

SOUTH AFRICA / JUDGMENT

University of KwaZulu-Natal Staff Union obo Members v University of KwaZulu-Natal (D266/2014) [2015] ZALCD 59 (30 September 2015) [2015] ZALCD 59

COURT

Labour Court Durban

BEFORE

Cele

CASE / FILE NUMBER

D266/2014

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IN THE
LABOUR COURT OF SOUTH AFRICA
HELD AT
DURBAN

CASE NO:

D266/2014
DATE: 30
SEPTEMBER 2015
Not
Reportable

In the matter between:

THE
UNIVERSITY OF KWAZULU-NATAL STAFF
UNION on
behalf of its
members.....Applicant
And
THE
UNIVERSITY OF
KWAZULU-NATAL.....Respondent

Heard:

18 March 2015

Delivered:

30 September 2015

Summary: a declaratory and interdictory relief is sought – application proceedings - Court has power to grant a declaratory order as envisaged by section 158 (1) (a) (iv) of the Act in respect of matters that fall under its jurisdiction- Court will decline to entertain a dispute as a Court of first instance if the dispute must first be referred to conciliation and arbitration – application dismissed.

JUDGMENT

CELE J

Introduction

[1] In terms of section 158 (1) (a) of the Labour Relations Act[1] the Applicant seeks declaratory and interdictory relief in the following terms:

1. It is declared that:

1.1 The Respondent is bound to honour the existing terms and conditions of its employees conditions of service, including the provisions of all policies and practices applicable to them;

1.2 the Respondent is bound to honour the provisions of its Performance Management Policy, in particular (and without derogating from the generality of the foregoing);

1.2.1 Clause 3.15 thereof to the effect that measures to recognise and reward good performance amongst the Respondent's employees must be applied in a fair and equitable way;

1.2.2 Clause 6 thereof which provides that the policy applies to all permanent and long fixed term employees of the Respondent; and

1.3 the Respondent is further bound to follow the provisions of clauses 5.1.1 and 5.6.2 of its amended Remuneration Policy, 2011 to 2014;

2. the Respondent is interdicted and restrained from employing any means to compel and/or induce its employees who are not currently on the Respondent's 2012 conditions of service to migrate to those conditions other than via a process of collective bargaining at the Joint Bargaining Forum or by way of a lawful lock-out in terms of chapter 4 of the LRA; and

3. the Respondent is ordered to pay the costs of this application.

- [2] The Respondent opposed this application on the basis, inter alia, that this Court does not have jurisdiction to grant the relief sought for what is in effect an unfair labour practice dispute within the meaning of section 186 (2) of the LRA, in the alternative, that it should decline to exercise such jurisdiction, and that no case has been made out for the relief sought. The answering and the replying affidavits were filed late. Condonation was sought for such lateness. A case has been made for same. It is granted.

Factual

Background

- [3] The Applicant, the University of Kwazulu-Natal Staff Union (UKSU), is a trade union duly incorporated in accordance with the provisions of the LRA. and which carries on business as such at UKZN, Durban. The Respondent, the University of Kwazulu-Natal, (UKZN), is an incorporated statutory entity created by the Statute of the University of Kwazulu-Natal and it operates from various campuses in Durban and one in Pietermaritzburg. The Respondent employs approximately 3 213 employees divided into around 1 349 academic staff and 1 864 administrative or support staff. The Applicant has approximately 970 members who are made up predominantly from the ranks of the support staff but include various academic staff as well.
- [4] The current dispute has its genesis in attempts by the Respondent to “persuade” employees to change from their existing conditions of service to new conditions of service introduced by the Respondent. The action of the Respondent in doing so is justified by UKZN in that it is in financial difficulty that it operates under, particularly the non-payment of university fees but also because it wishes to modernise and update its remuneration practices. UKZN contended that according to an un-audited consolidated income statement for the respondent for the period ended 31 December 2013, it suffered a deficit of R412, 048,000.00 at the end of that year.
- [5] It said that the nett deficit was calculated before taking into consideration student bad debt write-offs for 2013 which were estimated between 10% to 13% of R869 million which translated to a figure of between R89 million and R115 million. This was expected to result in the projected deficit increasing to more than R502 million, which was over and above about R100 million that had to be written off in the past, the bulk of which was prescribed. The deficit was said to have resulted in an estimated backlog of maintenance of university buildings of approximately R1 billion. In addition thereto, it has impacted severely on student housing. The respondent currently has approximately 11500 beds but it needs a further 6000 beds of which it is only able to provide 800 beds. The 800 beds will cost approximately R150 million.
- [6] Further concern of the Applicant is that the Respondent intends retrenching staff, support staff in particular and that employees’

current conditions of service entail considerable benefits, including generous retrenchment provisions which are not included in the new conditions which the Respondent favours. Examples of benefits which do not exist under the new conditions of service and are therefore lost to employees should they change, are:

