LABOUR APPEAL COURT

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, PORT ELIZABETH

Reportable

Case no: PA 5/15

In the matter between:

NOMBULELO MHLEKUDE **Appellant**

and

SOUTH AFRICAN AIRWAYS (SOC) LTD **First Respondent**

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **Second Respondent**

COMMISSIONER A NYONDO NO **Third Respondent**

Heard: **13 September 2016**

Delivered: **24 November 2016**

Summary: Demotion. Full-time shop steward, removed from office by virtue of her expulsion from the union, deployed to her former position in the employer's organisation. Interpretation of a collective agreement. Union alleged shop steward unfairly demoted by not being offered a position on the same level at

which she was remunerated as a full-time shop steward. Held, on correct interpretation of agreement, deployment to previous position not a demotion.

Coram: Coppin JA, Landman JA and Phatshoane AJA

Neutral citation: *Nombulelo Mhlekude v South African Airways (Soc) Ltd and Others* (LAC**:** PA 5/15)

JUDGMENT

LANDMAN JA

Introduction

[1] Ms Nombulelo Mhlekude, the appellant, appeals against a judgment of the Labour Court (Van Niekerk J) reviewing and setting aside an arbitration award by Commissioner A Nyondo of the Commission for Conciliation, Mediation and Arbitration (CCMA) that held that the South African Airways (Soc) Ltd (SAA) had demoted the appellant and granted her relief.

Background

[2] The South African Transport and Allied Workers Union (SATAWU) represents a sufficient number of employees of SAA to warrant its recognition by SAA. In terms of clause 5.2 of a collective agreement entitled: “recognition amendment agreement” (the agreement), the union is entitled to have one full-time shop steward (the FTUR) for every 600 members employed by SAA.

[3] The function of a full-time shop steward, is to represent the union as regards SAA both locally and nationally, to participate in the collective bargaining process at those levels and to perform the further duties listed in clause 5.2.3 of the agreement. SAA bears the full cost of remuneration of the FTUR. In terms of

LABOUR APPEAL COURT

clause 5.2.4.3, the career plan of the FTUR was to be determined by the employee relations manager, acting in junction with the union. The agreement provides that the FTUR shall be subject to the same regulations, employment conditions and disciplinary measures as are applicable to other employees taking into account item 4.2 of schedule 8 of the Labour Relations Act 66 of 1995 (LRA).

[4] What is of importance in this appeal is what happens on the termination of the office of a FTUR. This is governed by clause 5.2.6 of the agreement. It reads:

> 'Upon the ending of the office term of the FTUR, or his removal from office:
>
> 5.2.6.1 Management shall, where practicable and possible, offer the same, or equivalent, or higher alternative employment to the FTUR.
>
> 5.2.6.2 The term of office and benefits of a FTUR shall automatically cease to exist when the FTUR is dismissed, or his or her services are terminated due to death, incapacity, resignation or according to the union's constitution.'

The facts

[5] The appellant commenced employment with SAA as a customer service agent in 2002. She was employed at remuneration level 6-9. She was a member of the union. On 11 June 2011, while still holding her level 6-9 post, she was appointed as a FTUR in terms of the agreement. This entailed her fulfilling the duties of this office and not those of a customer service agent. She was remunerated by SAA, in her capacity as FTUR, on remuneration level 13. She also received an allowance of R3 000 per month.

[6] On 3 February 2014, the union expelled the appellant as a member. This had the immediate effect that she no longer served as the union's FTUR.

[7] SAA then redeployed her to the position which she occupied prior to her becoming a FTUR, namely a customer service agent. SAA, however, continued

LABOUR APPEAL COURT

to remunerate her on the level 13, i.e. the salary that she had earned as a FTUR. But, in accordance with the agreement, the allowance of R3 000 ceased.

[8] The appellant was dissatisfied with the situation. After some time she referred a dispute to the CCMA. She couched the dispute as:

> 'Unfair demotion contrary to collective agreement. Employer seeks to place the employee at level 10-11 position from level 13 position when there are alternatives available.'

[9] After hearing the parties, the arbitrator found that the appellant had been demoted by SAA and that the demotion was unfair. He ordered SAA to offer the appellant the same level 13 or equivalent or higher alternative position by 30 August 2014.

<u>The review</u>

[10] Subsequently, SAA launched an application in the Labour Court to review and set aside the award. In his judgment, Van Niekerk J analysed the award and concluded that the matter turned upon the correct interpretation of clause 5.2.6.1 of the agreement. The learned Judge held, that properly construed, this clause:

> '… [R]ead in its context, especially in relation to the evidence of record concerning full-time union representatives and …. requires the applicant to do no more than seek to place the employee in another position at the level or equivalent or higher than that which she occupied at the time of her appointment.'

[11] The learned judge went on to say at paras 11 and 12:

> 'It follows on a proper interpretation of the recognition agreement that the employee had no right to remain engaged at level 13L after her dismissal from office as a full-time union representative. Her placement in a post-graded at the same level in which she was engaged prior to her appointment therefore did not constitute a demotion; it was no more than a reversion to the status quo.

LABOUR APPEAL COURT

> It follows that the flawed reasoning adopted by the commissioner had the result of an outcome that fell outside of a band of decisions to which reasonable people could come. There is nothing on record that serves to sustain the result of the proceedings under the review, even if the commissioner's flawed reasoning was to be disregarded. For that reason, the application to review and set aside the arbitration award stands to succeed.'

Evaluation

[12] Mr Grogan, who appeared for the appellant, submitted that on a proper interpretation of clause 5.6.2.1 of the collective agreement, the appellant, because she was remunerated on level 13 and retained that remuneration, should have been offered a position in SAA on that level unless it was impractical or impossible. Mr Grogan's submissions rest upon his interpretation of the words "same… employment" in clause 5.2.6.1, that reads: "Management shall, where practicable and possible, offer the same, or equivalent, or higher alternative employment to the FTUR." Mr Grogan submits that "same... employment" refers to the FTUR post. But, there is no FTUR post in SAA's organizational structure and the context clearly shows that it is a reference to the post held by the FTUR in SAA before she was appointed by the union to this position.

[13] The FTUR post fell outside SAA's organization and there was no equivalent post within SAA although there were other posts on level 13. Assuming, for a moment, that the appellant was entitled to be offered a level 13 post, then it would be a promotion from her previous position within SAA. The deployment of the appellant to the same post (apparently at level 10-11L; ie a slightly higher level than her initial appointment) she occupied before she became a FTUR does not constitute a demotion. It is an action contemplated by the collective agreement. The character of her deployment to her previous post is not affected by SAA's gesture of allowing her to retain her higher salary.

[14] The CCMA has the power to interpret collective agreements. However, the Commissioner was not requested to perform this function of simply interpreting

LABOUR APPEAL COURT

the agreement. He was requested to arbitrate a dispute concerning an alleged unfair labour practice and, in the course of doing so, he was obliged to interpret the agreement. This is an important distinction because his jurisdiction to grant the appellant relief was contingent on his finding that the appellant had been unfairly demoted. No relief could be granted if she had been wrongly or unfairly refused an equivalent or higher post than she occupied prior to becoming a FTUR.

[15] The Commissioner relied *on Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services, and Others* (*Nxele)*,[1] which was concerned with the transfer of a correctional services official. This Court held that the official's transfer constituted a demotion, even though his salary and rank remained the same because far greater responsibilities and status were attached to the official's previous position than to the new position to which he was transferred. This accordingly constituted a demotion.

[16] *Nxele's* case is relevant and binding in so far as it decides what constitutes a demotion. But, the facts of the appeal before us are not concerned with the demotion of an employee *qua* employee. Rather the circumstances in which the appellant finds herself was caused by her union expelling her and thus removing her from her position as a FTUR, which was a union position and not a position within SAA. In so far as there may have been a diminution in her status, which she certainly perceives to be the case, it was not caused by her employer. It has to do with her fall from grace in the union. In my view, the interpretation of clause 5.6.2.1 by the court *a quo* is the correct interpretation.

[17] Furthermore, I am of the opinion that this Court is entitled to interpret the agreement and is not required to be deferent to the commissioner's finding or interpretation. This is because of the nature of the dispute that the appellant referred to the CCMA. She categorised the dispute as one concerning an unfair labour practice. Whether or not it is an unfair labour practice is, therefore, a

[1] [2008] 12 BLLR 1179 (LAC).

LABOUR APPEAL COURT

jurisdictional fact, which must be decided by the courts. See in this regard, the incisive analysis by Hulley AJ in *Distinctive Choice 721 CC t/a Husan Panel Beaters v The Dispute Resolution Centre (Motor Industry Bargaining Council) and Others.*[2]

[18] Finally, I must point out that Ms Msizi, who appeared for SAA, correctly submitted that the benefits in the agreement rest on the basis that the appellant is a member of SATAWU.[3] (Clause 17). Ms Msizi went on to make the further submission that, at the moment the appellant was expelled from the union, she lost the position of FTUR as well as the dispensation applicable to a FTUR whose term had ended. This proposition was not raised in the arbitration and in the court *a quo*. In any event, SAA was entitled to act as it did in the exercise of its prerogative as an employer as if the agreement was binding.

[19] In the result, the appeal falls to be dismissed. I am not inclined to award costs against the appellant.

<u>Order</u>

[20] I make the following order:

1. The appeal is dismissed.

2. There is no order as to costs.

____

A A Landman

LABOUR APPEAL COURT

---

[2] (2013) 34 ILJ 3184 (LC).

[3] Clause 17.2 of the agreement provides ‘This agreement shall be legally binding upon the parties and their members within the Company.’

Judge of the Labour Appeal Court

I concur,

____

P Coppin

Judge of the Labour Appeal Court

I concur,

____

M V Phatshoane

Acting Judge of the Labour Appeal Court

APPEARANCES:

FOR THE APPELLANT: Adv J Grogan SC

Instructed by Gray Moodliar Attorneys

FOR THE FIRST RESPONDENT: Adv N Msizi

Instructed by Poswa Inc

LABOUR APPEAL COURT