**IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH**

**JUDGMENT**

Not Reportable

Case no: PR110/16

In the matter between:

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| **DALUBUHLE UYS MFIKI** | **Applicant** |
| **And** | |
| **GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL** | **First Respondent** |
| **KELVIN KAYSTER N.O** | **Second Respondent** |
| **DEPARTMENT OF TRANSPORT** | **Third Respondent** |

**Heard:** **1 December 2017**

**Delivered:** **13 February 2018**

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**JUDGMENT**

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**TLHOTLHALEMAJE, J.**

*Introduction and background:*

[1] The applicant seeks an order reviewing and/or correcting and/or setting aside the arbitration award issued by the second respondent (Arbitrator) under the

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auspices of the first respondent (GPSSBC) dated 26 April 2016. The application is opposed.

[2] The background facts to this matter are as follows.;

2.1 The applicant has been in the employ of the third respondent (Department) since 2008 as Assistant Director. He was at some point appointed to act as Deputy Director with effect from 12 December 2008.

2.2 The applicant contends that he had acted in the above mentioned position up to and including 31 August 2013. The Department however disputes this contention and submitted that in terms of collective agreement *GPSSBC Resolution 1 of 2002: Payment of an Acting Allowance*. (The Resolution), an employee under its clause 3.1.6 cannot act in a higher position for a period exceeding 12 months.

2.3 Thus in accordance with the provisions of the Resolution, the period of acting ceases automatically when the 12 months period elapses. To this end, it was disputed that the applicant could have acted for a continuous period of five years.

2.4 It was common cause that the applicant was paid acting allowances in terms of the provisions of the Resolution. The Department however disputed that the applicant was paid any acting allowance between 1 September 2011 until 30 September 2012. It further confirmed that the applicant was not paid any acting allowances between May to December 2009; April to December 2010; January to August 2011; September to December 2012 and January to August 2013. This was on the basis that he was not entitled to any payment.

[3] When the applicant was not paid what he contended was due to him, he had referred a dispute in terms of the provisions of section 24 of the LRA to the GPSSBC, more specifically pertaining to the application and/or interpretation of the Resolution. Conciliation having failed, the matter came before the Arbitrator for arbitration.

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*The arbitration proceedings and the award:*

[4] It was not in dispute before the Arbitrator that the applicant was appointed to act in the position of Deputy Director whilst the incumbent was placed on suspension. The incumbent returned from suspension in April 2009 and was at some point ultimately dismissed by the Department, and the applicant had continued to act in that position. The applicant's case however was that even after the incumbent came back and again after her dismissal, he was asked, and had continued to act in the position.

[5] During his cross-examination, the applicant had conceded that the provisions of clause 3.1.7 of the Resolution did not permit employees to act for periods exceeding 12 months. His contention however was that he was not familiar with those provisions.

[6] The testimony of the Department as presented by its HR Manager, Nosipho Viki was that even if an employee acting in a position is not informed that the period of 12 months had lapsed, the acting stint in any event ceased automatically. She confirmed that the applicant acted between 16 December 2008 until 14 April 2009 whilst the incumbent was suspended and was paid accordingly. After the incumbent came back from suspension, there was no need for the Department to issue a letter terminating the applicant's acting stint. She further confirmed that after the incumbent was dismissed, the applicant acted between 1 September 2011 and 31 August 2012 when the new Deputy Director was appointed.

[7] In his analysis, the Arbitrator found that the applicant could not have expected to continue acting after the incumbent came back from suspension. On a proper interpretation of clause 3.1.1 of the Resolution, the Arbitrator found that the applicant could only have acted in the absence of the incumbent between 15 December 2008 and 14 April 2009, and the question of whether he was verbally informed to continue acting was immaterial, as this would not have constituted a formal appointment to act or to continue to act in the position. To that end, the applicant could not have been entitled to any acting allowance for the period after 15 April 2009.

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[8] The Arbitrator further held that the applicant only acted officially in the position after the incumbent was suspended, and after again for a period of 12 months after the dismissal of the incumbent. Consequently, it was found that the Department had correctly applied the provisions of the Resolution, and that the applicant was not entitled to any further payments.

