



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR2173/12

In the matter between:

KHAMPEPE, SMITH

Applicant

and

DEPARTMENT OF HEALTH (FREE STATE)

First Respondent

PUBLIC HEALTH & SOCIAL DEVELOPMENT

SECTORAL BARGAINING COUNCIL

Second Respondent

BOBBEJAAN, DAVID N.O.

Third Respondent

Heard: 14 January 2014

Delivered: 15 October 2014

Summary: Arbitration proceedings - arbitrator ruling that parties provide heads of argument in respect of jurisdictional point raised during arbitration

proceeding committing a gross irregularity in the conduct of the arbitration proceedings by determining the arbitration on submissions made by the parties where it was essential to call for *viva voce* evidence.

Evidence – submissions or heads of argument is an aid prepared by parties for the convenience of the arbitrator or court and cannot be regarded as evidence.

JUDGMENT

RAM AJ

Introduction

- [1] This is an application in terms of which the applicant seeks to review and set aside the jurisdictional ruling of the third respondent, namely, David Bobbejaan (“the arbitrator”) in arbitration proceedings conducted under the auspices of the Public Health Social Development Sectoral Bargaining Council (“PHSDSBC”).
- [2] The essential question before me was whether the arbitrator could decide the jurisdictional point raised by the first respondent on the submissions made by the parties in their submissions affidavits or should *viva voce* evidence be called for where it is essential to do so.

The background facts

- [3] The applicant referred an unfair labour practice dispute in terms of section 186(2)(a) of the Labour Relations Act No. 66 of 1995 as amended (“the Act”) to the PHSDSBC alleging that the first respondent committed an unfair

labour practice in failing to promote him to the post of Assistant Manager Batho Pele (“the post”).

- [4] At the arbitration proceedings held on 12 March 2012, the first respondent raised a point *in limine* that the PHSDSBC had no jurisdiction to entertain the applicant’s unfair labour practice dispute as the post never existed (“the jurisdictional point”). This point was raised at the second sitting of the arbitration (the first sitting was postponed *sine die* to allow the applicant to join certain parties). It was during this second sitting that the arbitrator ruled that the parties must file heads of argument on the jurisdictional point raised by the first respondent. The parties complied with the arbitrator’s ruling by making their submissions in affidavits containing their respective arguments (“submissions”).
- [5] The first respondent reiterated its jurisdictional point in its submissions. The applicant denied this in his submissions alleging that he could call witnesses to produce “positive” evidence that the post existed.

The arbitrator’s jurisdictional ruling

- [6] In his jurisdictional ruling, the arbitrator found on the parties’ submissions that:

[6] It is my finding that it will not be proper and the Applicant [the first respondent in this review application] might be unfairly prejudiced if this dispute is entertained because the Respondent [the applicant in this review application] failed to prove that the post existed and was catered for in the Applicant’s staff establishment. The Respondent’s failure to submit some sort of proof that the post existed in the Applicant’s staff establishment did not assist his case either because the latter cannot be expected to fill post that do not exist. The Respondent cannot just claim that he was head hunted without submitting proof that the post existed because a person cannot be

head hunted into a non-existent post. A post must first be created and approved by the relevant authority for it to be filled.' (My emphasis)

The applicant's ground of review

- [7] In the founding affidavit of the Applicant's review application, he alleged that during September 2010, the first respondent represented by its Head of Department granted permission to its District Manager to head hunt a candidate for the post. The post was budgeted for. He was selected for the post. He was not allowed to take up the post because the first respondent alleged that he did not meet the requirements for such post. He attached documentary evidence in support of his allegations that the post existed and reiterated that he could call witnesses to prove that the post existed. This was his primary ground of review.
- [8] The first respondent in opposition to the applicant's review application reiterated in its answering affidavit thereto that the post never existed and that the person who appointed the applicant to the post had no authority to do so.

Evaluation

- [9] Both the parties were *ad idem* that they were ordered to exchange submissions which they did by way of affidavits. The arbitrator on the other hand has stated in his jurisdictional ruling that it was the applicant who requested to submit heads of argument because he was not aware that the first respondent intended to raise the jurisdictional point.

- [10] I am of the view that the first respondent's jurisdictional point could not be decided on the submissions made by the parties despite being made on affidavits or heads of argument as stated by the arbitrator. In my view, this was a matter which should have been decided on the production of *viva voce* evidence.
- [11] My view is based on the following reasons. Firstly, *viva voce* evidence of the parties was necessary to decide whether on the applicant's version the post existed or to uphold the first respondent's jurisdictional point. The submissions or heads of argument prepared by the parties could not be regarded as evidence.¹ Secondly, it should have at least occurred to the arbitrator that when the applicant stated in his submissions that he had "positive" evidence to prove that the post existed, the parties' submissions would not suffice in deciding whether the post existed or that the jurisdictional point should be upheld. This should have led the arbitrator to conclude that *viva voce* evidence was necessary.
- [12] The arbitrator's jurisdictional ruling offends important powers granted to him in terms of section 142 of the Act to resolve disputes, *inter alia*, to call for *viva voce* evidence, subpoena documentary evidence, etc.
- [13] An arbitrator cannot permit the parties to file submissions or heads of argument and make a finding thereon on the strict rules of application proceedings.
- [14] Had the parties intended that the arbitration or the jurisdictional point be decided on affidavits, I would still be inclined to hold that the arbitrator was duty bound to at least explain to the parties what such procedure would entail. This I would have expected the arbitrator to do especially taking into

¹ In the unreported decision of *Minister of Justice and Constitutional Development v Mathobela and Others* (1185/05) [2007] ZANWHC 5 (25 January 2007), at para 16, Justice Hendricks found that heads of argument is an aid prepared by counsel or an attorney or a litigant for the convenience of the court and cannot be regarded as evidence by a party.

account that the applicant was a layperson representing himself in which case, the arbitrator was at least required to explain to the applicant the consequences of not answering allegations contained in the first respondents affidavit and the need to attach information supporting the allegations relied on (if any). This, I say because it is not a task that a layperson such as the applicant could achieve without the arbitrator advising him on what to do or obtaining legal assistance. Lacking from the arbitrator's jurisdictional ruling is whether the parties adopted such procedure as well as him advising them on what to do.

[15] This court cannot encourage practices where arbitrators breach their duties by deciding arbitrations on mere submissions or heads of arguments of the parties especially when it is apparent from the record of proceedings that the applicant is a lay person having stated therein that he could produce evidence to prove his case and where there was indeed a need for *viva voce* evidence.

[16] In the circumstances, the arbitrator committed a gross irregularity in the conduct of the arbitration proceedings. The arbitrator's jurisdictional ruling is therefore reviewed and set aside.

Conclusion

[17] I make the following orders:

17.1 The jurisdictional ruling granted under case number PSHS352-11/12 is reviewed and set aside.

17.2 The matter is remitted back to PHSDSBC to be heard before another arbitrator to hear evidence on the applicant's unfair labour practice referred to it in term of section 186(2)(a) of the Act.

17.3 There is no order as to costs.

Ram AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Advocate P Ngutshana

Instructed by: Seleke Attorneys

For the First Respondent: Mr Gough

Instructed by: The State Attorney, Bloemfontein