IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO: JR211/08

In the matter between:

THE PUBLIC SERVANTS ASSOCIATION OF SOUTH AFRICA obo REGISTRARS	**Applicant**

and

Z WALELE	**First Respondent**
GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL	**Second Respondent**
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	**Third Respondent**
THE DIRECTOR-GENERAL, DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	**Fourth Respondent**

JUDGMENT

JAMMY AJ

1. In its Notice of Motion in this application, the Applicant, the Public Servants Association of South Africa on behalf of twelve Registrars of the High Court seeks an order in the following terms:

"1. The Arbitration Award under Case No. PSGA1154-05/06 dated 26 November 2007 issued by the First Respondent under the auspices of the Second Respondent is reviewed and set aside.

2. The Award is substituted with the following:

'*1. The collective agreement concluded between the Applicant and the Department of Justice and Constitutional Development on or about 12 August 2002 and more particularly paragraph 8(b) thereof is to be interpreted to mean the following, and is to be so applied: The individual employees listed in Annexure A are to be absorbed into their posts at post level/grade 9 in the case of Registrars and post level/grade 11 in the case of Senior Registrars.*

2. The Respondents are ordered to absorb the individual employees listed in Annexure A into their respective upgraded posts, such absorption to be effected immediately and to be backdated to apply with effect from 1 April 2005'.

Alternatively the matter is remitted to the Second Respondent for Arbitration anew before a different Arbitrator."

2. The application is opposed by the Third and Fourth Respondents on the basis that the First Respondent's award in question is reasonable and is not one that a reasonable decision-maker could not have reached.

3. The Applicant defines the dispute before the Arbitrator as having been one which "evolved around the interpretation and application specifically of clause 8(b) of the Collective Agreement referred to, read together with the relevant part of the Public Service Regulations." For the sake of proper analysis, it is appropriate that the clause concerned, and the relevant extract from the Regulations be here set out. They read as follows:

10 Clause 8(b) reads as follows :

> "(b) In cases where filled posts are to be upgraded, the decision maker should also decide whether the upgraded post should be advertised or whether the incumbent should continue to be employed in the higher graded post as provided for in Public Service Regulation V C.6. The decision will obviously have to be made in consultation with Chief Director : Human Resource and Director : Human Resource Management to determine whether the incumbent of the post complies with the requirements in the Regulations for continued employment in the upgraded post, and the relevant line function manager {are least at Director level}. (In terms of V C6 the incumbent must already perform the duties attached to the upgraded post and he/she must have received a rating of at least 'acceptable' in his/her most recent performance assessment:. The incumbent should continue to be employed in the upgraded post if he/she so agrees, provided that he/she complies with the requirements contained in PSR VC.6".

11 The relevant part of the Regulations reads as follows :

> "If an executing authority increases the salary of a post as provided under regulation V C.5, she or he may continue to employ the incumbent employee in the higher graded post without advertising the post if the incumbent 0
>
> (a) already performs the duties of the post;
>
> (b) has received a satisfactory rating in his or her most recent performance assessment …"

4. The Third and Fourth Respondents ("the Respondents") refine that definition as one relating to "a claim to be paid higher salaries through the process of litigation". In essence there is no difference between the two approaches. An order in terms of paragraph 2 of the Notice of Motion, would have its consequence an increase in the salaries of the individual Registrars involved in this matter, - the essence of the relief claimed.

5. The common cause facts constituting the background to the dispute are succinctly summarised by the First Respondent, the Arbitrator. The Applicants are employed as Registrars in different Courts and at different salary levels ranging from level 7 to level 10. It is not in dispute that during the period 2003 to 2005, the Department of Justice and Constitutional Development conducted an investigation into the post levels of Registrars at the High Court and implemented a new dispensation in that context. This, the Respondents submitted, was a culmination of extensive consultations held with their employees and their representative trade union, resulting in a Collective Agreement between the Department and the union on 27 September 2004 which incorporated new job grades and new job profiles with the entry level for a Registrar at level 9, progressing to a highest level of 12. The new dispensation further envisaged that Registrars with no legal qualification would remain at their existing salary and would carry out part of new defined functions excluding those that required legal competencies.

6. The only witness to testify in the arbitration was Ms Ronel Jooste, employed as a Registrar at the Pietermaritzburg High Court, with matriculation being the highest academic qualification held by her. Testifying (by implication on behalf of the other individual Registrars in the same situation), she stated, the First Respondent records, that although she did not hold the four-year legal qualification that was now ostensibly required for an upgraded position, she had no new functions and was doing exactly the same work as incumbent Registrars who in fact held that qualification. The upgraded Registrar post had been advertised but she had not applied, not because she did not hold the legal qualification but because, in her perception, it “was not her job and related to a vacant post”. She was, she said, doing the same work as an incumbent holding the qualification but was not receiving the same salary.

7. The Applicant's case is premised on what the First Respondent refers to as "a strict interpretation of Clause 8(b)" and in that context that they "should have been absorbed into their posts when the posts were upgraded following the Job Evaluation exercise". The Respondent, it was contended "could not have introduced the further requirement i.e. a four year legal qualification, for purposes of absorbing the employee at a higher salary level'.

8. The Applicants submit that a proper interpretation of clause 8(b) involves the correct meaning to be attributed to the word "should" as used in the clause. A decision is required to be made "whether the upgraded post *should* be advertised or whether the incumbent *should* continue to be employed in the higher graded post as provided for in Public Service Regulation VC 6, in terms of which "…. the incumbent must already perform the duties attached to the upgraded post and he/she must have received a rating of at least 'acceptable' in his/her most recent performance assessment".

