



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 51/2018

In the matter between:

THABANG MAMPANE, N.O

First Appellant

NATIONAL LOTTERIES COMMISSION

Second Appellant

THE BOARD OF THE NATIONAL LOTTERIES

COMMISSION

Third Appellant

KHAU MOLOKO, NO

Fourth Appellant

and

NATIONAL UNION OF PUBLIC SERVICE

AND ALLIED WORKERS ("NUPSAW")

First Respondent

KELEBOGILE MOKGATLHA

Second Respondent

Heard: 05 September 2019

Delivered: 16 October 2019

Summary: Employee relocated due to the restructuring of the employer – employee appealing against her relocation – Commissioner delegated the authority to the Human capital manager for consideration which rejected the appeal – employee contending that the decision to refuse her appeal *ultra vires* and void and that commissioner did not have the authority to delegate his power

Held that: firstly, the evidence does not establish that the employee had any right to an internal appeal (under the policy or otherwise) against the decision to relocate her; secondly, even if she enjoyed such a right of appeal, the Commissioner personally reconsidered the decision; and thirdly, even if the decision had been reconsidered by the HCM rather than the Commissioner, the Commissioner had the statutory power under section 2D of the Act to delegate the authority to the HCM and clause 9 of the policy imposed no limitation upon that power. In the result, it cannot be said that the decision in relation to the request for reconsideration was unlawful and reviewable because the decision-maker acted under a delegation of power which was not authorised by any applicable empowering provision. Further that it is inconceivable that a collective agreement to which a person is bound as a party can constitute a decision capable of review. Labour Court's judgment set aside and appeal upheld with costs.

Coram: Waglay JP, Murphy and Kathree-Setiloane AJJA

JUDGMENT

MURPHY AJA

[1] The four appellants ("the appellants") are respectively, the Commissioner of the National Lotteries Commission ("the NLC"), the NLC, the board of the NLC and the Human Capital Manager of the NLC ("the HCM"). They appeal against the judgment and order of the Labour Court (Lagrange J) of 18 January 2018 finding that the refusal of the fourth appellant (the HCM) to deviate from the decision of the first appellant (the Commissioner) to deploy the second respondent, Ms. Mokgatlha, ("Mokgatlha") to KwaZulu-Natal was *ultra vires* and therefore null and void.

[2] In 2011, the NLC (then the National Lotteries Board) embarked on an organisational development process aimed at transforming the organisation in

accordance with pending amendments to the Lotteries Act¹ ("the Act"). The Act was amended in 2013 with the aim of accelerating service delivery and ultimately required the NLC to provide services in all of the provinces. This necessitated the deployment of staff to newly established provincial offices. The NLC thus was required to embark on a process to select which employees it should transfer.

- [3] Prior to the restructuring, 10 assistant managers, including Mokgatla, were based at the NLC's offices in Pretoria. These assistant managers were eventually all relocated to various provinces throughout the country. All the employees of the NLC were affected and Mokgatla's entire department of 13 staff members was relocated to Durban.
- [4] On 5 March 2012, a general notice was circulated to all staff of the NLC informing them of the proposed restructure. The notice explained that there would be nine regional offices across the Republic in order to ensure greater efficiency and that the NLC became more accessible to its beneficiaries and applicants.
- [5] Thereafter a consultation process, involving all the relevant trade unions including the first respondent ("NUPSAW"), was undertaken by an independent service provider to determine the selection of staff for re-deployment and the finalisation of new job descriptions. The process took longer than anticipated and only began in earnest in February 2015.
- [6] As part of the process, an engagement forum for the provincial deployment was established. The forum members comprised of affected divisional executives and managers, NLC management, NEHAWU, NUPSAW and non-unionised staff representatives. Numerous meetings were held between 16 April 2015 and 4 December 2015 at which NUPSAW was duly represented. No objections were raised in relation to the assessment process and criteria adopted. The unions accepted the method of selection of employees to be transferred and agreed to the process followed.

¹ Act 57 of 1997.

