THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not reportable

Case no: C313/2018

In the matter between:

SINDISWA TYHOKOLO MBETSHE **Applicant**

and

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION **First Respondent**

PIET VAN STADEN *N.O.* **Second Respondent**

PARLIAMENT OF RSA **Third Respondent**

Heard: **21 August 2019**

Delivered: **21 August 2019**

Edited: **11 October 2019**

Summary: **Unfair labour practice in terms of section 186(2)(a) LRA, demotion – redeployment back to the position the applicant held 14 years' prior with a salary cut of about 80% – failure to have due regard to the peculiar circumstances and to consider less drastic alternatives – decision not preceded by consultation with applicant.**

***EX-TEMPORE* JUDGMENT**

NKUTHA-NKONTWANA. J

Introduction

[1] In this application the applicant, Ms Sindiswa Tyhokolo Mbetshe, seeks an order reviewing and setting aside the arbitration award rendered by the second respondent (commissioner) under case number WECT 17084-17

dated 2 March 2018. The commissioner dismissed the applicant's claim that the third respondent (Parliament) committed an unfair labour practice in terms of section 186(2)(a) of the Labour Relation Act[1] (LRA) by demoting her.

[2] The applicant's main grounds of review are that the commissioner misconceived the nature of the enquiry; failed to apply his mind to the evidence that was before him; and ultimately rendered an unreasonable award. The Parliament is robustly defending the award.

Background

[3] The facts in this matter are mostly common cause. The applicant was appointed on a permanent basis at level C1 as the Public Education Practitioner in 2003 and remained in that position for a period of four years. This position has since been upgraded to C2 with effect from 1 September 2017.

[4] In the year 2005, following the adoption of the Oversight and Accountability Model in which Parliament Democracy Offices (PDOs) featured as one of the identified mechanisms to enhance parliamentary democracy that is responsive to the needs of the people, Parliament embarked on a project of establishing the PDOs. The plan was that the project would initially consist of an 'establishment phase'. Subsequent to the establishment phase, a pilot phase would be embarked upon.

[5] Pursuant to the above, Parliament established a Project Team responsible for the project of the establishment of the PDOs. In year 2006, the applicant was assigned to work on the PDOs project team as Project Co-ordinator working alongside the Project Manager, who was on five-year employment contract.

[6] In November 2006, the Task Team for the PDOs requested that the applicant's job description grading be updated to suit her role on the project as a Co-Project Manager. The request was accordingly granted and the applicant's position was upgraded to grade level D1.

[7] On 1 February 2007, the applicant was deployed/ appointed to the newly graded position of a Co-Project Manager, grade level D1. This position was at

[1] Act 66 of 1995 as amended.

the same level as that of the Project Manager and higher than the C1/C2 position which the applicant occupied in 2003.

[8] On 1 June 2011, the applicant was appointed to act as Section Manager: PDO at grade level D2 for the duration of the pilot phase, a position that was four levels higher than the entry grade level C1. Three PDOs were established during the pilot phase as well as a central PDO based in Parliament to co-ordinate and manage the pilot offices.

[9] The Parliamentary independent review of the pilot phase was undertaken in order to determine whether the PDOs were a viable mechanism to realise public involvement and participation. The independent review and recommendations resulted in the decision by the Executive Authority to integrate PDO's into the Parliamentary Administration and thus signalling the end of the pilot phase of the project. It is instructive that the Parliament approved the following recommendation:[2]

9.1 Adoption of the TNS report on the Evaluation Research of the PDOs;

9.2 Integration of PDOs piloted in Northern Cape, Northwest and Mpumalanga as permanent structures of Parliament Administration;

9.3 Integration of the PDO's staff into Parliamentary Administration Service; and

9.4 Report to the Speakers Forum on the pilot close out and roll out of the PDOs.

[10] Consequently, in March 2017, the approval for the closeout of the pilot part of the PDOs project was granted. The PDOs' staff members who had been on fixed-term contracts that had been extended from time to time during the pilot phase were appointed on permanent basis.

[11] On 8 August 2017, the applicant was informed in writing that her acting capacity had ceased following the closure of the pilot project and that she had to revert back to the level C2 position, a position she occupied in 2003, as of 1 September 2017.

[2] See: Record, bundle of documents file, page 50.

[12] The applicant referred the dispute of unfair labour practice, demotion to the CCMA. The matter set for arbitration and the commissioner found in favour of Parliament, hence this review application.

The award

[13] The commissioner correctly identified the issue in dispute as whether the applicant was demoted and if so, whether the demotion was fair. In the end. he found that the applicant had served on a pilot project which was temporary in nature. He also found, as an objective fact, that the project run its course.

