

IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

D254/19

Not Reportable

In the matter between:

NEHAWU obo LONDOLANI TSHAVHUNGWA

APPLICANT

and

CEO FOR ESTATE AGENCY AFFAIRS

BOARD N.O. FIRST RESPONDENT

ESTATE AGENCY AFFAIRS BOARD

SECOND RESPONDENT

HEARD: 26 MAY 2022

DELIVERED: 22 June 2022

JUDGMENT

B. Purdon AJ

Introduction:

[1] This is an application in terms of Section 77(3) of the Basic Conditions of Employment Act (Act No. 75 of 1997), in terms of which the Applicant seeks the following relief:

[1.1] Ordering the Respondents to adjust the Applicant's member's remuneration to R924 324.00 (Nine Hundred and Twenty Four Thousand Three Hundred and Twenty Four Rand) from 01 December 2017 to the date of the granting of the Order in terms of the Memorandum dated 10 January 2018.

[1.2] Ordering the Respondents to continue paying the Applicant's member's remuneration on the adjusted scale mentioned in prayer 1 above.

[1.3] That the costs of this application to be paid by the Respondents jointly and severally, the one paying the other to be absolved.

[1.4] Granting further and/or alternative relief.

Background:

[2] The application was opposed, and an answering affidavit filed, in reply to which the Applicant filed a further affidavit.

[3] Upon the hearing of the matter, an attorney, Mr. Njabulo Zondi appeared for the Respondent (who had not filed Heads of Argument).

[4] He indicated that he was merely a correspondent attorney and was not in a position to argue the matter, but was instructed to request a postponement and to tender costs.

[5] The tender of costs was nugatory in the sense that the Applicant was represented by an official of the National Education, Health and Allied Workers' Union (NEHAWU), a trade union.

[6] The matter stood down at the suggestion of the Court in order to afford the parties an opportunity to reach agreement as to the terms of a possible postponement.

[7] When the matter was recalled, the Respondent was represented by counsel, Ms. NCL Ntuli, who advised the Court that she attended as a courtesy and was not in a position to make submissions.

[8] The submissions made from the Bar were, as the Court understood them, that the Respondent's attorneys of record had been instructed not to continue with the matter on unexplained grounds but were recently instructed to resume their opposition to the matter.

[9] The application for postponement was refused as insufficient explanation had been placed before the Court for the default of the Respondent.

The Merits:

[10] The Applicant has been employed by the Respondent, it appears, since September 2007 and was subsequently appointed as Risk and Strategic Officer in July 2012.

[11] On the 14th of September 2017 she submitted a "Memorandum" to the then Acting Chief Executive Officer of the Respondent one Nikita Sigaba, which read as follows:

"1. PURPOSE:

To request the Acting CEO (Mr. Sigaba Nikita) to review my current position and salary from a C4 level to D1 level due to the more added responsibilities that I am currently doing.

2. BACKGROUND:

I have been with the EAAB since September 2007, working in finance department, I was then later appointed as a Risk and Strategic Officer from July 2012, ever since joining the Risk and Strategic department. I have enjoyed working in this department and believe I played an important role in the department.

Since I joined the Risk and Strategic department, I was then informed by then Chief Executive Officer to be part of the management committee

and have complied with same since then. I have been attending, reporting and presenting to the Management committee.

4. MOTIVATION FOR REVIEWING:

The following list is what I am currently doing over and above my role:

- *Attending Manco meeting and presenting on a regular basis*
- *Attending and presenting on Department of Human Settlement Risk forum on a regular basis*
- *Arranging and facilitating the strategic planning sessions with all Manco and Exco members*
- *Liaising with the department of Human Settlement with regard to all matters that are addressed to the Risk and Strategic department and ensuring that all matters are addressed*
- *Attending National Treasury Risk Forums representing the organisation on a regular basis*
- *Alignment of business process with organisational performance obtained from SAP system*
- *Development of an overall organisational strategy and Annual Performance plan*
- *Doing quality assurance on the reports submitted to the departments*
- *Coming up with solutions on raised audit findings*
- *Maintain CEO's office expenditure within budget*

For the past few months I have also been fully hands-on on the Auditing for the Risk and Strategy Department.

