Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 2026/13

In the matter between:

NATIONAL HOME BUILDERS REGISTRATION COUNCIL	**First Applicant**
and	
NEHAWU obo SIZA NGHULELE	**First Respondent**
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**Second Respondent**
COMMISSIONER BHEKINHLANHLA STANLEY MTHETHWA *N.O*	**Third Respondent**

Heard: 9 June 2016

Delivered: 10 June 2016

Summary: (Review – unfair labour practice allegedly relating to promotion – *in limine* issues – date of referral –nature of dispute – merits of dispute – findings unreasonable)

REASONS FOR JUDGMENT

LAGRANGE J

Introduction

[1] On 10 June 2016, the following order was handed down:

1.1 The first respondent's late filing of his answering affidavit is condoned.

1.2 The arbitration award of the third respondent under case number GAJB3560-13 is reviewed and set aside, and the findings in paragraphs 32 to 34 of the award, inclusive, are replaced with a finding that:

"The respondent did not commit an unfair labour practice relating to promotion when it placed the applicant on Grade 7A after he obtained his professional registration in May 2010."

The "applicant" and "respondent" in the substituted finding above refer to the third respondent and the applicant in this review application respectively.

1.3 No order is made as to costs.

My reasons for the judgment are set out below.

[2] Before dealing with the merits of the matter, I should mention that shortly before the review application hearing, the first respondent withdrew his opposition to the review application, unconditionally. However, it was apparent from a letter to the applicant's attorneys that he did so in the belief that the CCMA should first consider of the jurisdictional issues raised by the applicant. A candidate attorney from the first respondent's attorneys of record was in attendance at court. As I indicated in court, it would have been pointless for the court to have remitted the jurisdictional question back to the CCMA when the matter could be determined with finality by the court. As it is, the jurisdictional points were without merit for the reasons set out below, so the court was obliged to consider the merits of the review application itself.

Condonation

[3] Notwithstanding the merits of the first respondent's defence to the review application, I am satisfied that the prejudice caused by the relatively short delay in filing its answering affidavit was not one of great magnitude, caused no demonstrable prejudice to the applicant of any significance, and that he should not be deprived of the opportunity of defending the arbitration award in his favour. Consequently the late filing of his answering affidavit should be condoned.

The review

[4] In this matter the applicant has applied to review and set aside the award of the third respondent in which he found that the applicant had committed an unfair labour practice by placing the first respondent, Mr S Nghulele, ('the employee') on grade 7A instead of grade 6 after he obtained his professional registration in May 2010 as a Geographical Information Science Technologist ('GIS Qualification').

[5] The arbitrator had found that the employee should have been promoted to the higher grade in terms of the Career Path and Retention Strategy for Technical Staff which the applicant had claimed was applicable to him.

Preliminary jurisdictional issues

[6] The applicant raised two jurisdictional objections to the arbitrator's award.

6.1 Firstly, it contended that because the employee only referred the unfair labour practice dispute to the CCMA on 4 February 2013, whereas he claimed that his advancement to grade 5 should have taken effect on 11 May 2010, the arbitrator had no jurisdiction to hear the unfair labour practice claim because it had been referred after the 90 day period since the occurrence of the alleged unfair labour practice as required by section 191 (1) (b) (ii) and no condonation had been granted for the late referral under section 191 (2) of the Labour Relations Act 66 of 1995 ('the LRA').

6.2 Secondly, it argued that the dispute was not a dispute of right but one of interest and accordingly could not constitute an unfair labour

practice dispute which an arbitrator could entertain. A related objection was that, because the applicant was not seeking appointment in a different post, the dispute could not be one relating to promotion in terms of section 186(2)(a) of the LRA.

