

IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

D1356/2019

Not Reportable

In the matter between:

**MEC DEPARTMENT OF HEALTH
KWAZULU-NATAL**

APPLICANT

and

SIVUYISIWE STOTO

FIRST RESPONDENT

**PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL**

SECOND RESPONDENT

BHEKINHLANHLA STANLEY MTHETHWA N.O.

THIRD RESPONDENT

HEARD: 26 MAY 2022

DELIVERED: 28 June 2022

JUDGMENT

B. Purdon AJ

Introduction:

[1] This is an application in terms of Section 145 of the Labour Relations Act where the Applicant seeks to set aside the arbitration award of the Third Respondent dated the 17th of July 2019, issued under the auspices of the second Respondent.

[2] The issue to be determined was the substantive and procedural fairness of the First Respondent's dismissal.

Background:

[3] The Third Respondent adequately summarises the Applicant's case (at paragraph 12 of the award) as follows:

“The applicant testified that she was appointed as a Speech Therapist with effect from 7 August 2018. While she was serving her community service contract, she approached her Manager and requested to be considered for absorption into a permanent position of a Speech Therapist at Port Shepstone Regional Hospital. She was advised to make her request in writing. On 7 March 2018 and 4 May 2018, directed written requested to the Medical Manager, Dr. Dlamini. Subsequently, on 7 May 2018 the Medical Manager advised her that her request had been approved and she should contact the Human Resources Department for further details. When she approached the Human Resources Department she was advised to come and sign a new contract on the expiry date (6 August 2018) of her community service contract. Indeed, on 6 August 2018 she went to the Human Resources Department and she was issued with a letter of appointment. She then signed the contract of employment and commenced her duties on 7 August 2018”.

[4] The Respondent's evidence was also summarised (at paragraphs 14 and 15 of the award) as follows:

“14. It was Mr. Gumede's testimony that he was employed as an Assistant Director: Human Resources Management. He further testified that the proper processes were not followed when the applicant was appointed. Secondly, the applicant was only registered with the Health Professions Council of South Africa (“the HPCSA”) on 25 September 2018. Therefore, she could have not been appointed as a Speech Therapist prior to the registration date.

15. *He issued the applicant with the offer of employment in error. When he realised that he had made a mistake he went to his Manager and explained that he had issued the applicant with the offer of employment by mistake. He realised on 13 August 2018 that he misinterpreted the memorandum from the provincial office. When he issued the applicant with the appointment letter, he was under the impression that the memorandum was approving her appointment. He only realised on 13 August 2018 that the appointment was approved with certain conditions”.*

[5] There was no substantial dispute of fact between the parties.

[6] The evidence showed that on the 06th of August 2018 the First Respondent was issued with a letter which stated:

“Dear Ms. S.S. Stoto,

I have pleasure in informing you that authority has been granted on 2018/08/07 for you to be offered the position of Speech Therapist: Level 08: on the establishment of Port Shepstone Regional Hospital on 12 calendar months’ probation period, in terms of the Public Service Act of 1994. Your appointment is subject to the verification of information mentioned below. In the event of misrepresentation on your CV and application and other misdemeanours that were not disclosed correctly and truthfully, the offer of employment will be withdrawn:

- *Criminal records checks*
- *Citizen verification*
- *Financial/asset record checks*
- *CIPC Screening (Company Intellectual Property Commission)*
- *Qualifications verification*

REMUNERATION: R300 828.00 PER ANNUM

EFFECTIVE DATE: DATE OF ASSUMPTION OF DUTY”.

[7] The First Respondent signed her acceptance of the letter and commenced her employment on these terms.

[8] It appears that the First Respondent was called to a meeting on the 14th of August 2018 where she was informed that she was occupying a “frozen” post.

[9] The record indicates that attempts were made by the Applicant to seek permission from Treasury to fill the post, but these attempts came to nought.

[10] On the 23rd of August 2018 the First Respondent was handed a letter (dated the 17th of August 2018) which read:

“We hereby regret to advise you that the offer of employment that was issued to you on the 06th of August 2018 was issued erroneously, and hereby withdrawn.

This office sincerely apologies (sic) for any convenience caused”.

[11] At the arbitration hearing, the Applicant argued *inter alia* that the First Respondent was not an employee as her further appointment was a “nullity”.

[12] The Third Respondent with reference *inter alia* to the definition of an employee contained in Section 213 of the LRA, found, correctly, that the First Respondent was indeed an employee.

[13] He continued to find that in the circumstances, the First Respondent’s dismissal was both procedurally and substantively unfair and awarded the First Respondent a sum equivalent to 10 months’ remuneration as compensation.