5. CONCLUSION:

In light of what I mentioned above, i would like to request that you look at my request and kindly review at the earliest opportunity”.

[12] That Memorandum was signed and dated by the Applicant and beneath the signature of the Applicant is a matrix with two columns “Approved” and “Not Approved”. Under the column “Approved” is the signature of Nikita Sigaba Acting Chief Officer and a tick (presumably indicating such approval).

[13] On the 19th of December 2017 Sigaba addressed a letter to the Applicant which read as follows:

“This serves to inform you that the position of the Risk and Strategy Officer has been evaluated and graded at Patterson Level D1. The applicable salary scale for grade D1 is from R736,004 to R1 230,920.

It, therefore, gives me great pleasure to inform you that your annual salary package has been revised from R731,431 to R924,324 which is the 75th percentile of the grade with effect from 01 December 2017. The back pay arising from this adjustment will be paid on 24th January 2018.

If you wish to re-structure your package please do so in writing and forward it to the Human Resources department before 12h00, on Monday, 15 January 2018. Please note that the restructuring of salaries should be done in line with the Estate Agency Affairs Board’s Remuneration Policy.

Yours Sincerely,

*Nikita Sigaba
Acting Chief Executive Officer”.*

[14] On the same date, another letter was addressed by Sigaba to the Applicant which read as follows:

“This serves to inform you that the position of the Risk and Strategy Officer has been evaluated and graded at Patterson Level D1. The applicable salary scale for grade D1 is from R736,004 to R1,230,920.

It, therefore, gives me great pleasure to inform you that your annual salary package has been revised from R731,431 to R861,394 which is the fifth percentile of the grade with effect from 01 December 2017. The back pay arising from this adjustment will be paid on 24 January 2018.

If you wish to re-structure your package please do so in writing and forward it to the Human Resources department before 12h00, on Monday, 15 January 2017. Please note that the restructuring of salaries should be done in line with the Estate Agency Affairs Board's Remuneration Policy.

Yours Sincerely,

Nikita Sigaba

Acting Chief Executive Officer”.

[15] The letters are identical in terms other than the second paragraph in terms of which the increased salary is given as R861 394 and the percentile of the grade has been amended from the 75th to the fifth percentile.

[16] On the 10th of January 2018, Sigaba addressed an email to what would be appear to be Human Resources Practitioners of the Respondent which read as follows:

“Dear all,

Please adjust Londolani Tshavhungwa salary from R861,394 (as per Implementation of Job evaluation results) to R924,324 (As per D1 scale Annual guaranteed package)”.

[17] On the same date Sigaba signed a Memorandum entitled "Subject: Implementation of Mrs LP Tshavhungwa's Revised Package" and read:

"1. PURPOSE:

To adjust Londolani Tshavhungwa salary from R861,934 (as per Implementation of Job evaluation results) to R924,324 (As per D1 scale Annual guaranteed package).

2. BACKGROUND:

Human Resource department recently evaluated and graded the position of Risk and Strategic Officer to a D1 scale. Mrs LP Tshavhungwa and myself also had an engagement regarding her salary adjustment taking into consideration her current salary level and her move to the new salary scale.

3. MOTIVATION:

Based on the employee's current functions within the Risk Unit that she is currently doing, her job also requires that she reports/present regularly on Manco meeting. Reporting to Audit and Risk Committee regularly and representing the organization on DHS Risk Forums and managing Performance monitoring.

She is also currently doing more than what her job profile entails. I also took into consideration her current job profile and the list of duties she is currently doing.