[14] The commissioner rejected the applicant's evidence that she had been appointed as Co-Project Manager, grade level D. He was of the view that her assertion was inconsistent with the fact that she served on the project that eventually came to an end. He also accepted Parliament's evidence that the appointment of the applicant to grade level D1 was not effected in accordance with its recruitment policies as trite.

[15] Despite acknowledging the reality that the project ran for almost 11 years at the instance of Parliament and the inherent prejudice to the applicant, the commissioner only found it to be regrettable. He went on to blame the applicant for not raising concerns on her part.

Legal principles and evaluation

[16] As a point of departure, we must be reminded, as succinctly expounded in *Distinctive Choice 721 CC t/a Husan Panel Beaters v The Dispute Resolution Centre (Motor Industry Bargaining Council) and Others,*[3] 'that section 3 of the LRA enjoins a person applying the LRA to interpret its provisions so as to give effect to its primary objects and in compliance with the Constitution and the public international obligations of the Republic. The primary objects of the LRA are set out in section 1 and include the regulation and giving effect to the rights entrenched in section 23 of the Constitution. Accordingly, 186(1)(e) [in this instance section 186(2)(a)] must reflect the fundamental right of every person to fair labour practices enshrined in section 23 of the Constitution.

[3] *Distinctive Choice 721 CC t/a Husan Panel Beaters v The Dispute Resolution Centre (Motor Industry Bargaining Council) and Others* ((2013) 34 ILJ 3184 (LC) at paras 83, 89-90.

Fairness, in the context of unfair dismissals, must be considered from the perspective of both employer and employee.'

[17] The courts further stated that:

> 'The provisions of the LRA (like all other statutes enacted to give effect to constitutional rights) must be interpreted in a 'purposive' manner so as to give effect to the purpose of the legislation and the values enshrined in the Constitution. However, as Sachs J observed in *South African Police Service v Public Servants Association*:
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> > 'Interpreting statutes within the context of the Constitution will not require the distortion of language so as to extract meaning beyond that which the words can reasonably bear. It does, however, require that the language used be interpreted as far as possible, and without undue strain, so as to favour compliance with the Constitution. This in turn will often necessitate close attention to the socio-economic and institutional context in which a provision under examination functions. In addition it will be important to pay attention to the specific factual context that triggers the problem requiring solution.'

[18] Turning to the matter at hand, section 186(2)(a) reads as follows:

> '(2) "Unfair labour practice" means any unfair act or omission that arises between an employer and an employee involving-
>
> (a) Unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee,'

[19] It is clear from the award that the commissioner premised his findings on the temporal nature of the pilot project and did not consider the constitutional imperatives and the factual context that triggered the dispute.

[20] Nonetheless, it is common cause that the applicant had been deployed to serve in the PDOs project for 11 years, i.e. from 2006 to 2017. She was appointed as Co-Project Manager grade level D1, a position she occupied from 2007 until 2017. In 2011 she was appointed as an Acting Sectional Manager until 2017. In my view, there is no way that a person on an acting

appointment can be appointed to act on a higher position. Clearly, the applicant was appointed as a Co-Project Manager grade level D1 in 2007 hence she could be appointed to act as Sectional Manager grade level D2. The applicant's pay slips and the submission that motivated her appointment to this position supports this conclusion.

[21] Notwithstanding, Clause 3 of the Parliament's Deployment of Staff Policy clearly states that 'no person may be deployed in a stand-in or acting capacity for more than three months, unless the Secretary in a particular instance decides otherwise with reasons given.' In this instance, the applicant's deployment and acting appointment violated the Deployment Policy and it would seem that such was condoned without reason.

[22] Another issue that eloped the commissioner is the reality that even though the Pilot Project ran its course, as described by the commissioner, the actual PDOs Project was ultimately sanctioned by Parliament. Consequently, incorporated into the Parliament Administration and the personnel on fixed term contracts were appointed on permanent basis. In essence, the structure became permanent with both grade levels D1 and D2 positions on the organogram. Ms Begg, Parliament's Divisional Manager: Core Business Support and the applicant's immediate supervisor confirmed in her testimony that these positions were part of the permanent structure and vacant but not funded. However, she failed to explain how these positions were not budgeted for when the PDOs were made permanent.

[23] To my mind, it is inconceivable that a project would be made permanent and appoints junior personnel permanently without a provision for the supervisory staff; particularly since there was a possibility for the project to be rolled out to other provinces that were not part of the pilot project as per Ms Begg's evidence. Also, the appointment of the other staff members was not preceded by the recruitment procures as prescribed in the Parliament's Recruitment Policy. Clearly, the commissioner deferred his finding in this regard to Parliament's reasoning as opposed to assessing the fairness of the conduct.

