REPUBLIC OF SOUTH AFRICA

Not reportable

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 787/15

In the matter between:

THE COLLEGE OF CAPE TOWN	Applicant
and	
GPSSBC	First respondent
JACQUES BUITENDAG N.O.	Second respondent
ELROY FEBRUARY	Third respondent
MANDY DARIES	Fourth respondent
GARTH HOSKING	Fifth respondent
WILHELMINA FREDERICKS	Sixth respondent
RUTH VALENTINE	Seventh respondent
JACQUELINE SAMUELS	Eighth respondent
JAMERA CARELSE (DARIES)	Ninth respondent
CARMEN WILLIAMS	Tenth respondent
FAAIQA BADEROEN (HOLLAND)	Eleventh respondent

NTOMBI TOFILE Twelfth respondent

SONIA DE BRUYN Thirteenth respondent

Heard: 27 October 2016
Delivered: 2 December 2016

SUMMARY: Review – LRA s 158(1)(g) – interpretation of collective agreement.

JUDGMENT

STEENKAMP J

Introduction

[1] This application for review turns on the interpretation of a collective agreement.

[2] The applicant is the College of Cape Town, a public further education and training (FET) college. The third to thirteenth respondents are its employees. They are support staff employed as administrative clerks (production level clerks).

[3] The dispute arises from a collective agreement providing for payment parity between employees transferred from the State and those previously employed by FET colleges. A trade union, the PSA, referred a dispute on behalf of the eleven employees party to this dispute to the first respondent, the General Public Service Sectoral Bargaining Council. The second respondent, Jacques Buitendag, is a panellist of the Bargaining Council. Conciliation having failed, he was tasked with interpreting the collective agreement in an arbitration. He found that the College was in breach of the collective agreement; and that it had to 'translate' the employees to the minimum notch of salary level 5 with effect from April 2010. The College

applies to have that award reviewed and set aside in terms of ss 158(1)(g) and 145(2) of the LRA.[1]

Background facts

[4] The dispute that the PSA referred to the Bargaining Council concerns the interpretation of a collective agreement in the public service known as Resolution 1 of 2010.

[5] The agreement was signed on 10 February 2011 and implemented with effect from 1 April 2010.[2] The PSA is party to the collective agreement. It is entitled: 'Establishing parity in salaries of support staff employed in Public Further Education and Training Colleges'. Its stated aim is set out in the agreement. Certain support staff previously employed by the State were transferred to FET colleges in 2008, retaining their existing salaries and conditions of service. In some cases these were better than their counterparts' who had been employed by colleges from the start. The purpose of the agreement is 'to establish parity in salaries for support staff historically employed by Public Further Education and Training Colleges with those employees who were transferred from the State to Public Colleges".

[6] The employees who are the claimants in this dispute were not transferred from the State. They were employed by the College on salary level 3. In November 2009 the College informed them that their salaries would be revised to level 4.

[7] In 2010 the Western Cape Education Department issued a minute titled 'Internal Human Capital Management Minute 0003/2010'. The WCED minute provided for the salary level of clerks in certain posts to be upgraded to salary level 5 with effect from 1 April 2010 but backdated to 1 October 2009.

[1] Labour Relations Act 66 of 1995.

[2] There appeared to have been no irony attached to the date.

[8] The College understood the WCED minute to apply to three clerks who had been employed by the State and transferred to the College. It upgraded those three clerks to level 5.

[9] The claimants referred a dispute about the interpretation and implementation of the collective agreement to the Bargaining Council. They contended that they had been employed on level 4; the three clerks transferred from the State had been upgraded to level 5; and this disparity was not permitted by the collective agreement.

Arbitration award

[10] The arbitrator upheld the claimants' contention. He concluded:

> 'Having translated the applicants' salary from level 3 to level 4 in 2009 did not create salary parity with the three clerks who were transferred to the [College] from the State because those clerks were placed on salary level 5 with effect from 1 April 2010. To give effect to the purpose of Resolution 1 of 2010 i.e. to *establish salary parity*, the applicable salary range to which … the applicants had to be translated to [*sic*] with effect from 1 April 2010 should have been salary level 5 and not salary level 4.
>
> I accordingly find that the [College] is in breach of Resolution 1 of 2010. To comply with Resolution 1 of 2010 the [College] must translate the applicants to the minimum annual basic notch of salary level 5 as set out in Annexure A of Resolution 1 of 2010 with effect from 1 April 2010. The applicants are also entitled to pay progression and to back pay with effect from 1 April 2010.'

[11] The award was handed down on 16 July 2015. The College lodged an application for review within the prescribed time periods.