[7] In respect of the first point, it was held in ***SABC Ltd v CCMA & others***[1] that:

> "While an unfair labour practice/unfair discrimination may consist of a single act it may also be continuous, continuing or repetitive. For example, where an employer selects an employee on the basis of race to be awarded a once-off bonus this could possibly constitute a single act of unfair labour practice or unfair discrimination because like a dismissal the unfair labour practice commences and ends at a given time. But, where an employer decides to pay its employees who are similarly qualified with similar experience performing similar duties different wages based on race or any other arbitrary grounds, then notwithstanding the fact that the employer implemented the differential on a particular date, the discrimination is continual and repetitive. The discrimination, in the latter case, has no end and is, therefore, ongoing and will only terminate when the employer stops implementing the different wages. Each time the employer pays one of its employees more than the other he is evincing continued discrimination."[2]

Although in this instance, the employee's claim to higher grading and remuneration was squarely based on the applicability of the applicant's Career Path and Retention Strategy for Technical Staff policy, the principal of the continuous nature of the alleged unfair labour practice in my view is indistinguishable from that in the *SABC* case. Accordingly, he was entitled to raise the claim not only within 90 days of not receiving the advancement but for so long as he was denied it. Consequently, the first *in limine* point must fail.

[8] In relation to the jurisdictional objection based on the supposed nature of the dispute, the applicant relied on the Labour Court judgment in

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[1] **[2010] 3 BLLR 251 (LAC)**

[2] At 258,para [27].

Polokwane Local Municipality v SALGBC & others.[3] In that matter, the employee had applied to have her post upgraded. The court held that:

> "The grading or evaluation of a post is a matter of mutual interest,[and] there is no agreement between the parties that provides otherwise."[4]

The court further held that:

> "The complaint of the employee was that her position should be evaluated and that she be placed on level 6. In this regard, she was seeking to create a new right of being placed and paid a salary at a higher position."[5]

[9] Having decided that the matter concerned a dispute of interest, the court concluded that the arbitrator did not have jurisdiction to entertain the matter as an unfair labour practice dispute.[6] To the extent that the court decided that a dispute over the grading of a post could not be considered as an unfair labour practice relating to promotion because it concerned an interest dispute, the judgement might have been overtaken by the principle developed in LAC decision in ***Apollo Tyres SA (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others***.[7] In that judgment, the LAC confirmed that:

> "Clearly the notion that the benefit must be based on an ex contractu or ex lege entitlement would, in a case like this, render the unfair labour practice jurisdiction sterile."[8]

By the same logic, it might be argued that a complainant in an unfair labour practice dispute relating to promotion in the form of upgrading, could conceivably argue that an unfair failure to upgrade them might amount to an unfair labour practice, without having to demonstrate an express *ex contractu* or *ex lege* right to promotion.

[10] In addition, the LAC seems to have adopted a generous approach as to what might constitute an unfair labour practice relating to promotion. Thus

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[3] **[2008] 8 BLLR 783 (LC)**

[4] At 786, para [21].

[5] At 787, para [24].

[6] At 787, para [26].

[7] **(2013) 34 *ILJ* 1120 (LAC)**

[8] At 1136, para [48].

in the *SABC* matter, the LAC saw no difficulty in a dispute "to obtain promotion or upgrading" of complainants to a particular salary scale being entertained as an unfair labour practice relating to promotion, quite apart from a separate unfair discrimination claim also being advanced on the same facts. Also, in ***Mathibeli v Minister of Labour*** [9] the LAC cited with approval[10] the following dicta in the judgment of *National Commissioner of the SA Police Service v Potterill* A *NO &* others[11], a matter involving a dispute over the promotion of incumbents in upgraded posts in the SAPS, in which the labour court held:

> "[15] The substance of the dispute pertained to the employees' complaint that their posts had been regraded but, despite the fact that they had continued to be employed in the same posts and despite the requirements of regulation 24, their salaries had not been increased. In my view this is a complaint about alleged unfair conduct "relating to the promotion" of the employees
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> [16] In my view regulation 24 requires one to draw a distinction between a decision to regrade a post and a decision to allow the incumbent employee in the regraded post to continue to occupy that post. Where the incumbent employee is permitted to continue to occupy the regraded post and is afforded the appropriate higher salary, the employee is, in my view, "promoted". In my view such a situation falls within the first meaning given for the word "promote" in *The Concise Oxford Dictionary* (9 ed), namely: "V.tr.1 (often foll. by to) advance or raise (a person) to a higher office, rank, etc (was promoted to captain).
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> …
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> [19] Mr *Oosthuizen* argued that the employees' failure to state expressly in the referral forms that the relief that they sought was promotion established that the dispute referred to arbitration was not a dispute concerning promotion. I cannot agree with this. In my view a distinction needs to be drawn between the nature of the dispute underlying the remedy sought and the remedy itself. The remedy sought does not necessarily give a clear indication as to the real nature of the underlying dispute. As to a similar