[14] By the time of the arbitration hearing, the First Respondent no longer sought reinstatement as she had by then obtained alternative employment.

The Review proceedings:

[15] In the instant proceedings, the First Respondent sought the following relief:

- “1. That the certification in terms of Section 143(3) of the Labour Relations Act of 66 of 1995 dated 3 September 2019 of the arbitration award under case no. PSHC1233-18/19 dated 17 July 2019 is hereby rescinded;*
- 2. That the Applicant’s late filing of this review application be condoned;*
- 3. That the arbitration award handed down by the Third respondent under case number PSHC1233-18/19 handed down and transmitted on 17 July 2019 be and is hereby reviewed, corrected or set aside;*
- 4. in the alternative to paragraph 2 above, should no written record or only a portion thereof be available or the written notes of the arbitrator and/or parties be inadequate for reconstruction or inadequate to use the available arbitration bundle or record, that the above Honourable Court direct that the matter be referred back to the Second Respondent for a hearing de novo before another arbitrator;*
- 5. In the alternative to paragraph 2, if the above Honourable Court finds that it does not have sufficient evidence to grant paragraph 2, direct that the matter be remitted back to the Second Respondent for a hearing de novo before another arbitrator;*
- 6. The execution and/or enforcement of the certified arbitration award of the Third Respondent dated 17 July 2019 and issued under case number PSHC1233-18/19, is suspended/stayed pending the finalisation of the Applicant’s review application;*
- 7. The certification and/or enforcement of the arbitration award certified on 3 September 2019 and disused under case number PSHC1233-18/19, is stayed/suspended pending the finalisation of the Applicant’s review application under case number PSHC1233-18/19;*

8. *The suspension/stay granted in terms of paragraphs 6 and 7 of this Order is not conditional upon the Applicant providing security Section 145(8) of the Labour Relations Act 66 of 1995;*

9. *That the First Respondent is absolved from paying security in terms of Section 145(8) of the Labour Relations Act 66 of 1995;*

10. *Make such Order as this Honourable Court deems appropriate for the further conduct of the proceedings;*

11. *That the First Respondent be ordered to pay the costs of this application, as well as any other Respondent who opposes this application, unless successfully opposed;*

12. *Further and/or alternative relief”.*

[16] In respect of the first ground of review, the Applicant's submission was that the Third Respondent had impermissibly intervened in the proceedings, had curtailed the cross examination of the First Respondent by the Applicant's representative pointing to several instances on the record where he had so intervened.

[17] In the Court's opinion, the Third Respondent did curtail the questioning of the Applicant's representative in circumstances where the Third Respondent felt that a question had been asked and answered several times.

[18] The Court is not persuaded that the interventions by the Third Respondent constitute a defect in the proceedings.

[19] However, the Third Respondent's finding that the First Respondent's dismissal was substantively unfair is not one that could be made by a reasonable Commissioner under the circumstances.

[20] Although the First Respondent had contended in the arbitration proceedings that the post in which she was appointed was “vacant”, this was true only in the literal sense in that a previous incumbent had left the post.

[21] The uncontested evidence of the Applicant’s representative was that the post could not be filled as it had been “frozen”. In other words, there was no budgetary allocation to that post and in terms of the prescripts of the Public Service Regulations, the post could not be filled without the requisite authority and consequent budgetary allocation.

[22] In this respect, the Applicant alleged that the prescripts of:

- a. Section 9 and 11 of the Public Service Act No. 103 of 1994 as amended;
- b. Paragraph 40(d) and 65 of the Public Service Regulations, 2016;
- c. Section 2 of the Employment Equity Act No. 55 of 1998;
- d. Recruitment and Selection Policy of the KZN Department of Health;
- e. Provincial Treasury Circular No. PT (3) of 2018/19: ISSUING OF UPDATED COST-CUTTING MEASURES; and
- f. Delegations of Authority of KZN Department of Health;

were not followed.

[23] *Inter alia*, the Public Service Regulations and the Recruitment and Selection Policy of the Applicant Department (read with the Public Service Act), required that the post be advertised and the recruitment procedures specified by Regulation were to be followed, which *in casu* they were not.

[24] Further the Applicant’s evidence was that the First Respondent was not in any event qualified to be so appointed as she was not registered with her professional body, the Health Professions Council of South Africa, at the time of her (defective) appointment and was only subsequently registered on the 25th of September 2018.

[25] She therefore lacked one of the regulatory requirements to be appointed to the post, to be a registered Health Professional.