*The review test and evaluation:*

[9] The test that this Court applies in determining whether the arbitrator's decision is reviewable is that as laid down *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[1]. On this test, in order to succeed on review, the applicant must demonstrate that the award falls outside the band of reasonableness. In assessing the reasonableness of the outcome of an arbitration award, the question to be posed and answered is: '*Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?*

[10] The dispute between the parties was referred to the GPSSBC in terms of section 24 of the LRA. The matter turns on the interpretation and application of the provisions of Resolution, which stipulates the terms and conditions for the payment of an acting allowance.

[11] 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'*. Clause 3.1.1 of the Resolution stipulates the conditions under which an employee will be entitled to an acting allowance, and provides that:

> '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 –

[1] *(2007) 28 ILJ 2405 (CC)* at para 110, where it was held that;

> "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"

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(a) the post is vacant and funded; and

(b) the period of appointment is uninterrupted and longer than six weeks'.

[12] Clause 3.1.6 provides that;

"The employer will pay the acting allowance on a monthly basis, provided the first payment takes place in the month following the completion of the six weeks referred to in clause 3.1.1, backdated to the date that the employee officially began acting.

An employee may not act in a higher post for an uninterrupted period exceeding twelve months."

[13] The purpose of section 24 of the LRA is to resolve disputes where a party is alleged to have been in breach of the collective agreement by failing to apply its terms either correctly or at all[2]. In *Western Cape Department of Health v Van Wyk and Others*[3], it was held that;

> "In interpreting the collective agreement the arbitrator is required to consider the aim, purpose and all the terms of the collective agreement. Furthermore, the arbitrator is enjoined to bear in mind that a collective agreement is not like an ordinary contract. Since the arbitrator derives all his/her powers from the Act he/she must at all times take into account the primary objects of the Act. The primary objects of the Act are better served by an approach which is practical to the interpretation of such agreements, namely to promote the effective, fair and speedy resolution of labour disputes. In addition, it is expected of the arbitrator to adopt an interpretation and application that is fair to the parties."

[14] In applying the above approach to collective agreements, a trite principle remains that when interpreting a collective agreement, in the absence of ambiguity, the words contained in the collective agreement must be given their plain, ordinary and literal meaning. In addition thereto regard must be had to the application of the parol evidence rule where relevant.

[15] Furthermore, in review applications in respect of awards emanating from section 24 of the LRA disputes, the reasonableness test as formulated in *Sidumo* remains applicable, and the enquiry is further whether the arbitrator in

[2] *PSA obo Liebenberg v Department of Defence and Others (2013) 34 ILJ 1769 (LC)* at para 2
[3] *(2014) 35 ILJ 3078 (LAC)* at para 22

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coming to his or her decision, acted fairly, considered and applied his or her mind to the issues before him or her[4].

[16] In this case, the parties appear to be in agreement in respect of the interpretation of the 12 months acting period as stipulated in clause 3.1.6 of the Resolution. This is notwithstanding the applicant's assertions in the arbitration proceedings that he was not familiar with it.

[17] What appears to be in dispute pertains to certain periods during which the applicant had acted, which on the Department's version, fell outside of the 12 months' prescribed period, and which on the other hand, the applicant submitted that they nonetheless fell within that period, and for which he should have been paid his acting allowance. This is in particular reference to the periods April 2009 to December 2009, and April 2010 to 31 August 2011

[18] The applicant contends that the award of the Arbitrator is therefore reviewable on the basis that;

a) He failed to deal with the periods September 2 to December 2012 and January to August 2013;

b) Failed to take into account that although the incumbent for the post came back after her suspension and before her dismissal, she did not in effect occupy or discharge the obligations of her post, and to this end, the award is unreasonable and 'enriches the Department unjustifiably' and in effect 'permits the Department to perpetuate fraud on the applicant';

c) Failed to properly identify the dispute he was required to arbitrate, and with particular reference to the periods he omitted to take into account;

d) His interpretation of the relevant Resolution was to slavishly follow the prescript as opposed to giving effect to the intention of paying an employee for rendering services in an acting position in good faith;