4. CONCLUSION:

The salary of the employee should be adjusted to R924,324 (As per D1 scale Annual guaranteed package) as per my email sent on the 10 of Jan 2018, effective from 1 December 2017 as per the previous letter”.

[18] The Applicant did not receive the increase. She avers in her founding affidavit:

“12. The Second Respondent did not implement the salary adjustment as per the memorandum dated the 10th of January 2018, which led to the lodging of a grievance by the Applicant’s member on the 19th of March 2018. Subsequent to the lodging of the grievance the member made a follow up through an email to HR requesting feedback. See Annexure “TM6’.

13. The HR responded in a letter dated the 19th of April 2018 where it was indicated that the CEO had made an erroneous reference to the D1 salary level. It was then recommended that the CEO should resend the instruction letter for implementation and omit reference to D1 salary level. See Annexure “TM7”.

14. The CEO subsequently wrote a letter dated the 02nd August 2018 to Applicant’s member, titled Grievance Outcome where he was indicating that the reference to salary level D1 was erroneous and therefore the salary adjustment was unwarranted. However, the CEO’s letter was misguided as the adjustment of the Applicant’s member’s salary was on the basis of the job evaluator’s comments regarding the key performance areas that were similar to the higher position, as well as evidence of additional duties and functions which were submitted to the CEO, and he agreed to and approved as per the memorandum dated 10 January 2018 (“TM5”). The letter of the CEO is attached marked as Annexure “TM8”.

15. The Applicant’s member then referred an Unfair Labour Practice dispute in terms of section 186(2) of the LRA to the CCMA. The matter was heard on the 01st October 2018 and a point in limine was raised with

regard to whether the Commission had jurisdiction to hear the matter or not. The Commissioner Themba R. Hlatshwayo N.O. issued a Ruling to the effect that the Commission lacked jurisdiction to hear a dispute regarding a salary. See the award attached Annexure "TM9".

[19] The Respondent's answering affidavit was deposed to by the current Chief Executive Officer, Mamodupi Mohlala Mulaudzi ("**MULAUDZI**").

[20] At paragraph 6.5. of the replying affidavit, Mulaudzi testifies:

"The employee on or about 14 September 2017 submitted a written request to Sigaba motivating for promotion, requesting that her position be reviewed and salary increased; which request was approved by Sigaba without following company processes and procedures, as it relates to remuneration. I refer the Court to annexure "TMP2" of the Applicant's founding affidavit".

[21] The affidavit continues at paragraph 6.6:

"As a result of the employee's request and approval by Sigaba the Second Respondent, through its Human Resources department, instructed an independent company called, The Assessment Tool Box, to do a job grading report in respect of the position of a Risk and Strategy Officer".

[22] At paragraph 6.7. she continues:

"Assessment Tool Box's report ("the Report") dated 5 December 2017 concluded and confirmed that the Risk and Strategy Officer's position fell under job grading C4".

[23] In her Replying Affidavit the Applicant admits the contents of 6.7. She however counter:

“It is submitted that the assessment also came with comments that indicate that the job description of the Risk and Strategy Officer post has the same responsibilities of the Chief Risk and Strategy Officer post”.

[24] The Second Respondent’s remuneration Policy provides:

“Where a position has been re-graded to a higher level, the current incumbent’s remuneration must be matched to the remuneration band for the new grade. If the current remuneration equals or exceeds the minimum of the higher level, no further adjustments shall be made”.

[25] Given the Applicant’s self-initiated request for a re-grading of the position, and given further the recommendations of the Independent Grading Committee assessment (Assessment Tool Box), it is inexplicable why on the 19th of December 2017, Sigaba should have informed the Applicant that *“this serves to inform you that the position of the Risk and Strategy Officer has been evaluated and graded at Patterson Level D1. The applicable salary scale for grade D1”.*

[26] To the extent that there was an agreement between the parties, that agreement, in this Court’s opinion, can be no more than an agreement between the Applicant and the erstwhile CEO that the Applicant’s job would be re-graded given the extra duties that she felt she performed in addition to her job description.