- Generous retrenchment benefits which include an entire years pay as a “severance gratuity”, plus an additional 2% of the employees maximum salary per completed year of service. Additional benefits for staff over the age of 46, up to an additional full year’s salary, are also applied. Under the new conditions of service only the statutory minimum of one week’s pay for every completed year of service applies.
- The annual leave gratuity payable on termination is also reduced from a maximum of 120 days to only 60 days.
- The sick leave provisions were reduced and special leave was reduced from 22 days to 15 days. Annual leave was similarly reduced. All employees employed prior to 2 July 2004, which is a significant percentage, were said by the Applicant to enjoy substantial post -retirement medical aid benefits which were not continued on the new conditions.

[7] The Applicant contended that the generous retrenchment provisions, in particular, are a compelling reason why the Respondent wishes employees to accept changed conditions of service. Conversely, and as retrenchments are contemplated, they present a powerful inducement to employees not to change conditions. The Applicant further said that the unlawful methods the Respondent has utilised to persuade employees to change to the proposed conditions of service include:

1. effectively discontinuing the “auto-notch” system of granting employees incremental increases based on their years of service in an attempt to detract from the desirability of the old conditions;
2. paying performance bonuses only to staff on the new conditions without any legal, logical or equitable basis for doing so;
3. refusing to honour existing conditions of service and unilaterally implementing aspects of the new conditions of service; and
4. refusing to promote deserving staff, or move staff internally, unless they migrate to the new conditions.

[8] The Respondent disputed the assertions of the Applicant on retrenchments by saying that the question of the retrenchment benefits has never been a factor primarily because the respondent had not performed any retrenchments. It was averred that this was an issue that had never been raised by the applicant in any of its meetings with the Respondent. The Respondent denied having utilised any unlawful methods as alleged in that:

- (a) The Respondent had not discontinued the “auto-notch” system of incremental increases and it continued to apply to 239 staff members. Although the Respondent had since 2009 negotiated salary increases on a Total Remuneration Package (“TRP”) basis the question of the auto-notch system had never been presented as a real issue in dispute between unions and the Respondent. A communique dated 12 July 2012, to employees explaining what the benefits of the TRP approach to remuneration are, also explains the significance of migration to the new conditions of service was referred to.
- [9] The issue of paying performance bonuses was said to be at the core of the dispute between the Applicant and the Respondent. It was disputed that the Respondent acted illegally, illogically or inequitably. In this regard paragraphs 5.2.1 and 5.2.5 of a remuneration committee (“REMCO”) meeting held on 19 October 2010 were referred to as showing that in order to finance the payment of performance management bonuses it was necessary for employees on the old conditions of service to relinquish some of the generous benefits. The employees were said to have resisted doing so and the Respondent said that it was accordingly not in a position to pay such bonuses until agreement could be reached on that issue. Employees who were on the new conditions of service were said to be already receiving such bonuses where they were due. The respondent said that it wished to move from a service based increase in salary, that is, automatic increases for years of service, to a performance-based system of reward where employees who were assessed to be deserving of rewards were paid such bonuses.
- [10] The contention of the applicant that the respondent was paying performance bonuses only to staff on the new conditions without any legal, logical or equitable basis for doing so was denied by the respondent. The respondent was said to be refusing to honour existing conditions of service and that it was unilaterally implementing aspects of the new conditions of service. It disputed these allegations by pointing out that what was said was so vague as to make it impossible to meaningfully deal with the allegations contained therein.
- [11] The applicant said that the respondent was refusing to promote deserving staff, or to move staff internally, unless they migrate to the new conditions. In response the respondent said that the position was that academic staff were in what was referred to as “broad banded” positions where they were promoted without vacancies having to be advertised. They were all employed on the new conditions of service. Support staff vacancies were, however, not broad banded and were vacancy driven and advertised on the budgets available. For that reason the respondent offered promotions to such employees on the new conditions of service. The respondent’s budget, which has already been stated to be severely compromised, was said not to allow the respondent to link promotions to the old conditions of service. It was said to be simply unaffordable and to be realistic the respondent said that it encouraged its staff members to migrate to the new conditions of service. The linking of promotions to the new conditions of service was described as a legitimate tool by means of which such migration was encouraged.

