REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case No:JR408/2012

In the matter between:

GAUTENG DEPARTMENT OF LOCAL GOVERNMENT

AND HOUSING **Applicant**

and

I A SIRKHOT *N.O.* **First Respondent**

GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL **Second Respondent**

PUBLIC SERVICE ASSOCIATION **Third Respondent**

Heard: 10 July 2014

Delivered: 14 October 2014

Summary: review application – test for review reconsidered – payment of acting allowance in terms of valid collective agreement - review application dismissed

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JUDGMENT

LEPPAN AJ

Introduction

[1] This is an application in terms of section 145 of the Labour Relations Act[1] ("LRA") to review and set aside the arbitration award dated 13 December 2011, issued by the First Respondent, acting under the auspices of the Second Respondent, under case number GPBC1958/2011 ("**Award**").

The review

[2] The Applicant instituted its review application on 28 February 2012. The Applicant, in terms of the review application, seeks an order *inter alia* in the following terms:–

2.1 the Award issued by the First Respondent be reviewed and set aside;

2.2 staying the enforcement of the Award issued by the First Respondent pending the adjudication of the review application;

2.3 substituting the finding in the Award with a finding that Mr De Beer is not entitled to the payment of an acting allowance;

2.4 alternatively referring the matter back to the Second Respondent for determination afresh by an arbitrator other than the First Respondent;

2.5 ordering costs against those respondents who oppose the review application

2.6 further and/or alternative relief.

[3] The First Respond issued the following Award:-

> 'Accordingly, the Respondent is ordered to pay the Applicant the acting allowance for the period of February 2009 to March 2010.
>
> I make the following award:-

[1] Act 66 of 1995 as amended

1) The Respondent has not followed the prescripts in terms of GPSSBC Resolution 1 of 2002;

2) The Respondent is ordered to pay the Applicant the amount of R299,622.26 minus statutory deductions within 30 days of receipt of this award…'[2]

Background

[4] The Applicant employed Mr Vonroy de Beer ("Mr de Beer") in the position of Deputy Director: Disaster Management.

[5] On 16 February 2009, Mr de Beer was appointed in an acting capacity in the position of Director: Disaster Management. Mr Colin Deiner ("Mr Deiner"), on behalf of the Applicant, appointed Mr de Beer to act in that position after consultation with the Head of Department, Mr Seabi. Mr Deiner was employed by the Applicant as its Chief Director of Disaster Management Fire Brigade Services. The Applicant argued that Mr Deiner did not have the authority to appoint Mr de Beer to the acting role.

[6] In his acting capacity, Mr de Beer performed all the functions of a Director and this included attendance at various strategic meetings, which he would ordinarily not have had to do.

[7] Mr de Beer remained in the position of Acting Director until 31 March 2010, over a year later.

[8] It is common cause that Mr de Beer was not paid an acting allowance for the period in which he was employed in the position of Acting Director, ie between 16 February 2009 and 31 March 2010.

[9] It is also common cause that the Applicant disputed that Mr de Beer was entitled to an acting allowance. The Applicant argued that Mr de Beer did not have the required and necessary written authority to act in the position of Director and so, he was not eligible to be paid any acting allowance.

[2] Page 8 of the Award

[10] In terms of the appointment of employees to acting positions, the Applicant followed a particular practice, namely, the position needed to be vacant and funded. In addition, a letter of appointment needed to be issued to the employee and that employee would then need to respond in writing if he/she intended to accept the position. This practice is meant to be facilitated by the Applicant's Human Resources ("HR") department. The Applicant's HR department was responsible for receiving files which contained documents that recommended a particular individual for an acting post.

[11] At the time when Mr de Beer was appointed to act, Mr Deiner sent the requisite file to the HR department for processing. On numerous occasions, Mr de Beer's file was lost in the HR system and Mr de Beer's appointment was never formalised.

[12] This matter turns on the interpretation and application of Resolution 1 of 2002: Payment of an Acting Allowance ("the Resolution") which stipulates the terms and conditions for the payment of an acting allowance.

[13] Clause 1 of the Resolution provides that 'the purpose of this agreement is to determine a policy on acting allowances and compensation to be paid'.

[14] Clause 3.1.1 of the Resolution stipulates the conditions under which an employee will be entitled to an acting allowance. The clause provides as follows:

> '3.1.1 An employee appointed in writing to act in a higher post, by a person who is duly authorised, shall be paid an acting allowance provided that –
>
> (a) the post is vacant and funded; and
>
> (b) the period of appointment is uninterrupted and longer than six weeks'.

[15] After Mr de Beer was unsuccessful in lodging a grievance regarding the non-payment of his allowance, he approached the Public Service Association ("PSA"), for assistance. On 21 April 2011, the PSA on behalf of

Mr de Beer (Third Respondent) referred a dispute to the Second Respondent on the interpretation and application of the Resolution.