[4] See *SAMWU v South African Local Government Bargaining Council and Others (2012) 33 ILJ 353 (LAC)*

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e) Failed to deal with the merits of the dispute, and failed to appreciate that the applicant was instructed to continue to act in the position throughout the periods until the subsequent employment of a new Deputy Director from September 2013

f) The Department allowed the applicant to act for periods longer than 12 months

[19] It was correctly pointed out on behalf of the Department that the onus was on the applicant to demonstrate that he was entitled to the relief that he seeks. What this implies is that he has to demonstrate that during the periods that he disputed he should have been paid an acting allowance, this was indeed due to him insofar as he sought to have the Resolution interpreted and applied in that manner.

[20] There are inherent difficulties with the submissions made on behalf of the applicant, taking into account the principles already set out elsewhere in this judgment in regard to what approach the Arbitrator was supposed to adopt in the face of the dispute before him. The issue is whether the Arbitrator acted fairly, considered and applied his mind to the issues before him in order to arrive at a reasonable outcome. This question in my view should be answered in the affirmative.

[21] The first glaring difficulty with the applicant's case is that it was common cause that in terms of the provisions of the Resolution, he could not act in the position for a continuous period over 12 months. Once there is an agreement on that interpretation, the applicant would then have to demonstrate that the periods for which he claimed payment fell within the 12 months period, and that his payment was due in accordance with the prescripts of the Resolution.

[22] The second difficulty with the submissions made on behalf of the applicant is that they are more emotive than legal in substance. It is permissible for an employee to feel aggrieved by the fact that he or she was required to take over additional tasks without being remunerated accordingly. It is however something else to merely advance an emotive and moral argument that it was wrong for the employer to allow the state of affairs to continue.

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[23] Arising from the second difficulty, and to the extent that an allegation was made that the Department was unjustly enriched and had in effect committed fraud, the issue is whether the Bargaining Council and this Court were in the first place, the correct forums to pursue such allegations, claims or arguments. The answer is clearly no.

[24] On the whole therefore, I am satisfied that the Arbitrator understood and appreciated the dispute he was called upon to resolve. He had applied his mind to the issues and the evidence before him and came to a conclusion which on the facts as presented to him is unassailable. To have come to a different conclusion as sought by the applicant would have implied that the Department would have been required to pay the applicant an acting allowance in circumstances that would have been in contravention of the Resolution itself, which provides that an acting employee shall be paid an acting allowance if the post is vacant and funded. During the periods in dispute, the incumbent was back from suspension and I did not understand the applicant's evidence as presented before the Arbitrator to be that the post, despite being occupied by the incumbent was nonetheless vacant and also funded for the purposes of payment of acting stints.

[25] Worst still, the applicant had contended that the instruction for him to continue acting whilst the incumbent was back from suspension was verbal. For the purposes of the provisions of the Resolution, any instruction to act in a position must have been in writing, and I fail to appreciate how that verbal instruction can be said to trump over the requirements stipulated in the Resolution for the purposes of any claim.

[26] To conclude then, there is no merit in the applicant's contentions that the Arbitrator's award is reviewable on any of the grounds relied upon. I am satisfied that the Arbitrator's reasoning and conclusions fall within a band of reasonableness, and the decision cannot be said to be one that a reasonable decision-maker could not reach. By all accounts, the decision is also a correct one in the light of the material that was placed before the Arbitrator.

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[27] I have further had regard to the requirements of law and fairness in regards to the issue of costs. Even though I am of the view that this review application was ill-conceived more particularly in the light of the submissions advanced in its support, a cost order is nonetheless not warranted given the circumstances of this case.

*Order:*

[28] Accordingly, the following order is made;

1. The application to review and set aside the award issued by the second respondent under case number GPBC2267/2015 dated 4 April 2016 is dismissed.

2. There is no order as to costs.

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E. Tlhotlhalemaje

Judge of the Labour Court of South Africa

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**Appearances:**

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| For the Applicant: | Adv. I Lambrecht |
| Instructed by: | Brown Braude And Vlok INC |
| | |
| For the First Respondent: | Adv. Ah Shene |
| Instructed by: | State Attorney |

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