[26] The Third Respondent deals with the defenses raised by the Applicant at paragraph 24 of his award where he records the following:

“Obviously, the above provisions makes it abundantly clear that the State as an employer is entitled to correct any action or omission purportedly made in terms of the PSA by a functionary, if the action or omission was based on error of fact or law or fraud and it is in the public interest to correct the action or omission. Undoubtedly that includes an administrative action similar to the one under consideration. However, that correction must be done in a proper, correct and fair manner prescribed by the law. A functionary cannot wake up in the morning and summon an employee in his/her office and inform him/her that his/her service have been terminated in the manner and circumstances described above. Immediately a functionary does that the termination shall be declared both substantively and procedurally unfair”.

[27] He does not deal at all with the issue of non-registration with the Health Professions Council of South Africa.

[28] This is a material omission which constitutes a defect in the award.

[29] Although the Third Respondent rightly observes that, that correction must be done in a proper, correct and fair manner prescribed by the law, he does not indicate what that remedial action ought to be.

[30] It is clear from the evidence that there did exist a fair reason at a substantive level that informed the Applicant's decision to terminate the First Respondent's services.

[31] Her appointment was irregular and there was no budget allocated to the post.

[32] The First Respondent lacked an essential requirement for the post which was registration with the HPCSA.

[33] In the Court's opinion, the Applicant would have been entitled to terminate the First Respondent's services due to its operational requirements, alternatively on the grounds of the First Respondent's incapacity.

[34] However, in each of these scenarios, a fair procedure ought to have been followed.

[35] In the event no procedure whatsoever was followed.

[36] The Third Respondent accordingly, correctly on the material before him, found that the First Respondent's dismissal was procedurally unfair.

[37] The unlawfulness, and indeed the illegality of a contract does not relieve an employer of its obligations to invoke a fair procedure prior to the dismissal of an employee.

Compensation:

[38] Whether a Court can interfere with the Commissioner's award of compensation, following a finding of procedural unfairness by a Commissioner has been dispositively answered by the Constitutional Court in ***Macgregor v Public Health and Social Development Sectoral Bargaining Council [2021] 9 BLLR 861 (CC)*** in the affirmative.

[39] Having found, as this Court has, that the Third Respondent committed a material misdirection in respect of his finding of substantive unfairness on the authority of ***Macgregor supra*** (where an award of compensation premised on a finding by a Commissioner that a dismissal is substantively and procedurally unfair, but it is subsequently found that the dismissal was merely procedurally unfair), it would follow that the award of compensation would be excessive under the circumstances.

[40] Indeed, as the Applicant points out in its review papers, the First Respondent found alternative employment in April 2019, some 8 months after the termination of her services.

[41] This Court takes the view that it would not serve the interests of justice, nor indeed that of the parties, to refer the matter back to the Second Respondent for reconsideration of the award of compensation.

[42] What is material is the First Respondent's relatively short period of service.

[43] Also material is the fact that the First Respondent was indeed remunerated for some of the period that the Applicant regarded her employment as being "void". The Court further takes cognisance of the Applicant's attempts to remedy the problem by seeking funds from Treasury. It is further relevant that the First Respondent was unemployed for a period of only 8 months.

[44] In respect of the First Respondent, certainly her dismissal was not due to any culpability on her part.

[45] There is no suggestion that in any circumstance the Applicant would have been entitled summarily to terminate the First Respondent's services and she would in the case of either incapacity or operational requirements have been entitled, at very least to one month's notice or pay in lieu of notice.

[46] Essentially, an award of compensation for a procedurally unfair dismissal is a "solatium", in lieu of a fair procedure having been followed.

[47] The Court is accordingly of the view that compensation equivalent to 4 months' remuneration is fair and appropriate.

Condonation:

[48] On the issue of condonation, although the Applicant's reasons given for the late filing of the review application are somewhat weak, it has, in the event demonstrated that its case on the merits is strong.

[49] The delay was slightly just over a month from the date upon which the review application ought to have been filed.

[50] No prejudice has been asserted by the First Respondent as a result of the delay.

Costs:

[51] Each party has achieved partial success in the instant application.

[52] There is no reason in law and fairness why either party should be obliged to pay the other's costs.

Order:

The Court therefore makes the following order:

[1] The late filing of the review application is condoned.

[2] Paragraph 35 of the arbitration award is substituted with the following:

“The Department of Health KwaZulu-Natal must pay Sivuyisiwe Stoto, the sum of R350 957-00.

[3] There is no order as to costs.

B. Purdon AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate R. Athmaram instructed by The Office of the State Attorney, Durban

For the First Respondent: Advocate T. Qashani instructed by Lutango Sigcau Attorneys c/o S. Mema & Associates