Grounds of review

[12] Mr *Quixley*, for the College, submitted that:

12.1 the arbitrator impermissibly applied the *purpose* of the collective agreement without applying the actual *operative provisions* of the agreement itself;

12.2 he incorrectly interpreted and applied the agreement; and

12.3 in so doing, he misconceived the nature of the enquiry and arrived at an unreasonable result.

Evaluation

[13] Messrs *Quixley* and *Philander* agreed that the applicable review test is that set out in *Sidumo*[3], i.e. that the conclusion was one that a reasonable arbitrator could not reach on the evidence before him. The test has been developed, as Mr *Quixley* correctly submitted, to ask whether the arbitrator misconceived the nature of the enquiry or arrived at an unreasonable result.[4] And an error of law will vitiate a decision where the error results in the arbitrator undertaking the wrong enquiry, undertaking it in the wrong manner or arriving at an unreasonable result.[5]

[14] The arbitrator correctly summarised the purpose of the collective enquiry. He correctly identified the nature of the dispute, i.e. the interpretation and application of the agreement. And he had regard to the legal principles pertaining to interpretation, such as *Natal Joint Municipal Pension Fund*[6] and *Securefin.*[7]

[15] Having done that, though, the arbitrator did not consider and apply the actual operative provisions of the collective agreement itself. As the SCA stated in *Natal Joint Municipal Pension Fund*[8]:

> 'The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document. '

[16] The arbitrator did not properly consider the language of the agreement itself. The agreement does not require salaries of support staff that were transferred from the state to be identical to those who had previously been

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[3] *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC) para [110].

[4] *Herholdt v Nedbank Ltd* 2013 (6) SA 224 (SCA) para [25].

[5] *Head of the Department of Education v Mofokeng* [2015] 1 BLLR 50 (LAC); (2015) 36 *ILJ* 2802 (LAC) para [30].

[6] *Natal Joint Municipal Pension Fund v Ndumeni Municipality* 2012 (4) SA 593 (SCA) para [18].

[7] *KPMG v Securefin Ltd* 2009 (4) SA 399 (SCA) para [39]. See also *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd* 2013 (6) SA 520 (SCA) and *Western Cape Dept of Health v Van Wyk* [2014] ZALAC 25 para [22].

[88] Above para [18], quoted in para 19 of the arbitration award.

employed by FET colleges. The claimants' salaries had already been upgraded from level 3 to level 4.

[17] The agreement provides that the salaries of support staff who were historically employed by colleges must be "translated to the minimum annual basic notch of the applicable salary range". The agreement applies to and binds all support staff whose salaries were not congruent with the salary structure of the Public Service Regulations. The salaries of the claimants were congruent with the salary structure in the Public Service Regulations. Yet the arbitrator did not consider that factor in deciding whether a further adjustment was called for.

[18] The agreement also provides for the existing salary scales in the public service to be applied to all support staff in public FET colleges. That is another factor that the arbitrator did not consider. And the agreement provides that existing support staff like the applicants whose salaries are congruent with the existing public service salary scales would retain their notch. But the arbitrator did not properly consider whether the College had complied with those provisions.

[19] It is not for this court to decide whether the College had complied with the agreement. The main argument on review raised by Mr *Quixley* is that the arbitrator simply disregarded the operative provisions of the collective agreement and focused instead on the sole question of parity. He did not embark on any analysis to ascertain whether the College had indeed complied with the agreement in respect of these complainants and in respect of the three transferred employees. I agree that that is a reviewable irregularity; but the interpretation and application of collective agreements is the province of the Bargaining Council. Another arbitrator will be best placed to properly interpret the operative provisions of the agreement and to consider whether the college had applied those provisions properly.

Conclusion

[20] The arbitrator misconceived the nature of the enquiry before him by failing to determine whether the College had complied with the operative provisions of the collective agreement. That is a reviewable irregularity. The dispute must be remitted to the Bargaining Council for another arbitrator to properly consider those provisions.

[21] With regard to costs, I take into account that the dispute has not been finally determined; and that there is an ongoing relationship between the PSA and the College. In law and fairness, I do not consider a costs award to be appropriate.

Order

[22] I therefore make the following order:

22.1 The arbitration award of 16 July 2015 under case number GPBC 2591/2014 is reviewed and set aside.

22.2 The dispute is remitted to the General Public Service Sectoral Bargaining Council (first respondent) for a fresh arbitration before an arbitrator other than the second respondent.

22.3 There is no order as to costs.

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Anton Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	Grant Quixley
Instructed by	Cliffe Dekker Hofmeyr.
THIRD to THIRTEENTH RESPONDENTS:	Mr Philander
(Heads of argument drafted by Grant Potgieter)	
Instructed by	Duncan Korabie.