[12] The actions of the Respondent were described to be a contravention of the employee's contracts of service; contrary to the Respondent's own policies; unlawful; and unfair with the consequence of causing extreme agitation and unhappiness amongst the employees and, ultimately, detracting from the ability of the Respondent institution, as a whole, to deliver academic services as it was required to do. The response to these submissions was that these were a gross overstatement in that there had certainly been no protests or even meetings concerning this issue and all staff members were perfectly aware of the pros and cons of either remaining on the old conditions of service or migrating to the new conditions of service. They were perfectly free to choose what they wish to do. Naturally, said the submission, the Respondent encourages its employees to migrate to the new conditions of service.

[13] In around 2004 the Respondent was formed by the former University of Natal (Durban and Pietermaritzburg), the University of

Durban-Westville and Edgewood Teachers' Training College. General negotiated conditions of service were implemented for all

permanent staff employed. During 2004 a second set of conditions of service was introduced for staff employed from 2 July 2004 onwards and in 2006 a third set of conditions arose for staff employed from 18 February 2006 onwards. The latter two sets of conditions of service were not established by collective agreement but were later ratified and amended by a collective agreement in 2007. All three are termed the "old conditions of service".

[14] Staff appointed in 2006 received an appointment letter stating that the Respondent was "developing a Performance Management System (PMS) which would be applicable to them if approved by Council". Thereafter, all appointment letters were specifically made subject to the PMS. On 28 November 2008 the Respondent's Council approved the Respondent's Performance Management Policy. Significant aspects of the policy are that it was aimed at recognising and rewarding good performance in a fair and equitable way. It would apply to all permanent and long fixed term employees of the University. The policy was linked to rewards which could take the form of promotion (for academic staff) and the payment of performance related incentives. The performance management policy was to be read in conjunction with the UKZN Remuneration Policy.

[15] On 1 January 2009 the Remuneration Policy for 2009 to 2011 which was approved on the same date as the Performance Management Policy, 28 November 2008 was implemented. Paragraph 5 of the Remuneration Policy referred to two approaches to remuneration being the "basic salary plus add on" and the Total Remuneration Package (TRP) approaches. Prior to that time only the University Executive, Deans and Deputy Deans were on the TRP package. According to the applicant the three existing sets of conditions of service previously referred to were based on the basic salary plus add on benefits approach. The Respondent said it was based on an annual cost to the employer basis.

[16] Further significantly, paragraph 5.6.2 refers to a “performance incentive award scheme” in terms of which an incentive scheme was to be implemented that would be linked directly to the University performance management system and would be paid annually on the results of the performance review. It further stipulated that:

- 1) the performance incentive award scheme would be implemented during 2010 and would “replace all existing merit awards, performance notches and merit notches”;
- 2) the calculation of the incentive would be based on University performance as well as other targets as determined by the Respondent’s Council;
- 3) once a value had been calculated it would be applied to individual performance through progress in achieving the individual performance targets as set out in the performance management system; and
- 4) annual assessments of performance would be based on the result of the proceeding calendar year ending 31 December each year.

[17] It was highly significant to the Applicant that the new performance incentive award scheme replaced existing performance benefits and the Applicant contended that it demonstrated that the incentive award scheme was clearly intended to operate across the entire spectrum of the Respondent’s employees. The Applicant said that there was, in any event, no other basis on which the policy could be interpreted. According to the Applicant the three performance benefits had been part of the Respondent’s policy and practice for many years and were applied to all staff on the old conditions of service. The Respondent’s version amounted to it disputing:

- the significance which the applicant sought to attach to the performance incentive award scheme as envisaged in the policy;
- that the three performance benefits mentioned in clause 5.6.2 formed part of the old conditions of service and
- that an employee could apply for a further salary increase as alleged by the applicant.

[18] Merit awards were once-off payments made to individual staff members for outstanding performance as motivated for by their manager. Merit notches entailed a salary elevation to a higher level based on overall performance. Performance notches applied when an employee had reached the highest applicable level in their salary grade and thus the “auto-notch” ceased to operate. According to the Applicant, in such circumstances an employee could apply for a further salary increase in any particular year which would be considered based on that employee’s performance.

[19] The workings of the auto-notch system could best be explained by reference to the grade 12 salary range. Various sub-levels or “notches” are contained within the applicable salary range. On a yearly basis, employees would automatically be elevated to a higher notch and thus receive a further salary increase in addition to the negotiated across the board yearly

increase. The gap between the different notches was uniform. The gap between the notches, was increased on a yearly basis by the same percentage as the yearly salary increase, with the result that the upper level of that particular salary grade would increase as the gaps between the notches increased. This “auto-notch” entitled staff members to an increase equivalent to the incremental value as provided for the applicable salary range as approved by council from time to time. Such increases were effective from the first day of January of every year, provided staff members had not reached the top of the applicable salary range.