- [7] Consultations were held with affected employees to explain the reasons for the restructuring and to inform them of the positions to which they would be allocated under the new structure, their new job descriptions and the terms and conditions applicable to them. The process allowed the employees an opportunity to be heard and for their representations to be considered. Change management workshops were conducted and one on one counseling sessions were provided to all impacted employees in order to assist affected employees with the management of their personal circumstances in accordance with the NLC's Relocation Policy ("the policy").
- [8] The policy, which was adopted by the board in early 2014, governs the compensation of employees chosen for relocation. Clause 6 of the policy sets out its purpose as follows:
- ‘This policy regulates the manner in which the NLB compensates an employee for actual reasonable expenditure where, in the interest of the organisation, the employee is transferred, appointed or utilised at a location other than the one where he/she has normally resides (sic)’.
- [9] The policy provides for payment of: i) travel and subsistence for a pre-visit; ii) travel and subsistence for moving to the new place of work; iii) transportation and storage of personal belongings; iv) interim accommodation; v) new school books, uniform and travel expenses for dependent school children; vi) transfer fees of property; and vii) relocation allowances.
- [10] Clause 9 of the policy has assumed some importance in this appeal. It reads:
- ‘The board delegates authority to consider written requests for deviations from this policy to the CEO.’
- [11] The implementation of the process was conducted in three phases. Firstly, a call for volunteers was made and employees were given an option of choosing three provinces based on their preferential choice. Nineteen employees volunteered and some were placed in accordance with their choice. The majority of the employees elected to remain in Gauteng, it was therefore not possible to accommodate all of the employees in Gauteng and therefore an assessment process was introduced. Where there was more

than one volunteer for the same position, employees were deferred to the second phase which focused on the multiple positions that were available. In order to fairly allocate these positions, an external panel was sourced to conduct interviews on behalf of NLC. The panel interviewed the assistant managers, grant officers and junior grant officers and the employees were appointed to various positions that were available. Mokgatlha was not placed during these phases of the process.

[12] A third phase was then opened. Four assistant managers remained unplaced at this stage, including Mokgatlha. The employees were subsequently consulted on an individual basis which resulted in one assistant manager volunteering for the Monitoring and Evaluation specialist position in Limpopo. The remaining three assistant managers were requested to undergo capacity assessments and the final deployment to the Eastern Cape, KwaZulu-Natal and North West was made, based on these interviews and assessments. The assessments were based on merit and took into consideration the experience of the assistant managers and the needs of the respective provinces. Mokgatlha was interviewed and assessed as part of this phase on 2 September 2015 and was the lowest scoring candidate.

[13] On 12 October 2015, Mokgatlha requested to be placed in the position of assistant manager in Mahikeng, North West Province starting January 2016. There were three applications for the position in the North West and thus additional assessments were conducted. Mokgatlha did not perform well in the assessment and was again rated the lowest amongst the three employees who had applied for the position in the North West.

[14] At the conclusion of the assessment, the Commissioner advised Mokgatlha, in a letter dated 18 November 2015, that she would be deployed to Kwa-Zulu Natal in terms of the agreed criteria. The letter informed her that the change would not have any adverse impact on her current status and conditions of employment and that her relocation would be dealt with in terms of the applicable policy prescripts. It is common cause that this decision was taken by the Commissioner personally.

- [15] In response to the letter of 18 November 2015, Mokgatlha filed an appeal on 23 November 2015 objecting to her re-deployment on the basis that she was involved in a building project in Gauteng which was capital intensive and required her full time management in order to avoid delays and additional costs. She also had two children at university who were wholly dependent on her financially and had recently lost her father and thus needed to support her mother.
- [16] The Commissioner and the HCM convened a meeting to discuss the appeal. The meeting concluded that the reasons put forward by Mokgatlha did not justify a deviation from the decision to transfer her to KwaZulu-Natal.
- [17] The engagement forum met for the last time on 4 December 2015 in what was referred to as a “close out meeting”. The report of the meeting dated 31 December 2015, and signed subsequently (in February 2016) by the various parties including NUPSAW, indicated that there were no objections and that there was consensus on the processes and its outcomes. The specific outcome in relation to Mokgatlha was recorded in the report as follows:
- ‘The other 3 Assistant Managers (NW) were then taken for capacity assessments, and a final deployment for EC, KZN and North West were made based on the interviews and assessments. Other than the order of merit that was utilised, the final placement had to take into cognizance the experience of the Assistant Managers and the needs of the respective provinces, culminating into tackling the unique challenges each province faced.’
- [18] Mokgatlha was informed on 7 December 2015 that her appeal had been considered and rejected and accordingly she was requested to make arrangements for her relocation. On 11 December 2015, a meeting was held to discuss the concerns raised by four assistant managers, including Mokgatlha, who were required to relocate. At the conclusion of this meeting it was agreed that the employees would be permitted to continue at the NLC's head office until 31 March 2016.

