

IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN DURBAN

REPORTABLE

CASE NO: **D1646/02**
DATE HEARD: 2005/02/08
DATE DELIVERED: 2005/02/11

In the matter between

DEPARTMENT OF PUBLIC WORKS

APPLICANT

and

**GENERAL PUBLIC SERVICE
SECTORAL BARGAINING COUNCIL**

**1ST
RESPONDENT**

R RHEEDER N.O.

**2ND
RESPONDENT**

PAWUSA

3RD RESPONDENT

D DU TOIT

4TH RESPONDENT

**JUDGMENT DELIVERED BY
THE HONOURABLE MADAM JUSTICE PILLAY
ON 11 FEBRUARY 2005**

ON BEHALF OF APPLICANT:

MR NTSHEBE

ON BEHALF OF 4TH RESPONDENT:

MS A GOVENDER

JUDGMENT 11 FEBRUARY 2005

PILLAY D, J

[1] This is an application to review the award of the second respondent arbitrator. The fourth respondent employee was employed by the applicant in 1986 as an artisan. From 1 August 1993 to 1 August 1997 he acted in the post of Artisan Foreman. Since 1999 he acted as Senior Artisan Superintendent. He was not compensated for acting in these positions. The duration of the acting appointments were also unduly long.

[2] Aggrieved, the fourth respondent referred a dispute in terms of item 2(1)(b) of the *Labour Relations Act No 66 of 1995* to the first respondent bargaining council, alleging an unfair labour practice relating to the failure to promote him.

[3] The arbitrator issued an award declaring that the applicant committed unfair labour practices in not promoting or compensating the fourth respondent for the period 1 August 1993 to 1 August 1997 (the first appointment) and 7 June 1999 to the date of the arbitration (the second appointment), and that the applicant callously disregarded the provisions of *section 32 of the Public Service Act Proclamation 103 of 1994 (PSA)*, which stipulates that acting appointments should be temporary.

[4] She ordered the applicant to promote the fourth respondent to the rank of Artisan Foreman and Senior Artisan Superintendent, respectively, for the relevant

periods. She also awarded the fourth respondent's and the bargaining council's costs of the arbitration to be paid by the applicant.

[5] The applicant pleaded that the arbitrator had exceeded her powers, committed misconduct and gross irregularities and rendered an irrational and unjustifiable award. The applicant was in the process of shutting down the workshop. Staff who left the employ of the applicant were not replaced. It was common cause that the position of Senior Artisan Superintendent had been abolished.

[6] The question that was not canvassed before the arbitrator or in these proceedings until it was brought to the attention of the parties is whether an acting appointment can be made to a post that has been abolished. The matter was stood down to the following day to enable the representatives to prepare to address the Court on this issue.

[7] Mr *Ntshebe*, for the applicant, submitted that the appointment to act in a post that did not exist was illegal and invalid. Mr *Donachie*, for the fourth respondent, countered firstly, that the executing authority, per the Minister, had the power to create and abolish posts and to appoint persons additional to the fixed establishment to perform work of a temporary nature (*section 3(5) read with section 1 of the PSA*).

[8] The executing authority therefore had the power to appoint the fourth respondent to act in a capacity that was not a post on the fixed establishment. (*Section 3(5)(b) of the PSA*;

[9] Secondly, it was common cause that the acting appointment was effected in terms of *section 32 of the PSA*. The fourth respondent was obliged to follow the directive to act in the post. As the directive was issued in terms of section 32, no agreement was concluded between the parties that the fourth respondent would act in the higher post.

[10] Thirdly, if there was any agreement to act, it was not illegal when it was concluded but could have become so after twelve months had expired as acting appointments may not exceed twelve months.

[11] In my view, it is an elementary principle of the rule of law that Government officials must exercise their powers lawfully. In this case the executing authority had the power to make appointments, including appointments additional to the fixed establishment on a temporary basis. It also had the power to issue directives in terms of *section 32 of the PSA*. Both provisions are sufficiently wide to encompass the power to make acting appointments. When making an acting appointment, however, the executing authority has to exercise that power in compliance with the regulations. The material provisions of the regulations and policy are that the post to which the acting appointment is made must be vacant and funded; that the appointee be compensated; that the period of appointment be uninterrupted and longer than six weeks but not longer than twelve

months. (*Regulation B5, chapter 1, part 7 of the Public Service Regulations of 2001, Government Notice R1, Government Gazette 21951, as amended; resolution No 1 of 2002 of the General Public Service Bargaining Council.*)

[12] A post that is abolished does not exist. No appointment can be made to a post that does not exist. As the post does not exist it is not funded. If a post is not funded it follows that the executing authority will not be able to comply with the compensation requirements of the regulations. The executing authority acted *ultra vires* in making an acting appointment to a post that did not exist, was not funded and for a period exceeding twelve months.