- [20] There are a number of other factual considerations in respect of which the parties are in dispute. Essentially, they all revolve around the migration of Applicant’s members to the new conditions of service, the performance management policy, the remuneration policy, the Respondent’s financial situation and the question of the Applicant’s willingness to bargain on conditions of service. For purposes of this application it is not necessary to have to outline each such factual dispute, save to say that each has been considered. The history of this matter reveals that in the middle of 2003 the Applicant referred an unfair labour practice dispute to the CCMA against the Respondent. Those proceedings are still pending and have not been disposed of or withdrawn. The present proceedings call for a determination of the same issues although the relief is framed differently. The parties agreed to keep those proceedings in abeyance pending the outcome of this matter. There is thus pending and suspended litigation between the same parties based on the same cause of action and essentially in respect of the same subject-matter.
- [21] The Applicant’s primary complaint is that the Respondent is using unfair and unlawful means to compel employees of the Respondent to convert to new conditions of service. It contended that not only did some of the methods used constitute unilateral changes to the employee’s conditions of service but they were contrary to the Respondent’s own policies approved by its Council. In respect of the new conditions of service and the payment of a performance bonus the Applicant submitted that there was no link at all between the two. It said that the performance based pay system was specifically stated to replace benefits previously enjoyed by those on the old conditions of service. In support of its case the Applicant made specific submissions on Respondent’s Performance Management Policy 2008 to 2011; the Remuneration Policy for 2009 to 2011 and the Performance Management Manual.
- [22] The Respondent raised a number of issues in its closing submissions to oppose this matter. Essentially, they are the following:
- (a) Whether the matter is *lis pendens*;
 - (b) Whether the Court has jurisdiction to grant the relief sought;
 - (c) If so, whether the Court should intervene and grant any relief in circumstances where:
 - (i) the dispute relates to an issue which should properly be resolved through the collective bargaining process, alternatively the dispute resolution processes as set out in the Act;

- (ii) there are material disputes of fact which cannot be resolved on the papers.
- (d) Whether the Applicant has made out a case for interdictory relief in circumstances where it has an alternative remedy and there can be no suggestion of irreparable harm.
- (e) Whether the Applicant is entitled to urgent relief.

Evaluation

[23] This Court has power to grant a declaratory order as envisaged by section 158 (1) (a) (iv) of the Act. In *Mantzaris v University of Durban Westville*,^[2] it was held that the power to make declaratory orders was similar to the power conferred on the High Court to make such orders in terms of section 19 (1) (a) (iii) of the Supreme Court Act.^[3] The approach adopted by the High Court ought therefore to be followed as a guide. This Court may however do so only in respect of matters that fall under its jurisdiction.^[4] For instance, this Court will decline to entertain a dispute as a Court of first instance if the dispute must first be referred to conciliation by an appropriate statutory body such as the Commission for Conciliation, Mediation and Arbitration, the CCMA.

[24] Further, and as a general policy, this Court might decline to grant declaratory orders when a party approaches the court to obtain a declaration of rights merely because those rights have been disputed. In the *Louw*-case *supra* the Court held that:

“The court is not here to advise on the merit of differing contentions in these circumstances, however important these may be to the parties, or however convenient it may be to them that the court makes an order upholding one of the positions contended for”.

[25] The Labour Appeal Court, (the LAC) has already sounded caution against premature referrals of disputes to this Court when such disputes are about or concern allegations of unfair labour practices which, in the ordinary course, must first be referred to conciliation and arbitration, in accordance with the mandatory provisions of section 191 of the Act, either by the CCMA or a bargaining council.

Where a litigant sought a declaratory order from this Court in terms of s158 (1) (a) (iv) of the Act, to the effect that the suspension

was unfair, unlawful and unconstitutional the LAC had the following to say:

“A declaratory order will normally be regarded as inappropriate where the applicant has access to alternative remedies, such as those

available under the unfair labour practice jurisdiction. A final declaration of unlawfulness on the grounds of unfairness will rarely be easy or prudent in motion proceedings.”^[5]

[26] In labour disputes therefore, a declaratory order will normally be regarded as inappropriate where the Applicant has access to alternative remedies. The High Court approach,^[6] that the availability of another remedy does not render the grant of a declaratory order incompetent, will have to be departed from, in the light of the *Gradwell*-decision. The facts

of this matter, some of which were briefly outlined above, indicate without doubt that a final declaration of unlawfulness on the grounds of unfairness will rarely be easy or prudent in motion proceedings.

