IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C472/19

In the matter between:

MEC FOR HEALTH NORTHERN CAPE	**Applicant**
and	
HOSPERA OBO HARVEY	**First Respondent**
PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL	**Second Respondent**
ARNE SJOLUND N.O.	**Third Respondent**

Date heard: 20 October 2020 on the papers
Delivered: 26 October 2020

JUDGMENT

RABKIN-NAICKER, J

[1] This is an unopposed application to review an arbitration award under case number PSHS 1113-16/17, dated the 26 July 2018. In terms of the Award, the applicant was ordered to restore Halvey's terms and conditions of employment as they were prior to his salary being reduced on 1 February 2017. The shortfall in remuneration from 1 February 2017 to date of the Award was also ordered to be paid.

[2] There is also an application for condonation for the more than a year which it took the applicant to bring the review. The applicant concedes the delay is inordinate but provides a detailed explanation for the relevant periods of delay involved. Given the application is unopposed, I am prepared to consider the merits of the review.

[3] In the Award sought to be reviewed, the issue to be decided is recorded as follows:

"6. This matter is brought in terms of section 64(4) of the Labour Relations Act 66 of 1995, an amended ("LRA") and relates to the alleged unilateral change of the terms and conditions of the applicant by the respondent.

7. I am tasked to consider whether the respondent by reducing the applicant's salary, unilaterally changed his terms and conditions of employment. Should I find in favor of the applicant, to order the appropriate relief."

[4] The ultimate decision of the third respondent (the Arbitrator) was as follows:

"22. The respondent is hereby ordered to restore the applicant's terms and conditions of employment as it was prior to his salary being reduced on 1 February 2017.

23. The respondent is ordered to comply with clause 22 of this award not later than 01 September 2018 and provide the applicant with proof of same.

24. The respondent is ordered to pay to the applicant the difference in remuneration that the applicant would have received after his salary was received on 1 February 2017 and the date of this award not later that 01 September 2018."

[5] The background to the dispute is as follows:

5.1 Halvey commenced working for the applicant in July 2004 until 2008 when he left the applicant's employ to join Intaka Technikon.

5.2 In early 2010, the Applicant advertised the post of Deputy Director: Clinical Engineering The salary on offer for the position was stated as R378 456 – R445 803. Halvey responded to the advertisement and applied for the position. The recommendation of the interviewing and selection panel was as follows:

'Your approval is sought for the appointment of the following suitable candidate for the post of Deputy Director: Clinical Engineering,

Northern Cape Province, in terms of section 11(2) (A) as well as 13(1) of the Public Service Act 103/94 dated 03 June 1994, as amended by the Public Service Laws Amendment Act 47 of 1997 and will be remunerated a salary of R378 456.00 (all inclusive) per annum.'

5.3 The recommendation to appoint Halvey was approved by several officials and ultimately the MEC on 20 May 2010.

5.4 In line with the recommendation, the Deputy Director General prepared an offer of employment letter to him dated 24 May 2010, effective from the date of acceptance. The post offered was the same as in the advert, but the salary was stated as R489 903 (all inclusive) level 11. This salary was more than the salary approved by the MEC. Halvey accepted the offer of employment and started work on the 1 July 2010.

5.5 Six years later, the Applicant appointed one Mathloko Motingoe (Motingoe) as the Acting Chief Director: Infrastructure and Corporate Services. Halvey worked in Infrastructure. Motingoe realized when he looked at the personnel files that Halvey's post was recorded as Chief Engineer instead of Deputy Director and that he earned the salary of a Chief Engineer, which is a level 12 position.

5.6 In September 2016, Motingoe called Halvey to his office to explain how he came to be in a post titled a Chief Engineer, level 12 when he was appointed as a Deputy Director, level 11. In that meeting Halvey confirmed he was not registered as a professional engineer with the Engineering Council of South Africa.

5.7 Subsequently in a letter dated 20 September 2016, Motingoe requested Halvey to explain way he was employed as a Chief Engineer and remunerated accordingly when he did not meet the requirements of a professional engineer.