[13] The appropriate remedy therefore is to restore the parties as far as possible to their status prior to the appointment.

[14] The arbitrator approached the issues not from the perspective of the legality of the applicant's actions but the fairness of them. The applicant's conduct in not promoting or compensating the fourth respondent fell within the definition of unfair labour practice in item 2(1)(b) of the LRA. In respect of the second appointment the arbitrator found that the applicant had been unjustly enriched at the expense of the fourth respondent's career. Not only is this finding factually correct but also, as a matter of law, it is unfair to appoint a person for a lengthy period without compensation. That finding was sufficient to

declare the conduct of the applicant to be an unfair labour practice in relation to the second acting appointment.

[15] Whether the dispute relating to the first appointment fell within the arbitrator's terms of reference is not evident from the papers. However, it is not a point that was specifically taken by the parties. The arbitrator, however, acted *ultra vires* in making any award in regard to the first acting appointment, firstly, because the fourth respondent failed to lodge a dispute within a reasonable time after that unfair labour practice arose. Secondly, he was subsequently appointed to the post in which he acted. Thirdly, the arbitrator applied the LRA retrospectively to a period before 11 November 1995, when it came into operation.

[16] The award in respect of the second appointment is also *ultra vires* because no post existed to which the fourth respondent could be promoted. Furthermore, the respondent did not meet the minimum requirements of the post, a fact that the arbitrator should have established before she promoted the fourth respondent.

[17] With regard to compensation for the second appointment, the applicant should restore to the fourth respondent the amount by which it has been unjustly enriched. The amount of compensation payable for acting appointments must be determined by the Minister through the collective bargaining

process. (*Regulation B5.1*). That amount is to be calculated on the basis of the difference between the salary notch of the employee and the commencing notch of the higher post. (*Paragraph 3.1.3 of resolution No 1 of 2002 of the GPSSBC*). The regulation came into effect on 1 January 2001. The resolution came into effect on 1 April 2002. The right to compensation accrued on 1 January 2001. Only the method of computing the compensation was resolved later. In deference to the collectively agreed method of calculating compensation for acting appointments, it is fair to apply that computation to the period 1 January 2001 to 17 October 2002, the date of the arbitration award. As regards the period 7 June 1999 to 31 December 2000, that is the period before the regulations authorising compensation came into effect, the fourth respondent is not entitled to any compensation because the applicant had no authority to pay him compensation. Furthermore, he agreed to act in the position without compensation. He acknowledged that he was free to refuse to do so. Given the relatively short period of the acting (1½ years) which, when considered with the agreement to act without compensation, the unfairness is not obvious. It became so with the effluxion of time. If the respondent was aggrieved then he should have launched these proceedings sooner.

[18] The basis of my finding of unfairness is the illegality of the appointment, as well as the fact that the applicant was unjustly enriched by the services

rendered by the fourth respondent.

[19] With regard to the arbitrator's award of costs against the applicant, the fact that the review succeeds substantially implies that the applicant's opposition at the arbitration cannot be said to have been frivolous or vexatious. In this regard too the arbitrator acted *ultra vires* her powers.

[20] As neither party appeared to be aware of the illegality of the appointment the appropriate order for costs would be to make none.

[21] The order I make is the following:

- (1) The application for review is granted with no order as to costs.
- (2) The arbitrator's award is substituted with the following:
 - (a) The applicant is directed to compensate the fourth respondent for the period 1 January 2001 to 17 October 2002, such compensation to be calculated on the basis of the difference between the salary notch of the employee (fourth respondent) and the commencing notch of the higher post of Senior Artisan Superintendent.
 - (b) There is no order as to the costs of the arbitration, including the costs of the bargaining council.
- (3) Any dispute about the computation of the award

for the period 1 January 2001 to 17 October
2002 may be referred to the bargaining council.

Pillay D, J
28 April 2005