The arbitration hearing and the Award

[16] The Award was issued on 13 December 2011.

[17] The Second Respondent was called upon to determine a single issue which involved the interpretation and application of the Resolution and whether Mr de Beer was entitled to payment for the period in which he was appointed in that acting role.

[18] The Award held that Mr de Beer was entitled to the payment of an acting allowance for the period between February 2009 and March 2010.

Grounds of review

[19] From a broad perspective, the Applicant submits that the First Respondent reached a decision which a reasonable decision-maker in the same position could not have reached. The Applicant further submits that the First Respondent failed to apply his mind to the evidence presented to him and misconstrued certain evidence that was led at the arbitration proceedings. The Applicant sought to review and set aside the Award.

[20] From a narrow perspective, the Applicant asserts that the Award is reviewable on the basis that the First Respondent ignored the legal force of a collective agreement and based his decision on a legal opinion, issued by the Applicant's Internal Counsel, without properly interrogating the basis upon which the legal opinion was given. The Applicant argued that many aspects of Mr de Beer's case were based on hearsay evidence and the Applicant contended that this was a reviewable irregularity.

[21] Before dealing with the merits of the Applicant's review application, I first turn to deal with the appropriate test for review.

The appropriate test for review

[22] The seminal case of *Sidumo and Another v Rustenburg Platinum Mines Ltd and others*[3] *("Sidumo")* holds as follows:

> '[110] To summarise, Carephone held that section 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that section 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in *Bato Star* is the decision reached by the commissioner one that a reasonable decision maker could not reach? Apply it will give effect not only to the constitutional right to fair labour practices,but also to the right to administrative action which is lawful, reasonable and procedurally fair'.

[23] Further, *Sidumo* holds that a Commissioner must approach the dispute in an 'impartial' manner taking into account the 'totality of circumstances' in any given case[4].

[24] Furthermore, *Sidumo* holds that in order to succeed with a reasonableness review, the Applicant must demonstrate that the award falls outside of the scope of reasonableness[5] delivering an unreasonable result.

[25] Ultimately, the Constitutional Court in *Sidumo* formulated the following test to be applied when assessing the reasonableness of the outcome of an arbitration award: 'Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?'[6].

[26] Van Niekerk J in *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[7] held that section 145 of the Labour Relations Act 66 of 1995 ("LRA") requires that the outcome of any CCMA arbitration 'falls within the band of reasonableness'. Importantly, Van Niekerk J further went on to hold that –

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[3] 2008 (2) SA 24 (CC) at para 110.
[4] *Ibid.* para 78
[5] *Ibid.* para 119
[6] *Ibid.* para 110
[7] (2010) 31 *ILJ* 452 (LC)

> 'If a commissioner fails to take material evidence into account, or has regard to evidence that is irrelevant, or the commissioner commits some other misconduct or a gross irregularity during the proceedings under review and a party is likely to be prejudiced as a consequence, the commissioner's decision is liable to be set aside regardless of the result of the proceedings or whether on the basis of the record of the proceedings, that result is nonetheless capable of justification'.[8]

[27] In the recent decision of the Supreme Court of Appeal (SCA) in *Herholdt v Nedbank Limited*,[9] the SCA held that:

> '…Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable'.

[28] In *Herholdt*, the SCA further held that:

> 'Where a commissioner fails to have regard to material facts, this will constitute a gross irregularity in the conduct of the arbitration proceedings because the commissioner would have unreasonably failed to perform his or her mandate and thereby have prevented the aggrieved party from having its case fully and fairly determined'.

[29] I now turn to deal with the merits of the Applicant's review application.

Merits of the Applicant's review application

[30] The case of *Louw*[10] holds that a claim for an acting allowance is similar to a salary or wage issue and is not to be construed as a claim for a benefit.

[31] In the case of *Johnson Edward Jacobus Henry*[11], Mr Henry was appointed by the Department of Correctional Services in an acting position. However, like in this case, Mr Henry's appointment was not confirmed in writing by the Department of Correctional Services. At the end of his acting stint, Mr

[8] *Ibid*. para 17
[9] (2013) 34 *ILJ* 2795 (SCA) at para 25.
[10] *SAPU obo Louw and Others v SAPS* (2005) 1BALR 22 (SSSBC).
[11] *Johnson Edward Jacobus Henry v General Public Service Sectoral Bargaining Council and Two Others* (C314/2005) [2006] ZALC 85 (5 September 2006)

Henry instituted proceedings against the department on the basis that the department had breached the very same Resolution by not paying him an acting allowance. With regard to the argument that written acceptance was a prerequisite for payment of the acting allowance, the arbitrator found that such an argument raised by the department amounted to an "attempt to contract out of the agreement". The arbitrator held that written acceptance by the employee in terms of Resolution was not a prerequisite for payment of the acting allowance. If this was the case, the department could have escaped the payment of the acting allowance to Mr Henry on the basis of a mere technicality. Revelas J cautioned the department that it is important it pays attention to the terms of the collective agreement (the Resolution) and must make every effort to carry out its terms.