[24] Another issue that escaped the grasp of the commissioner is the fact that the applicant was earning about R31 565.20, including the acting allowance, when she was informed that she had to return to the position she had occupied 14

years earlier. Her salary was reduced to R4227.76 with effect from 1 September 2017. Tritely, a salary reduction could amount to demotion, albeit it may be so not automatically as even without a reduction in salary, redeployment may solely constitute a demotion.[4] The commissioner never traversed this prospect as glaring as it was.

[25] In essence, the applicant was unilaterally flung in back to the position she occupied 14 years ago, at the time when she started her vocation with Parliament. That is so, despite what Parliament stands for as a constitutional institution and highest echelon of administration in this country. Cleary, there, was little consideration, if at all, of the applicant's constitutional rights to dignity, career prospects and fair labour practice. I am not sure whether any of the Parliamentarians, or Ms Begg herself, could survive on a salary cut of almost more than 80%.

[26] The applicant also had qualms with the fact that her redeployment was not preceded by any consultation despite its grave adverse effect on her salary. Ms Begg sought to blame the applicant for the failure to adequately consult with her. However, it is not disputed that Parliament did not consider any alternatives to redeployment that ultimately resulted in reduction of the applicant's rank, status, salary and benefits.

[27] In *Van der Riet v Leisurenet t/a Health and Racquet Clubs,*[5] referred to by the applicant, the Labour Appeal Court (LAC) held that failure by the employer to consult with an employee prior to the demotion constitutes an unfair labour practice. Similarly, in the present case, Parliament's conduct clearly offended the right of the applicant to be heard before deciding on her fate.

Conclusion

[28] In the circumstances, the commissioner clearly misconceived the nature of the enquiry before him and as a result, rendered an unreasonable outcome. The award stands to be reviewed and set aside accordingly as it offends the

[4] See: *Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services* [2008] 12 BLLR 1179 (LAC) para [88] (per Zondo JP); *SAPS v Salukazana* [2010] 7 BLLR 764 (LC); (2010) 31 *ILJ* 2465 (LC).
[5] [1997] 6 BLLR 721 (LAC).

benchmark set by the Constitutional Court and expounded in various *dicta* of both the SCA and LAC.[6]

[29] I am not inclined to remit the matter back to the CCMA as the record of the arbitration proceedings is sufficiently detailed and the facts are, in any event, mostly common cause. As a result, in the interest of justice, this Court is in a position to deal with the matter to finality.

[30] For all the reasons alluded to above, the conduct of Parliament in redeploying the applicant back to the position of Co-Project Manager grade level C1/C2 with a huge salary cut and without proper consideration of alternatives constitutes demotion in terms of section 186(2)(a) of the LRA.

[31] There is no reason why the following applicant's desired outcome as per paragraph 4 of her LRA 7.13 form requesting arbitration should not be granted:

30.1 The PDO Sectional Manager Acting Position to continue until due process that is procedurally and substantively fair is followed within reasonable time;

30.2 The letter dated 8 August 2017 purporting to demote her be withdrawn in writing; and

30.3 Her salary to be retained at the level of Acting Sectional Manager and that she be reimbursed for all the deductions consequent to the effecting of the impugned redeployment.

Costs

[32] Even though it is trite that costs do not follow the result in this Court, this case presents an exception to the rule. The applicant is an individual litigant who had her salary cut inhumanly by more than 80% and incurred costs in order to vindicate her rights. Parliament ought to have been better advised about the prospect of defending the award.

[33] In the circumstances, I make the following order:

Order

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[6] See: *Sidumo v Rustenburg Platinum Mines Ltd* [2007] 12 BLLR 1097 (CC).

1. The arbitration award rendered by the second respondent under case number WECT 17084-17, dated 2 March 2018 is reviewed and set aside. It is substituted with the following order:

    1.1 The conduct of Parliament in redeploying the applicant back to the position of Co-Project Manager grade level C1/C2 constitutes a demotion in terms of section 186(2)(a) of the LRA.

    1.2 Parliament is to reinstate the applicant to the position of Acting Sectional Manager grade level D2 retrospectively and without loss of benefits pending the outcome of a consultation process with the applicant on the issue of her redeployment or appointment.

    1.3 Parliament is to retain the applicant's salary at the position of Acting Sectional Manager grade level D2 and reimburse her all the monies deducted consequent to effecting the decisions to redeploy her back to the to the grade level C1/C2.

    1.4 Parliament is to comply with the orders in paragraphs 1.2 and 1.3 above within five days from the date of this order.

2. Parliament is to pay the applicant's costs.

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P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Instructed by:

Third the Respondent:

Instructed by: