Argument Whether JF Kern is entitled to Compensation in terms of Section 194(4) of “the Act”

[47] In *SA Fibre Yarn Rugs Ltd v Commission for Conciliation, Mediation & Arbitration & Others*

(2005) 26 ILJ 921 (LC), Murphy AJ held that, “Section 145 of “the Act” obliges the court to scrutinize the legality and regularity of the CCMA arbitration awards on review and not to substitute a decision by the Labour Court in place of the CCMA commissioner. The section grants a power of review not appeal. As a general principle, therefore, this court should be reluctant to substitute its own decision for that of the CCMA. However, in exceptional

circumstances and in the interests of speedy resolution of disputes, this principle may be departed from. The court has discretion, to be exercised judicially upon the consideration of the facts of each case. Although the matter will normally be sent back if there is no reason for not doing so, it is in essence a question of fairness to both sides – *Livestock & Meat Industries Control Board v Garda* 1961 (1) SA 342 (A) at

349. In this regard the court will have regard to whether: a fresh consideration would lead to a result which is a foregone conclusion; the importance of time considerations; the willingness and likelihood of the body being able to re-apply its mind to the issues at stake; any indications of bias or incompetence that cannot be remedied; and whether the court is in as good a position as the functionary under review to make the decision itself. In the present case it is this latter consideration which to my mind is the most important”.
- [48] I fully associate myself with the remarks of the learned Judge. In applying the above dictum; I am of the view that this is a case which this Court can exercise its discretion and make a decision regarding the question whether JF Kern is entitled to compensation in terms of section 194(4) of “the Act”, and if so, the amount of the compensation.
- [49] In considering an appropriate relief where an employee alleges that he has been subjected to unfair labour practice section 194(4) of “the Act” provides that, “the compensation awarded to an employee in respect of an unfair labour practice must be just and equitable in all the circumstances, but not more than the equivalent of 12 months remuneration”.
- [50] In *Ferodo (Pty) Ltd v De Ruiter* [1993] 14 ILJ 1974 (LAC) the Labour Appeal Courts formulated the following guidelines in establishing the loss and determining the compensation to be awarded:
- (a) “There must be evidence of actual financial loss suffered by the person claiming compensation,
 - (b) there must be proof that the loss was caused by the unfair labour practice,
 - (c) The loss must be foreseeable, i.e. not too remote or speculative,
 - (d) The award must endeavour to place the Applicant in monetary terms in that position which he would have been had the unfair labour practice not been committed,
 - (e) In making the award the Court must be guided by what is reasonable and fair in the circumstances,
 - (f) There is duty on the employee (if he is seeking compensation to mitigate his damages by taking all reasonable steps to acquire alternative employment)”,
- [51] The Applicant’s case is predicated on the following basis;

- (i) the Placement Committee and Third Respondent acted in breach of the Collective Agreement by placing JF Kern in the post Committee Officer, and not as Manager Human Resources,
- (ii) the Placement Committee and Third Respondent committed an unfair labour practice against JF Kern regarding his placement as Committee Officer because he was effectively demotion in fact and in law, and
- (iii) the Objection Committee and the Third Respondent failed to address JF Kern's objections and grievances as obliged in terms of the Collective Agreement.

The Third Respondent's Human Resources

Function Instructions to JF Kern

[52] The 18th February 2004;

- (a) The Third Respondent instructed JF Kern to furnish the Acting Manager Human Resources with its employees' job descriptions which were requested by the South African Local Government Bargaining Council to facilitate the implementation of the process of job evaluation and job description writing and evaluation,

[53] The 19th February 2004,

- (a) the Acting Executive Manager Corporate Affairs addressed a memorandum to JF Kern headed: RE: TASK ALLOCATION – JOB DESCRIPTION stating that;
- (i) JF Kern was allocated the task of attending to the whole process of job description writing, that he was informed in writing that he was expected to fulfil this task, as a matter of extreme urgency; failing which he would be guilty of extreme gross insubordination.

[54] The 1st December 2003,

- (i) The Third Respondents Acting Executive Manager Corporate Services addressed a memorandum to JF Kern headed RE: "ALLOCATION OF HUMAN RESOURCES TASKS". The memorandum allocated JF Kern the following Human Resources tasks;

- (ii) Selection and Placement Policy,
- (ii) Disciplinary Code and Grievance Procedure, and
- (iv) Job Description Writing,

[55] The 23rd December 2003;

- (a) The Third Respondent's Corporate Services Manager addressed a memorandum to JF Kern headed "RE ALLOCATION OF HUMAN RESOURCES – RELATED TASKS". In the memorandum JF Kern is advised that when he was placed as the Committee Officer, it was stated that he would still be required to perform his old duties that he is expected to carry out the tasks that were allocated to him.
- [56] The uncontroverted evidence shows that whenever there were Human Resources functions to be performed, the Third Respondent instructed JF Kern to execute same.

JF Kern's Objection to his Placement as Committee Officer

- [57] In terms of the Collective Agreement the Placement Committee was obliged to place JF Kern in a post that totally or close matched his qualifications and experience.
- [58] The Third Respondent's contention that the prescriptions of the Employment Equity Act, the Skills Development Act or Affirmative Action Policy were the overriding factors which influenced the Placement Committee's decision not to place JF Kern as Manager Human Resources is disingenuous and not borne out by the proven objective

facts.

- [59] JF Kern was the only employee in the Third Respondent's employ whose qualifications and experience close-matched the post Manager Human Resources. This evidence is not disputed. It therefore follows that the Employment Equity Act, Skills Development Act or Affirmative Action Policy did not apply.
- [60] The post Manager Human Resources was not a new post carrying duties, functions and responsibilities which did not exist in any form in the newly established Third Respondent's employ.
- [61] In my view, when the Third Respondent purported to create a new post referred to as Manager Human Resources, in effect it only changed the designation of the post Senior Personnel Officer to Manager Human Resources.
- [62] JF Kern was in effect occupying two posts namely: Senior Personnel Manager (de facto Manager Human Resources) and Committee Officer. The reality of the aforementioned assertion is confirmed by the fact that the Third Respondent subsequently appointed ZJ Mtsweni as its Manager Human Resources and Holmner as its Committee Officer.
- [63] It is common cause that the Third Respondent instructed JF Kern to define the job content of the post Manager Human Resources, that JF Kern based the job description of the post on the daily functions, duties and responsibilities he executed.
- [64] The facts show that the post Committee Officer is inferior in status and entails less functions and responsibilities than the post Senior Personnel Manager. In any event JF Kern's assertion that the post Committee Officer was a purely clerical post was not assailed.

[65] JF Kern executed Human Resources functions on behalf of the Third Respondent and also performed the duties and functions of a Committee Officer. JF Kern was in effect executing the functions of two posts in breach of the Collective Agreement.

[66] The Third Respondent has misconceived the legal status of the “the Policy Guidelines on the Placement of Staff”. This document is not a guideline, it is a Collective Agreement arising out of a bargaining process, it forms part of JF Kern’s

terms and conditions of employment.

[67] A Collective Agreement is defined in section 213 of “the Act” as a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand-

- (a) one or more employers;
- (b) one or more registered employers’ organisations; or
- (c) one or more employers and one or more registered employers’ organisations.

[68] The Third Respondent and the Objection Committee despite requests by JF Kern to address the objection of his placement failed to do so. The failure by the Objection Committee and the Third Respondent constitutes a breach of the Collective Agreement and is an unfair labour practice.

The Relief

[69] The postulation of an unfair labour practice within the contemplation of section 186(2)(a) of “the Act”, “makes it quite clear that it is the conduct of the employer that gives rise to the consequences of a demotion and not the demotion itself, that is capable of being impugned in terms of that section covered by “the Act”. See *Hlophe and Others v Minister of Safety and Security and Others* [2006] 3 BLLR 297 (LC) at para 17.

[70] The Third Respondent argues that JF Kern did not suffer any patrimonial loss as a consequence of his alleged demotion, because he took early retirement and is no longer in the Third Respondent’s employment that the matter would be academic and even if it was to be found that JF Kern was demoted when he was placed as Committee Officer.

[71] The evidence shows that JF Kern was subjected to continuous unfair labour practices, that by not being placed in the post Manager Human Resources he has suffered actual financial loss.

[72] It is undisputed that JF Kern had possessed outstanding academic and practical experience qualifications for the post Manager Human Resources, that for the past 20 years he occupied Senior Managerial Human Resources posts in various private and public companies, that he had 10 years experience in local government services as a Senior Personnel Officer, that he had previously being employed as a Senior Human Resources Manager in the chemicals industry. It is not disputed that he was the Third Respondent’s most senior Human

Resources employee.

[73] In my view, having regard to the Third Respondent's its obstinate obduracy in refusing to address JF Kern's placement

objections over the period March 2003 to March 2004, its dictatorial, parlous and reprehensible conduct in ordering JF kern to execute Human Resources functions without remuneration, it is just and equitable under all the circumstances to award the maximum

compensatory relief in terms of section 194 (4) of "the Act".

[74] Had the Placement Committee and the Third Respondent complied with the prescriptions of the Collective Agreement, JF Kern would have been placed in the post Manager Human Resources on the 10th March 2003 earning a salary in the amount of R337 000 00 per annum.

[75] The Third Respondent on the 22nd April 2003 adopted a resolution in terms whereof the post Manager Human Resources was changed from being a permanent post into a three year fixed term contract post. This resolution also reduced the remuneration of the post from the amount of R337 000 00 per annum to R250 000 00 per annum.

[76] In my view, this resolution would not have been applicable to JF Kern because had he been placed in the post Manager Human Resources on the 10th March 2003 as prescribed by the provisions of the "PGPS" his placement would have pre-dated the adoption of the resolution

this renders its applicability to JF Kern ultra vires.

[77] On the 31st March 2004, JF Kern's remuneration as Committee Officer was R144 285 36 per annum. It follows that JF Kern has sustained actual financial loss in the amount of R 192 714 64 calculated as follows;

R337 000 00

- R144 285 36

= R192 714 64

The Order

[1] The Third Respondent is ordered to pay compensation to JF Kern in the amount of R192 714 64 this being the equivalent of 12 months remuneration being the difference between the post Manager Human Resources and the post Committee Officer.

[2] The Third Respondent is entitled to deduct any applicable income tax in terms of the Income Tax Act No 58 of 1962 from the amount of R192 714 64.

[3] The Third Respondent is ordered to pay the costs of this application.

MOKGOATLHENG A.J.

ACTING JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

Date of Hearing : 22nd September 2006

Date of Judgment : 19th January 2007

Appearances

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