- [27] That the Respondent seeks to persuade its employees to change from their existing conditions of service to new conditions of service the Respondent has introduced is common cause. To the extent that the migration might be justified by the financial difficulties which the Respondent is operating under, any allegation that such a change is unfair or for that matter unlawful could properly be attested to in a viva voce hearing with the advantage of cross examination. The position of the Respondent is not as simple as that of the Applicant. Apart from the interchange that the Respondent has with its employees in respect of the terms and conditions of service, it still has to look after the affairs of its students. The balancing process it has to keep between the two groups it interacts with might often be a daunting task.
- [28] The Applicant seeks relief by way of application in circumstances where the application has its genesis in a longstanding dispute between the parties. On the Applicant's own version, the dispute regarding conditions of service started in 2008 and the issue relating to the payment of performance bonuses arose, at the latest, in 2013. The parties have consistently adopted opposing positions on the issues and it is accordingly unsurprising that the papers are replete with material disputes of fact which, as correctly contended by the Respondent, cannot be resolved on the papers. In the light of the history of the matter, the Applicant must at the time of initiating these proceedings, have reasonably foreseen that material and numerous disputes of fact would arise between it and the Respondent which would be incapable of resolution on the papers. In those circumstances, the initiation of motion proceedings was improper and inappropriate.
- [29] Two examples of such difficulty show that the application proceedings were not suited for this matter. Firstly, it remained common cause that the new conditions of service contained, at the least, slightly reduced benefits relating, inter alia, to leave days. The Respondent said that it envisaged that any savings obtained through the reduction in such benefits would potentially fund the performance incentive award scheme. In this application the Applicant has not demonstrated the apparent unfairness or unlawfulness of this approach. The allegation has been made by the Respondent that as at the end of 2011, the Applicant refused to engage the Respondent on the possibility of its members transferring to the new conditions of service and, according to the Respondent, the performance incentive award scheme remained unfunded, which could explain the concern raised by the Applicant.
- [30] Secondly, in 2012, the Respondent introduced the new conditions of service as an alternative to the existing conditions of service. A number of the Applicant's members, amongst other employees, elected to convert to the new conditions of service. Some of these employees

might very well be senior lecturers of the Respondent. The Respondent then said that during 2013 and as a direct result of such employees enjoying slightly reduced benefits, the Respondent was able to afford to implement a performance based remuneration policy for the payment of performance bonuses to those persons on the new conditions of service who achieved the prescribed standard of performance. In terms of the principle in the *Plascorn Events Paints v Van Riebeck Paints*[7] the Court had to accept this statement of facts. Again, there is no demonstration by the Applicant why this approach should be found to be unfair and unlawful without further scrutiny afforded by cross examination.

[31] I am accordingly, not satisfied that the declaratory order sought by the Applicant is inappropriate where the Applicant has access to alternative remedies. Further, the application proceedings adopted by the Applicant were not shown to be a proper procedure to resolve the dispute between the parties. As a passing remark though, the change of the retrenchment provisions as terms and conditions of employment leave much to be desired when the Respondent avers that it does not foresee retrenching its staff. There cannot be any financial benefits generated from the retrenchment provisions which it can use to fund any of its future programs.

[32] The following order shall issue, bearing in mind that there is a continuous relationship between the parties which must be kept harmonious:

1. The application is dismissed.
2. No costs order is issued.

Cele J.

Judge of the Labour Court of South Africa.

APPEARANCES:For the applicant: Mr P Schumann

Instructed by Brett Purdon Attorneys.

For the respondent: Mr G O van Niekerk

Instructed by Jayshree Moodley and Associates.

[1] Act Number 66 of 1995 hereafter referred to as the LRA

[2]

[2000] 10 BLLR 1203 (LC) at 1212.

[3] Act Number 59 of 1959.

[4] See *Louw v Eden District Municipality* (2011) 32 ILJ 1118 (LC) at para [5].

[5] See *Member of the Executive Council for Education, North West Provincial Government v Gradwell* (2012) 33 ILJ 2033 (LAC), the Gradwell-decision.

- [6] Munn Publishing Pvt Limited vs Zimbabwe Broadcasting Corporation 1995(4) SA 675 ZSC at 680C.
- [7] Plascorn Events Paints v Van Riebeck Paints [1984] ZASCA 51; 1984 (3) SA 623
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Prepared on 14 October 2026 · Esheria