



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Reportable

Case no: P483/07

In the matter between:

SOUTH AFRICAN MEDICAL ASSOCIATION (SAMA)

OBO LINDA

Applicant

and

DEPARTMENT OF HEALTH: EASTERN CAPE

First Respondent

PHWSBC

Second Respondent

FAITH NCUMISA BANTWINI

Third Respondent

Heard: 11 November 2011

Delivered 17 January 2012

Summary: Review– Interpretation and application of resolution 1 of 2004 Public Health and Welfare Sectoral Bargaining Council. Review dismissed- no proper record.

JUDGMENT

MOLAHLEHI J

Introduction

[1] This is an application to review and set aside the arbitration award made by the third respondent (the arbitrator) under case number PSHS 40-07/08 dated 30 August 2007. In terms of that arbitration award, the arbitrator found that the second applicant did not qualify for the skills allowance as provided for in terms of resolution 2 of 2004 read with the Implementation Policy of Scarce Skills and Rural Allowance in the Public Health Sector of 1 July 2003.

Background facts

[2] The applicant who is employed by the first respondent (the department) as Chief Medical Superintendent at salary level 13 at the Umtata hospital declared a dispute against the department concerning payment of the scarce skills allowance (the allowance).

[3] The department had initially paid the applicant the allowance but later refused to pay on the grounds that the applicant did not qualify for the allowance. The department said that the applicant did not qualify for the allowance because she was employed as a senior manager and thus forming part of the Senior Management Service (SMS).

[4] The issue in this matter concerns the interpretation and application of Resolution 1 of 2004 of the PHWSBC. The objectives of the Resolution reads as follow:

1.1 To attract and retain professionals with scarce skills on a full time basis to the Public Health Sector as managed by Health Employer;

1.2 To institute a non-pensionable scarce skills allowance. For designated health professional categories working in clinical service delivery of Public Health Sector hospital/institutions and are not part of Senior Management Services;

1.3 To identify the initial occupational group as the first recipients of the scarce skills allowance;

1.4 To determine the percentage of allowance and method of payment; and

1.5 To agree that scarce skills allowance be a fixed percentage linked to the annual salary notch.'

[5] In terms of clause 3 of the Resolution, the parties to the bargaining council agreed that the allowance would be paid to the occupational groups that are designated as scarce skills and also that a non-pensionable scarce skills allowance of the relevant annual salary notch be payable to personnel in the occupational groups that are listed in the resolution.

[6] According to the applicant after the introduction of the allowance, the Minister of Public Administration unilaterally introduced a limitation to the application of the resolution that excluded employees who are members of the Senior Management Service (SMS) from receiving the allowance.

[7] In introducing the exclusion of the SMS, the Minister exercised that power in terms of section 3(3) (c) of the Public Service Act of 1994. However the exclusion did not apply to those of the SMSs who performed nominal managerial duties. The Minister's determination set out the criteria to be used in determining whether a member of the SMS qualifies for the allowance.

The arbitrator's award

[8] The arbitrator in finding that the applicant did not qualify for the allowance took into account the policy which the department had introduced for the purposes of implementing the allowance, the requirement that for a member of SMS to qualify his or her weighted work in the identified clinical service must be 50 percent or more of the employee's job. It would seem that although the arbitrator accepted that the applicant did some clinical duties he was not satisfied that she (the applicant) did enough to qualify for the exception to the general rule that member of the SMS did not qualify for the allowance. The arbitrator further noted that the applicant is a senior manager at salary level 13.

The grounds for review

[9] The applicant contended that the arbitrator in arriving at the decision as he did was influenced by material error in law, was arbitrary or capricious and was not rationally connected to the information which was before him or her. The applicant did not dispute that she was part of the SMS but contended that she also performs clinical services as a medical doctor.

Evaluation

[10] It would seem to me that the critical aspect of this review concerns the issue of whether the applicant performed the clinical work at the level where the exception to the general exclusion of payment of the allowance to members of the SMS would apply to her. In other words, the question is whether the applicant in her work performed 50 percent or more of the clinical work.

[11] This issue cannot in my view be resolved on the papers before this Court. The applicant has not filed the record of arbitration proceedings. In terms of rule 7A (6) of the Rules of the Labour Court, the applicant is obliged after filing the review application to furnish the Registrar of the Court with record of the arbitration hearing including the arbitration award. The Registrar is then obliged to make the record available in terms of rule 7A (8) of the Rules. The applicant is further obliged to transcribe the record of the proceedings.

[12] In *The Department of Transport North West Province v Sebotha NO and Others*,¹ this Court held that:

‘The responsibility to ensure that a proper and complete record is placed before the court rests with the applicant. Failure to place before the court a complete record by the applicant could result in the dismissal of the review application on that ground alone.’

¹ (2010) 31 ILJ 97 (LC); [2009] JOL 23818 (LC) at para 18.

[13] In dismissing the review application because of failure by the applicant to ensure that a record of the transcript of the proceedings was placed before the court, it was held in *Boale v National Prosecuting of SA and Others*² at paragraph 5 that:

‘It is trite that there is duty on an applicant to provide a review Court with a full transcript of the proceedings he wishes to have reviewed. The applicant has failed to provide this Court with the full transcript of the proceedings that he wished to have reviewed. Where an applicant fails to provide a full transcript of the proceedings, the review application must be dismissed. The only exception would be where the tape cassettes are missing or where the parties are unable to reconstruct the record.’

[14] The court in *Fidelity Cash Management Services (Pty) Ltd v Muvhango NO and Others*³ in following the same approach as that in *Boale* held that:

‘[The] court [should be] placed in a position to assess the different versions as they were placed before the [commissioner through] a full transcription of the record or a satisfactory reconstruction thereof.’

[15] In the present instance, the applicant has not provided the reason as to why the transcript of the arbitration hearing had not been transcribed. There is also no evidence of the applicant taking steps to ensure that the second respondent produces the record in terms of rule 7 of the Rules. It is for this reason alone that the applicant’s review application stands to be dismissed.

Conclusion

[16] In my view the applicant's review application stands to be dismissed for failure to provide the Court with a complete record. I see no reason why the costs should not follow the results both in terms of law and fairness.

Order

[17] In the premises the review application is dismissed with costs.

² [2003] 10 BLLR 988 (LC) at para 5.

³ (2005) JOL 14293 (LC); [2005] 8 BLLR 783 (LC) at 785 H-I.

Molahlehi J

Judge of the Labour Court of South Africa

APPEARANCES:

FOR THE APPLICANT: SAMA- UNION OFFICIAL N.B SIBEKO

FOR THE RESPONDENT: No appearance

LABOUR COURT