[27] On the 23rd of February 2018 the Second Respondent addressed a letter to the Applicant, which she annexes to her affidavit which reads as follows:

“This letter serves to confirm that the position of Risk and Strategy Officer was re-evaluated and re-graded as prompted by the Risk and Strategy Officer supported by the Acting Chief Executive Officer. The job evaluation result praised (sic) the position on Patterson level C4.

Therefore the current job grade remains similar; consequently your terms and conditions of your employment, which applied prior to the job evaluation exercise, remain the same.

Your continued and valued support is highly appreciated.

Yours sincerely,

Ms L. Phalakatshela
HR Department”.

[28] The Applicant subsequent to the unsuccessful grievance proceedings against the Second Respondent thereafter launched an Unfair Labour Practice claim in the Commission for Conciliation Mediation and Arbitration which was dismissed for want of jurisdiction.

[29] She thereafter approached this Court and brought the instant application.

[30] The Applicant sought to suggest that the various Memoranda referred to above and annexed to her papers constituted a written agreement. Indeed, her claim in terms of the BCEA is essentially premised on this assertion.

[31] In the Court's opinion, to the extent that there was an agreement, that agreement was merely that the Applicant was entitled to apply for a re-grading of her position.

[32] To avoid the pinch of the shoe that that is the outcome of the grading exercise, instead, the Applicant contends that it was within the CEO's powers to award the Applicant a “discretionary” increase based on an email received from the Assessment Tool Box in which is contained the following observation:

“The role profile of the Risk and Strategy Officer lacks clarity and specifically, it is difficult to establish the line of separation between this role and that of the Chief Risk Officer. When I compared the job description of the Chief Risk officer to this profile, it is clear that the same responsibility has been assigned to the Risk Officer as that of the Chief

Risk Officer in many of the KPI's. for example, both positions state the same level of responsibility "develop and implement a risk management framework". The Risk and Strategy Officer role profile also states that it develops the organisational strategy and annual performance plan, which seems incorrect, considering the level of the role".

[33] The Applicant makes this contention given that it appears from the Tool Box's observations that there is an over-lap between the functions of the Risk and Strategy Officer (the Applicant's position) and that of the Chief Risk Officer.

[34] Despite these observations having been made, the Tool Box nonetheless rated the Applicant's position, given the grading exercise performed, as a C-Band at job grade C4.

[35] To meet this difficulty, the agreement which the Applicant perforce alleges pertained between herself and the Respondent was not that she would be bound by the results of the grading exercise but a startling assertion that the CEO was given carte blanche to effect a discretionary increase in salary, notwithstanding the Second Respondent's Policies and Procedures, and notwithstanding that a independent job grading exercise was to have been conducted.

[36] The Applicant seeks to rely not on the results of the job grading exercise but rather on an explanatory email under which the re-grading report was sent.

[37] The Applicant asserts at paragraph 16 of her affidavit:

"It is common cause that there was an agreement between the First Respondent and the Applicant's member that her remuneration would be adjusted to R924,324.00 (Nine Hundred and Twenty Four Thousand, Three Hundred and Twenty Four Rand) from 01st December 2017".

[38] The agreement alleged is certainly not common cause.

[39] The Respondent asserts, as it did in the grievance hearing that the award of the salary increase by the erstwhile CEO was an error.

[40] At best for the Applicant, there was merely an agreement that her position would be submitted for a grading exercise.

[41] The sum of R924 324.00 for which she contends was never the subject matter of an agreement. It stands to reason that her salary would be determined by the grading exercise.

[42] Her claim must accordingly fail.

Order:

In the circumstances the Court makes the following Order:

[1] The application is dismissed.

[3] There is no order as to costs.

B. Purdon AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: M. Maraka, Union Official of NEHAWU

For the Respondents: Mr. Njabulo Zondi, Correspondent Attorney instructed by Langelibalele & Associates Inc.