[32] It is common cause that Mr de Beer acted as a Director for the period between February 2009 and March 2010. The Applicant maintained that he had not been properly authorized to act in terms of the Regulation so it was not liable in the circumstances.

[33] The First Respondent found that despite strict compliance with the Resolution, the Applicant was still entitled to the payment. The following reasons are relevant:

33.1 Mr de Beer was appointed by Mr Deiner in an acting capacity. Although Mr Seabi did not directly extend the offer of the acting position to Mr de Beer (as required by clause 3.1.1), Mr Seabi verbally confirmed the appointment of Mr de Beer to Mr Deiner.

33.2 Mr de Beer remained in the acting position for a period exceeding 3 (three) months and the conduct of the Applicant demonstrated that they were content with Mr de Beer remaining in that role. This is further compounded by the fact that the Applicant accepted that Mr de Beer had indeed acted for a period longer than 3 (three) months, and once that period lapsed; the Applicant was under an obligation to inform Mr de Beer of the same. I do not share the same views of the Applicant to the effect that Mr de Beer was aware that he would

not be entitled to an acting allowance if he continued to act after the 3 (three) months period had expired. The Applicant did nothing to stop Mr de Beer's acting role when they could have done so.

33.3 A legal opinion issued by the Applicant's legal department recommended that Mr de Beer be paid his acting allowance. However, the Applicant did not follow this advice.

33.4 The basis for the Applicant's refusal to make payment of the acting allowance is premised on the fact that the appointment letter was not signed by Mr Seabi, the Head of Department, and that it was not signed by Mr de Beer. Consequently, the Applicant asserted that the appointment was unauthorized. However, the Applicant's refusal is based on a technicality which if upheld would absolve the Applicant from paying Mr de Beer even though he had worked tirelessly in that acting position. This would be unfair as notwithstanding non-compliance with the Resolution, Mr de Beer still acted in that capacity and the Applicant had the full benefit of his services in that acting capacity.

33.5 Non-compliance with clause 3.1.1 did not mean that Mr de Beer was not entitled to an acting allowance. The intention of the parties was for Mr de Beer to act as Director, even beyond the initial 3 (three) month period. The Applicant later imposed a moratorium but this was after the events of De Beer example.

33.6 Mr Seabi never objected to the continuance of Mr de Beer Acting Director until the end of March 2010.

33.7 If Mr de Beer's file had not repeatedly been lost by the Applicant's HR department, his appointment may have been validated properly. I hold that written acceptance by Mr de Beer was not a prerequisite for payment of his acting allowance.

[34] I agree with the First Respondent's finding that the Applicant will be unfairly enriched if it is not ordered to make payment of the acting allowance owing to Mr de Beer.

[35] During argument, Counsel for the Applicant referred to the case of *Noe E.P and Four Others*[12] ("Noe E.P"). This case can be distinguished from the *Johnson* case for a number of reasons:

35.1 It concerned the interpretation and application of the Public Services Act, 1994 (PSA) and in particular, section 12A of the PSA which deals with the appointment of persons on grounds of policy considerations.

35.2 It also concerned the application of certain peremptory processes for the appointment and selection of certain employees and whether these statutory processes had been applied and followed.

[36] The *Noe E.P* case does not expressly deal with acting appointments in terms of the Resolution. The *Johnson* case expressly deals with acting appointments in terms of that same Resolution.

[37] In light of the above, I find that the Applicant failed to prove that Mr de Beer was not entitled to the payment of his acting allowance. The decision reached by the First Respondent is sound and reasonable.

Conclusion

[38] In consideration of the *Sidumo* test, the *Johnson* case and the grounds for review put forward by the Applicant, the Applicant failed to prove that Mr de Beer was not entitled to the payment of his acting allowance for the period between February 2009 and March 2010.

[39] I am satisfied that the decision issued by the First Respondent amounts to a decision which a reasonable decision-maker could have reached in the circumstances.

[12] *Noe E.P and Four Others v Department of Premier Free State Provincial Division and Three Others* (3607/09) [2010] ZAFSHC 56 (4 June 2010)

[40] Therefore, the Award issued by the First Respondent is not reviewable.

Order

[41] I therefore, make the following order -

41.1 The Applicant's review application is dismissed.

41.2 There is no order as to costs.

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Leppan AJ

Acting Judge of the Labour Court of South Africa.

APPEARANCES

Applicant:

Instructed by: Raborifi R Inc Attorneys

Third Respondent:

Instructed by: Thabang Ntshebe Attorneys