[9] **(2015) 36 *ILJ* 1215 (LAC) 2015**

[10] At 1222, para [18]

[11] (2003) 24 *ILJ* 1984 (LC)

> conclusion reached in a different context, see *Ceramic Industries Ltd t/a Betta Sanitaryware & another v NCBAWU & others* (1997) 18 *ILJ* 671 (LAC); [1997] 6 BLLR 697 (LAC) at 703E-J.
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> [20] I do not accept the argument that the dispute was a "dispute of interests" which, for this reason, fell beyond the jurisdiction of the arbitrator. The employees' case was that they were the victims of an unfair labour practice and that, as a matter of law, they were entitled to salary increases. This was a "dispute of rights". The fact that the remedy sought was an increase in salary does not change the character of the dispute. A claim for a higher salary as a matter of right is not an "interests dispute".[12]

(emphasis added)

Clearly, this is in line with the thinking in *Apollo Tyres* that the unfair labour practice jurisdiction gives rise to a self-standing right to complain about unfairness relating to promotion. It also provides support for the view that promotion does not necessarily entail a dispute about the occupation of a vacant position, though of course this might be affected by regulations defining promotion in a particular workplace.

[11] In any event, turning to the facts of this matter, the claim of the employee was based on a belief that he had a clear entitlement to be upgraded in his existing position based on his eligibility under the Career Path and Retention Strategy for Technical Staff policy. Thus, assuming it was necessary for the employee to have formulated his claim as a claim to an existing right, I believe he did so and his dispute would be correctly classified as a rights dispute.

Substantive merits of the review

[12] Although the employee overcomes the jurisdictional hurdles which the applicant has tried to raise, the substantive merits of the review are more difficult for him to overcome. It is not necessary for the purposes of the judgement to address each one of them as the matter can be decided on those discussed below.

[12] At 1221-1222.

[13] As mentioned, the employee relied for his claim on proving that he fell within the ambit of the Career Path and Retention Strategy for Technical Staff policy ('the Retention policy'). The arbitrator concluded that the Retention Policy was amended to include recognition of the employee's GIS qualifications. On the only recorded version of the policy which had been adopted by the Council after a recommendation of the remuneration committee, the employee's qualification was not one of the professional competencies which the applicant had decided to recognise for the purposes of the policy with a view to retaining staff having the desired core qualifications. The arbitrator concluded that the policy had been varied to include the employee's qualification in the absence of evidence that would tend to prove the adopted retention policy had been varied.

[14] Apart from the fact that the evidence relied on by the employee to argue that the policy had been varied, which was based on communications between various managers and himself, there was no evidence to show that the Council had formally approved any variation of the policy. In those circumstances, there simply was insufficient justification on the evidence for the arbitrator to reasonably conclude that the policy had been varied, in the light of clear evidence of the process that had to be followed to adopt a variation in the policy. There is a suggestion in the arbitrator's reasoning that he also adopted the view that the employee's professional qualification was equivalent to some of the professional qualifications that were expressly recognised as prerequisites for upgrading under the retention policy. However, the employee had not claimed that he was performing work of equal value or that his salary level should be upgraded even if he did not qualify in terms of the adopted Retention policy, because as a matter of fairness, his skill ought to have been recognised as one necessary to retain in terms of the policy. Accordingly, for the arbitrator to consider whether his qualification was comparable and therefore deserving of recognition is not the dispute that was placed before him and he could not draw support for his conclusions from an argument not advanced by the employee as part of his case.

[15] For these reasons, I am not satisfied that, on the evidence available, a reasonable arbitrator could have arrived at the findings which the arbitrator did in this instance.

Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	Mr M Marcus instructed by Poswa Inc.
FIRST RESPONDENT:	No appearance