REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Reportable
C927/2013

In the matter between:

PSA (obo L TRAUT)	Applicant
and	
DEPARTMENT OF CORRECTIONAL SERVICES (WESTERN CAPE)	First Respondent
PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL	Second Respondent
COLIN RANI N.O.	Third Respondent

Date heard: 9 October 2014
Delivered: 23 January 2015
Summary: Unfair labour practice referral *res judicata* in the extended sense; Arbitrator bound to decide jurisdictional issue of which he was aware; award set aside and substituted.

JUDGMENT

RABKIN-NAICKER J

[1] This is an opposed application to review and set aside an arbitration award under case number PSHS400-12/13. The third respondent (the arbitrator) dismissed a claim of demotion pursuant to section 186(2) (a) of the LRA.

[2] Traut applied for a position as a Pharmacist Supervisor Grade 1 in March 2010. She was appointed to this position on 1 November 2010, at a salary of R381 093 per annum. When the post was first advertised, the salary scale was R349 263- R393 944 per annum, and the applicant was offered a salary of R381 000, which she accepted. The post was advertised before the implementation of a collective agreement signed inter alia between the applicant union and the Department, the Occupational Specific Dispensation (OSD). The OSD came into effect on 1 April 2010. Traut contended that after the introduction of the OSD, her salary was supposed to be R423 846. However, the Department offered her R 381 000 when she accepted the job offer on 1 November 2010. Applicant alleged that this was a demotion and constituted an unfair labour practice.

[3] At the arbitration proceedings, the Department relied on an arbitration award under case number PSHS 605-11/12, which was issued on 18 July 2012 (the first award) which related to a dispute between Traut and the Department. The arbitrator in those proceedings was required to determine whether Traut was covered by the OSD and whether she was "translated" correctly i.e. placed into the correct wage band in terms of the collective agreement. The award in the first arbitration was that "Traut was not covered by the OSD". The reason given for this was that at the time that she was appointed to the post of Pharmacist Supervisor grade 1, she was not working for the and could not claim any rights in terms of the collective agreement. This award was not taken on review and stands as binding on the parties.

[4] The case for the applicant in this review application is that the OSD applied to all employees of the Department, who were employed just prior to the implementation of the OSD, as well as future employees of the Department. In other words, it submits that the OSD is a uniform set of conditions that apply to all employees of the Department, irrespective of when they became employed. Therefore, it is alleged that the Department should have paid Traut, at the very least, the minimum net salary for Pharmacist Supervisor

according to the OSD. The applicant union submits that the failure to do so constitutes unfair conduct and amounted to a reduction in Traut's status, remuneration and benefits as specified by her letter of appointment read with the OSD.

[6] In its answering affidavit, the Department submits that the first Award, irrespective of its merits or alleged demerits, remains competent and not challenged and is consequently binding on the parties and that any attempt to have the same issue revisited via this review application is bad in law. It pleads in this review application that the matter is *res judicata*.

[7] In as far as the first arbitration award is concerned, it is submitted by the applicant union that it is:

"with respect far from clear what, if anything, had been ruled upon by Commissioner Ndzombane, but it cannot be the case that he had made rulings that disposed of any part of the case PSA and Traut subsequently referred to the arbitrator in this matter. In other words, the question of res judicata does not arise." This submission needs to be considered.

[8] In **Smith v Porritt and Others**[1] Scott JA summarised the law as follows:

> '[10] Following the decision in Boshoff v Union Government 1932 TPD 345 the ambit of the exceptio res judicata has over the years been extended by the relaxation in appropriate cases of the common-law requirements that the relief claimed and the cause of action be the same (eadem res and eadem petendi causa) in both the case in question and the earlier judgment. Where the circumstances justify the relaxation of these requirements those that remain are that the parties must be the same (idem actor) and that the same issue (eadem quaestio) must arise. Broadly stated, the latter involves an inquiry whether an issue of fact or law was an essential element of the judgment on which reliance is placed. Where the plea of res judicata is raised in the absence of a commonality of cause of action and relief claimed it has become commonplace to adopt the terminology of

[1] 2008 (6) SA 303 (SCA) at 307J

English law and to speak of issue estoppel. But, as was stressed by Botha JA in Kommissaris van Binnelandse Inkomste v Absa Bank Bpk 1995 (1) SA 653 (A) at 669D, 670J - 671B, this is not to be construed as implying an abandonment of the principles of the common-law in favour of those of English law; the defence remains one of res judicata. The recognition of the defence in such cases will however require careful scrutiny. Each case will depend on its own facts and any extension of the defence will be on a case-by-case basis. (Kommissaris van Binnelandse Inkomste v Absa Bank (supra) at 670E - F.) Relevant considerations will include questions of equity and fairness not only to the parties themselves but also to others. As pointed out by De Villiers CJ as long ago as 1893 in Bertram v Wood (1893) 10 SC 177 at 180, unless carefully circumscribed, [the defence of res judicata] is capable of producing great hardship and even positive injustice to individuals".'

[10] Commenting on this dictum, Heher JA stated in **Janse van Rensburg & others NNO v Steenkamp & Another v Myburgh & Others**[2] that it is apparent that the first duty of the court is to compare the relevant facts of the two cases upon which reliance is placed for the contention that the cause of action (in the extended sense of an essential element) is the same in both.

[11] The applicant union's case for an unfair demotion claim is based on the submission that the OSD applied to Traut. This is evident not only from the record of the arbitration proceedings giving rise to the award sought to be reviewed, but in the review papers before me

[12] From the record before me, it is evident that in the two arbitration proceedings (between the same parties), the objective of the dispute taken up on behalf of Trout, and the relief sought on her behalf, was to raise her remuneration consistent with what it purportedly should have been in terms of the OSD.

[13] The application of the OSD to Traut was an "essential element" in both arbitrations, although in the strict sense of the meaning of *res judicata*, different causes of action were utilized by the applicant in pursuit of the same

[2] 2010(1)SA 649 (SCA) 2010 (1) SA 649 @ paragraph 25

relief against the department in both. In the first arbitration with reliance was placed on section 24 of the LRA and in the second arbitration, section 186. In my judgment, the arbitrator did not have jurisdiction to hear the second arbitration as, in the extended sense, the dispute between the parties was *res judicata* when it came before him. The second respondent appeared to realize this in his award when he said:

> "I have also established that the applicant's case was in essence about the implementation of the OSD. Had the applicant conceded that this was an issue in dispute, I would have made a jurisdictional determination first i.e. determined whether the PHSDSBC has jurisdiction to hear this dispute. Firstly, in light of the fact that the applicant's dispute regarding her alleged demotion hinges on the implementation of the OSD, the pertinent question to answer is whether the applicant was covered by the OSD. There is a valid determination in the form of an arbitration award that found that the applicant was not covered by the OSD….."

[14] The arbitrator should have made the fundamental determination given that it appeared to him that a jurisdictional issue fell to be determined. His failure to do so amounted to a gross irregularity of the latent type, and as a result he undertook his enquiry in the wrong manner[3]. His award thusstands to be set aside. Given my finding that the unfair labour practice dispute was *res judicata*, the correct remedy is for this court to substitute the award. I note that the applicant has stated that it is unclear as to whether the first award contained any ruling at all. The correct route for it to have taken, in such circumstances, was to challenge that award by means of a review application.

[15] In all the circumstances I make the following order:

Order

1. The award under case number PSHS400-12/13 is reviewed and set aside and substituted as follows:

   "The referral is dismissed for want of jurisdiction"

[3] Herholdt v Nedbank Ltd (COSATU as *amicus curiae*) (2013) 34 ILT 2795 (SCA)

2. There is no order as to costs.

_____

H. Rabkin-Naicker

Judge of the Labour Court

Applicant:	J Whyte of Cheadle Thompson & Haysom
Third respondent:	Adv Jerome van der Schyff instructed by C. Bailey of the State Attorney