5.8 On the 21 September 2016 Halvey wrote to Motingoe and stated as follows:

"Dear Mr Motingoe

1. With reference to your Memo dated 20 September 2016 and I put it on record that the memo was only received on 21 September 2016 at 09h30.

2. I will not be able to respond in full by the close of business today as it leaves me no time for consultation in order to get clarity on this matter.

3. I cannot explain how the current remuneration level I am on since 2010 was calculated, as this is a Human Resource function.

4. Subsequent to my appointment, various changes in the Department and work output of our Chief Directorate, resulted in my current Job Description. (Please find job description attached)."

5.9 On the same day Halvey raised a grievance complaining that he had held the rank of Chief Engineer for the past six years and Motingoe was now questioning his rank and salary. The outcome sought was:

'To do a job evaluation.

Assessment of my actual activities and responsibilities.

To revise the existing job description/to determine my salary scale.

That my current salary not be reduced at all because I was appointed as such, since I was appointed six years.'

5.10 The applicant cannot produce evidence that the grievance was attended to. But on the 16 November 2016, Motingoe wrote the following letter to Halvey:

"Re: PRODUCE EVIDENCE OF ENTITLEMENT TO CHIEF ENGINEER REMUNERATION

Dear HoD,

I refer to my letter dated 20 September 2016 in which I invited you to produce evidence of your entitlement to be remunerated as a Chief Engineer when your appointment is that of a Deputy Director.

To date you have failed to produce such evidence. In the circumstances, I am left with no option but to conclude that there exists no legal justification for your current salary level. The department's records show that this irregularity in your remuneration has persisted for several years.

I now formally advice (sic) you that with immediate effect your salary will be adjusted to the level of your appointment Deputy Director – Level 11. The department has a duty to correct the anomaly in your remuneration, but also to recover all money paid to your (sic) over the years as such payments constitute wrongly granted remuneration which must be dealt with in accordance with section 38 of the Public Service Act.

Once the calculation of the overpayment has been finalized you will be invited to make representations as to how you will repay the money to the department.

The department reserves its rights entirely to institute any proceedings if (sic) it may deem necessary."

[6] A look at the record of the arbitration proceedings as filed by the second respondent reveals a jurisdictional ruling by the Arbitrator dated the 12 November 2017 under the same case number PSHS113-16/17 which is signed by him. The Ruling reads as follows:

"7. The PHSDBC does not have jurisdiction to deal with the matter.

8. The matter must be set down for arbitration.

9. No order as to cost is made."

[7] Whether this was a 'type and paste job' and error by the Arbitrator or not, there is a clear ruling that the second respondent does not have jurisdiction to hear the dispute in the record which has not been varied or reviewed. The content of the ruling appears to reason that the second respondent has jurisdiction under section 77 of the LRA but the outcome of the ruling does not reflect this. This puts into question the legal status of the arbitration proceedings and Award in my view.

[8] I note that even if the Ruling's outcome on jurisdiction was a 'mistake' typed in error, it is unacceptable in the Court's view. The carelessness of the arbitrator is also evident in the Award sought to be reviewed when he states in Paragraph 8 of the Award that:

"The applicant was employed by the respondent on 1 July 2010 as a Deputy Director – Clinical Engineer with a salary of R498 303-00 per annum (all inclusive). On 01 February 2017 the applicant's salary was reduced to R650 433-00."

[9] There are further problems with the Award as contended by the applicant. The analysis of the evidence by the arbitrator is illogical and at times contradictory and on occasion unintelligible. The Arbitrator also appears to have misconceived the nature of the enquiry before him, delving primarily into contract law, and issues of fairness (with no reference to an unfair labour practice dispute), while apparently determining a section 64 dispute. The Award read with the record before me reflects that there could have been no fair trial of the issues.[1]

[10] In addition to the issues raised above, the record of the proceedings was not fully transcribed and only an incomplete transcript is available. In all these circumstances, the Award must be set aside and I make the following order:

[1] Edumbe Municipality v Putini 2 Others (2020) 41 ILJ 891 (LAC) at para 35

Order:

1. The Award under case number PSHS 1113-16/17 is reviewed and set aside and remitted to the second respondent for re-hearing before an arbitrator other than third respondent.

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H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Representation:

For the Applicant: CTH Inc