[19] On 22 January 2016, Mokgatlha submitted a memorandum complaining about the decision to relocate her to KwaZulu-Natal and asking for it to be re-considered. On 14 March 2016, Mrs. Lucia Baker, the NLC's human resources assistant, addressed an electronic mail to Mokgatlha requesting engagement with her in respect of her transfer to KwaZulu-Natal. Mokgatlha advised Baker that she had lodged an appeal with the Commissioner and was still awaiting a response. On 15 March 2016, Mokgatlha submitted a further memorandum to the Commissioner again requesting the Commissioner to reconsider the decision.

[20] On 16 March 2016, the Commissioner addressed a letter to Mokgatlha informing her that her correspondence had been referred to the Human Capital Division and asked her to "approach the Senior Executive of Grant Funding and the Talent and Performance Manager on your redeployment". Ms Mokgatlha was not satisfied with this response, and addressed an electronic mail to the Commissioner on 16 March 2016. In the e-mail, Mokgatlha again expressed dissatisfaction about the decision and the fact that the Human Capital Division was seeking to engage her on the logistics of her re-deployment. She concluded the memorandum as follows:

'The above Commissioner, is the reason why I have escalated this matter to your office as the Accounting Authority for your consideration and intervention. It is therefore my still my humble request Commissioner that I receive a decisive response from your office.'

[21] A further meeting was held on 31 March 2016 subsequent to which the Commissioner reconfirmed the NLC's decision to deploy Mokgatlha to KwaZulu-Natal. On the same day, a letter was addressed to Mokgatlha by the HCM as follows:

'SUBJECT: OUTCOME OF APPEAL OF REDPLOYMENT TO KZN –YOURSELF

Following receipt of your appeal addressed for the attention of the Commissioner dated the 22nd day of January 2016 and the subsequent follow up date the 15th day of March 2016; please be advised that your appeal was unsuccessful.

You are therefore expected to arrange with the Senior Executive Granting Funding, Mr. Jeffrey Du Preez on or before the 1st day of April 2016 as to the time that you will be able to assume your duties in your new work station (KZN Province).'

- [22] Mokgatlha failed to take the necessary steps and as a result was instructed by the Commissioner in a letter dated 5 April 2016 to report for duty on 11 April 2016, failing which the NLC reserved its rights to terminate her contract of employment. The letter read as follows:

'Following the outcome of your unsuccessful appeal which was communicated to you through correspondence dated the 31st day of March 2016; this office has been reliably informed by the office of Senior Executive: Grant Funding that you failed to respond by yesterday (as promised on 1 April 2016) nor discussed with a view to reach agreement on a date for you to report for work at your new work station (KZN Provincial Office) as expected without any valid reason.

In view of the aforementioned, please be advised that you are expected to report for work at the abovementioned office on or before the 11th day of April 2016 and failure to do so will be construed as repudiation of your contract of employment and the employer reserves the right to terminate same with or without further correspondence on the subject matter.

Hope you will treat this matter with the urgency it deserves.'

- [23] On 7 April 2016, NUPSAW addressed a letter to the NLC claiming that its correspondence of 31 March and 5 April 2016 to Mokgatlha amounted to victimisation and that the NLC had failed to properly consider Mokgatlha's personal circumstances. It requested the deployment of Mokgatlha be delayed pending the outcome of a meeting to be arranged.

- [24] In response to NUPSAW's letter, the Commissioner addressed a further letter to Mokgatlha on 8 April 2016 informing her that the decision to transfer her to KwaZulu-Natal was final and that no further correspondence and/or appeals would be considered. Mokgatlha eventually reported for duty to KwaZulu-Natal on 26 April 2016 under protest and reserving all her rights.

- [25] The respondents (NUPSAW and Mokgatlha) instituted an application in terms of section 158(1)(h) of the Labour Relations Act² (“the LRA”) to set aside the decision of the Commissioner taken on 18 November 2016 to transfer and redeploy Mokgatlha. They essentially raised four grounds of review. It was alleged that: firstly, Mokgatlha had not been given an opportunity during the re-deployment process to present her personal circumstances in support of her request to remain in Gauteng; secondly, “her requests for deviation” (her appeal) had been unreasonably and irrationally refused; thirdly, the Commissioner had failed to take a decision on her various appeals and abdicated the decision to an official who was not invested with the authority to consider them; and fourthly, the HCM (Moloko) had dismissed her appeals without the authority to do so.
- [26] Section 158(1)(h) of the LRA provides that the Labour Court may review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law. It is not disputed that the NLC is an organ of state. Thus, its decisions, in its capacity as employer, are reviewable either under the Promotion of Administrative Justice Act³ (“PAJA”), provided they constitute administrative action, or on legality grounds under the Constitution. The broad constitutional principle of legality is an aspect of the rule of law recognised as a fundamental value of our constitutional order in terms of section 1(c) of the Constitution. All exercises of public power must be lawful.
- [27] Disputes over the transfer or relocation of an employee are not specifically dealt with in the LRA. They thus cannot be arbitrated under the LRA by the CCMA or a bargaining council, unless the transfer constitutes an unfair labour practice by unfairly impacting on the provision of benefits, is an unfair disciplinary measure or demotion, or results in an unfair constructive dismissal.⁴ As the relocation of Mokgatlha was not disciplinary in nature and did not impact on her benefits or status, the respondents sought a legality

² Act 66 of 1995.

³ Act 3 of 2000.

⁴ See J Grogan *Workplace Law* (10th ed) Juta 89-91; *Matheyse v Acting Provincial Commissioner, Correctional Services and Others* (2001) 22 ILJ 1653 (LC); and *Egerton v Mangosuthu Technikon* [2002] 10 BALR 1047 (CCMA).

review under section 1(c) of the Constitution⁵ and alleged that the decision was procedurally unfair and irrational, as well as being illegal because the HCM had acted under a delegation of power by the Commissioner which was not authorised by the relevant empowering provision, in particular the policy. The latter contention rests on the assumption that employees of the NLC had a statutory or contractual right to appeal to the Commissioner against a relocation decision, and that the Commissioner was required to decide the appeal personally.

- [28] The Labour Court held that the decision to transfer Mokgatlha was not procedurally unfair or irrational. There is no cross-appeal against those findings. It, however, found that the intertwined third and fourth grounds of review had merit. The learned judge held that it was common cause that the Commissioner had not herself decided Mokgatlha's appeal and had unlawfully delegated the power to decide the appeal to the HCM. He rejected the Commissioner's contention that she had the power to delegate authority to consider the appeal in terms of section 2D of the Act, which provides that the Commissioner may delegate, with or without conditions, any of the powers of the Commissioner to any suitably qualified employee of the NLC. His reasoning in this regard was as follows:

'However, the applicants argue that the Commission's relocation policy only contains evidence that the board delegated authority to the CEO to consider written requests for 'deviations' from the policy. The policy does not mention any other delegations. Further, the respondents provide no other evidence of the alleged delegation under section 2D.'

- [29] After mentioning the Commissioner's letter of 16 April 2016 referring the matter to the human capital division, the learned judge continued:

'This alone indicates that the Commissioner did not regard Mokgatlha's appeal against deployment as a matter requiring her own personal attention after the meetings she held with Mokgatlha in December 2015, but is not evidence that she had clearly delegated the power to consider the appeal or

⁵ A transfer in the employment context is not administrative action but rather a labour practice, and thus PAJA does not apply.

deviations to anyone in particular or when this might have been done. In addition, the Commissioner's letter of 14 March reinforces the view that she declined to take responsibility for the final decision on Mokgatlha's appeal or request for deviation relating to her re-deployment, without a clear express delegation of authority.'

[30] The learned judge went on to say that the mere say-so of the Commissioner that she had delegated authority to consider the appeal was "simply insufficient". He, accordingly, upheld the review on this ground, declared the HCM's decision "to refuse to deviate" from the decision to transfer Mokgatlha *ultra vires* and null and void and ordered the Commissioner to take a fresh decision "whether or not to deviate from the decision to deploy" Mokgatlha. He later granted leave to appeal against his judgment. As there is no cross-appeal, the only issue on appeal is whether there was an unlawful delegation in the alleged failure by the Commissioner to deal with Mokgatlha's appeal in accordance with the prescripts of the policy.

[31] The reasoning of the Labour Court is flawed in more than one respect.

[32] Firstly, it was not common cause that the Commissioner did not deal with the request by Mokgatlha for reconsideration of the decision of 18 November 2015. In paragraph 61 of the answering affidavit, the Commissioner stated:

'Upon receipt of the appeal dated 23 November, a meeting was arranged with myself, Tintswalo Nkuna...and Moloko. The purpose of this meeting was to discuss the appeal received from Mokgatlha and to further consider her reasons for the appeal. All the submissions were properly considered. Those reasons in my view did not justify a deviation from the decision to deploy Mokgatlha to KwaZulu-Natal....'

[33] This averment was not denied or disputed in the replying affidavit and accordingly must be accepted as factually correct.⁶

[34] Furthermore, the evidence (as appears from the correspondence) suggests strongly that the Commissioner was personally involved in further reconsideration of the decision between January and April 2016.

⁶ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

- [35] However, be that as it may, there is a more fundamental flaw in the reasoning of the Labour Court. Its decision is falsely premised on the notion that Clause 9 of the policy gave Mokgatlha a right to appeal or “to request a deviation” from the decision to transfer. That proposition is not correct. Clause 9 of the policy has nothing to do with the decision to transfer an employee. It simply delegates the board’s authority to the CEO (the Commissioner) to consider written requests for deviations from the principles governing reimbursement of expenditure incurred by employees called upon to relocate. The policy does not deal with the substantive decision to relocate an employee. It is concerned only with the compensation of employees for reasonable expenditure incurred in relocating; and clause 9 gives the Commissioner the power to deviate from the generally applicable norms. It gives no right to an employee to appeal to the Commissioner against a decision to relocate and most certainly does not impose a limitation of any kind upon the Commissioner’s authority to delegate her powers in terms of section 2D of the Act.
- [36] Hence, to summarise, the decision of the Labour Court is wrong for the following reasons. Firstly, the evidence does not establish that the employee had any right to an internal appeal (under the policy or otherwise) against the decision to relocate her; secondly, even if she enjoyed such a right of appeal, the Commissioner personally reconsidered the decision; and thirdly, even if the decision had been reconsidered by the HCM rather than the Commissioner, the Commissioner had the statutory power under section 2D of the Act to delegate the authority to the HCM and clause 9 of the policy imposed no limitation upon that power. In the result, it cannot be said that the decision in relation to the request for reconsideration was unlawful and reviewable because the decision-maker acted under a delegation of power which was not authorised by any applicable empowering provision. The appeal, concerned solely with this narrow issue, must succeed for these reasons alone.
- [37] Finally, there is merit in the submission of the appellants that Mokgatlha was bound by a collective agreement to relocate to KwaZulu-Natal. NUPSAW agreed not only to the process in the engagement forum close out report in

December 2015 but also to the final outcome report in February 2016, which constituted a collective agreement as defined in section 213 of the LRA and thus was binding on Mokgatlha in terms of section 23(1)(b) of the LRA.⁷ In these circumstances, there was an agreement and not a unilateral administrative decision or exercise of public power. It is conceivable that a collective agreement could be reviewed where it is extended by the Minister of Labour in terms of section 32 of the LRA to a non-party to the agreement,⁸ but it is inconceivable that a collective agreement to which a person is bound as a party can constitute a decision capable of review. The Labour Court erred in finding that the decision to deploy Mokgatlha was reviewable in such circumstances.

[38] For all the foregoing reasons, the appeal must be upheld and the judgment of the Labour Court be set aside.

[39] The appellants seek costs. Mokgatlha was given ample consideration and there was no merit at all in the application. The grounds of review were spurious and the decision to transfer Mokgatlha entirely fair. She was properly consulted, fully assessed and more than reasonably accommodated. Having signed off on the closure report it was unreasonable for NUPSAW to persist with the application and appeal on behalf of its member. In the circumstances, equity demands that NUPSAW should bear the costs.

[40] In the premises, the following orders are made:

40.1 The appeal succeeds and the orders of the Labour Court are set aside and substituted with the following orders:

“a). The application is dismissed.

b) The first applicant (NUPSAW) is ordered to pay the costs of the application”

⁷ Section 23(1)(b) of the LRA provides that a collective agreement binds each party to the collective agreement and the members of every other party to it, in so far as the provisions are applicable between them.

⁸ *Association of Mineworkers and Construction Union and others v Chamber of Mines of South Africa and others* [2017] 7 BLLR 641 (CC)

40.2. The first respondent (NUPSAW) is ordered to pay the costs of the appeal.

JR Murphy

Acting Judge of Appeal

I agree

B Waglay

Judge President

I agree

F Kathree-Setiloane

Acting Judge of Appeal

APPEARANCES:

FOR THE APPELLANTS:

Adv N Cassim SC

Instructed by: Hogan Lovells

FOR THE RESPONDENTS:

Adv P van Wyk

Instructed by Ndumiso Voyi Inc

LABOUR APPEAL COURT