9. The Applicants, it was argued, had satisfied this latter alternative and were already performing the duties of the post in question. In that context, a proper interpretation of "should" is that in fact it is peremptory and must be deemed to mean "must". In other words, the upgraded post must be advertised *or* the incumbent must continue to be employed in that post if the requirements of Public Service Regulation VC 6 are satisfied.

10. Relying in support of that contention on the dictionary definition of "should" as meaning "shall", indicating a "command or duty, obligation …" the Applicants contend that the positions that were advertised in the context of the new dispensation were in fact not the jobs that the present incumbents were doing. Those jobs remained essentially the same, save for certain administrative duties which were removed in certain

instances. They were not given new or additional duties or responsibilities, either quasi-judicial or otherwise, it was submitted, they were still doing the jobs that they had been doing for many years, the nature of which had not been affected by the job evaluation and re-grading. In fact they were doing exactly the same work as their colleagues, who, holding the requisite legal qualification, had now been placed on higher salary levels.

11. In short, the Applicants should, they contend, pursuant to Clause 8(b), have continued to be employed in the higher graded posts (posts which, in their nature, were not those which had been advertised), with the appropriate increase in their remuneration.

12. The Applicants, as further authority for this submission, refer to the Constitutional Court Case of –

SA Police Service v Public Servants Association (2006) 27ILJ 2241

in which Sachs J at 2255 says the following –

> "An incumbent whose work is satisfactory should not be subjected to the anxiety of losing employment simply because the work he or she is doing is considered to be worthy of an upgrade and better pay … It follows then that subject to the qualification mentioned below, 'may' in the context of this case does not mean 'must'. The Commissioner has a discretion and is accordingly entitled to make a declaration that although he is authorised without advertising to promote an incumbent whose job is upgraded, he is not obliged to do so. The declaration should, however, be qualified by a further declaration that the Commissioner's discretion must be exercised in a manner which does not place an incumbent who is performing satisfactorily in jeopardy of losing his or her job in the service simply because his or her post is being upgraded".

13. At page 2256, Yacoob J in his judgement says this –

> "The crisp question that needs to be answered is whether the Commissioner, having upgraded a post found to be under-graded by an evaluation, is obliged by the regulation to 'promote' the incumbent to that upgraded post without advertising it, regardless to the circumstances, and provided only that she already performs the duties of the post and has received a satisfactory rating in the most recent performance assessment. The Commissioner contends that a discretion whether to appoint the incumbent to the upgraded post is vested in his office by the regulation in the circumstances just described, while some of the Trade Unions have adopted the view that no such discretion is conferred upon the Commissioner who is obliged by the Legislation to appoint the incumbent to the upgraded post … I agree with the conclusions in the judgment of my colleagues Sachs J that the regulation gives the Commissioner a discretion whether to allow the incumbent of the upgraded post to continue in that post and that the incumbent concerned cannot be dismissed by reason only of the circumstances that he was not promoted in an upgraded post in which he had been performing satisfactorily before the upgrade had occurred".

14. Those *dicta* however do not support the Applicants' cause in the circumstances prevailing in this matter but, in any event, the issue in that case was, in my view, manifestly distinguishable. What the Court there ruled was that the security of employment of an incumbent who was performing satisfactorily in a post which was subsequently upgraded but to which the Commissioner, in his discretion, determined that he or she should not be promoted, could not be jeopardised.

15. In the present instance, the "decision-maker", applying the same principle, is vested with the discretion whether to advertise the post in question, that is to say the upgraded post, *or* to allow the incumbent to continue to be employed in the higher graded post if the requirements of Regulation VC 6 are satisfied. It is common cause that it was the first of these alternative options that was exercised.

16. The Respondent's submission is that in any event, neither that provision of the Collective Agreement nor the Regulation in question are applicable to the present circumstances. In the first instance, it is contended, the job profile and functions in the new dispensation are not the same as those being performed by the Applicants. They had been restructured with new requirements and competencies and it was only the incumbent who could meet those new requirements and competencies who could be considered for promotion to those posts. If there had been no changes in the characteristics of the positions concerned, then the Regulation may have had some substance but in any event the legal qualification was a *sine qua non*. That, in essence is the conclusion which the First Respondent reached. Ronel Jooste, she records, admitted "that her job functions were measured in relation to the newly defined position and that since she did not meet the requirements, that she could not be placed on the higher salary level and hence was not absorbed in the upgraded post". The fact of the matter, the First Respondent found, was "that the position and its job functions have changed since the restructuring" and simplistically stated, the Applicants' complaint was simply that their "colleagues who are in possession of legal qualifications but doing the same work are paid higher salaries".

17. I am unable to agree with the First Respondent's perception in that context that, if that is in fact the essence of the complaint, what was being submitted was a unilateral change in conditions of employment and as such an unfair labour practice and should have been dealt with as a dispute of that nature. That opinion however, does not render her award reviewable and that aside, I can find no basis to justify a conclusion that on the *conspectus* of the evidence before her and her resultant analysis and determination, the decision which she reached is one that a reasonable decision-maker could not reach.

See: Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (2007) 28 ILJ 2405

18. For these reasons, the order that I make is the following:

18.1 The application is dismissed.

18.2 The Applicant is to pay the Third and Fourth Respondent's costs

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B M JAMMY
ACTING JUDGE OF THE LABOUR COURT

May 2009

For the Applicants: **Adv F J van der Merwe**

For the Respondents: **Adv N A Cassim SC**