IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT PORT ELIZABETH
REPORTABLE
Case Number: P284/09
In the matter between:
THE SOUTH AFRICAN POLICE SERVICES Applicant
and
PHILLIP SALUKAZANA First Respondent
NYAMEKO GQAMANA N.O Second Respondent
THE SAFETY AND SECURITY SECTORAL
BARGAINING COUNCIL Third Respondent
DIRECTOR T I DYANTI Fourth Respondent
JUDGMENT
MOSHOANA AJ 2

INTRODUCTION

[1] This is an opposed application to review and set aside an award issued by the second respondent on 22 April 2009, who at the time was acting under the auspices of the third respondent. In terms of the award, the second respondent found that the transfer from the position of a Provincial Head: Supply Chain Management to the post of Section Head: National Inspectorate was unfair in that it amounted to his demotion. He accordingly ordered the applicant to restore the *status qou*. He made no order as to costs. The applicant was aggrieved thereby and launched these proceedings.

BACKGROUND FACTS

[2] The first respondent, Phillip Salukazana was employed by the applicant as Provincial Head: Supply Chain Management at the Provincial office, Zwelitsha. Before being permanently transferred, the first respondent was temporarily transferred. He was aggrieved by the temporary transfer and lodged a grievance. The crux of his grievance was that the temporary transfer amounted to a demotion in his status. Whilst his grievance was pending, on 18 February 2008, he received a letter captioned "*lateral transfer*". In terms of that letter, he was permanently transferred to the position of Section Head: Inspections, National inspectorate, Eastern Cape Province. Owing to the fact that his first grievance was still pending, the first respondent was aggrieved by that permanent transfer 3

and lodged yet another grievance. Again the crux of his complaint was that his status was diminished thereby.
[2] The position of the applicant was that the transfer was necessary to enhance service delivery. The first respondent was not convinced and he maintained that his transfer amounts to a demotion and nothing else. It is common cause that the said transfer was not to affect his salary and benefits. He then referred a dispute to the third respondent as a demotion within the contemplation of Section 186(2) of the Labour Relations Act as amended. The dispute came to the attention of the second respondent for purposes of arbitration.
[3] As pointed out above the first respondent characterised his dispute as one of demotion. He viewed the transfer as nothing else but a demotion since his status was affected thereby. At arbitration, the record reflects that it was clear to both the applicant, who at the time was represented by Daniel Isaac Billet, director legal services, the first respondent and his representative and the second respondent that the dispute was about demotion. Billet is on record for having said on a number of occasions that the applicant shall lead evidence to show that the first respondent was not demoted.
[4] It stands to reason that since it was clear to the applicant what the dispute was about it advisedly did not raise any jurisdictional point before the second respondent. The second respondent only heard evidence from the first respondent. From the record, it is clear that his case was about demotion. He bitterly complained about his status. He used to report to an area commissioner 4

and in his new position he would report to a person lower. The record further reflects that on being questioned by the second respondent on the caption of the letter of transfer, which made reference to a *lateral* transfer, he testified that his understanding of *lateral* transfer is... "*I will move with my status...my responsibilities.*" The first respondent was cross-examined at length. The cross-examination was aimed at discrediting his evidence to the effect that his status was affected by the transfer. The applicant tendered no evidence at all to support its case. This of cause is contrary to the opening remarks by Billet. The versions put during the lengthy cross-examination were not supported.

[5] At the conclusion of the evidence stage, the parties made written submissions to the second respondent. It is clear from the applicant's written submissions that it sought to argue that there was no demotion. It referred to various authorities including those of the Labour Appeal Court, where the issue of demotion, in terms of what constitute demotion, was dealt with extensively.

[6] On 16 April 2009, the second respondent made known his award. The terms of his award were referred to in the introductory part of this judgment. The applicant was aggrieved by that and sought to launch these proceedings. It did so on 17 June 2009. At that time the application was out of time. That necessitated seeking condonation of the late filing. In its notice of motion, the applicant included a prayer seeking exactly that. Such an application was to be considered at the same with the main application, being the review. The first respondent opposed the application.

GROUNDS OF REVIEW.

[9] The applicant effectively sought to attack the award on four grounds. Those were:
The second respondent lacked jurisdiction to entertain the dispute before him given the fact that a dispute about the fairness or otherwise of a transfer does not fall within the ambit of an unfair labour practice as defined by Section 186(2) of the Labour Relations Act 66 of 1995 as amended.

The decision of the second respondent was based on the fundamentally incorrect premise that the applicant's transfer policy required that a transfer of an employee within the organisation of the applicant could only be on a *"lateral*" basis.

The second respondent erred in finding that the transfer in question was not *"lateral*" given the fact that the first respondent was transferred from a post graded level 13 to a post also graded at level 13.

In the event of it being found by this court that the second respondent was entitled to disregard the unchallenged grades attaching to the respective posts, it is alleged that the second respondent in any event failed to give any proper consideration to the evidence which was placed before him.

It bears mentioning at this stage that during argument, Advocate Kroon appearing for the applicant sought to add a further ground which suggest an irregularity in the arbitration proceedings in that the second respondent although duty bound and despite the fact that the issue of the regulations on job evaluation was not raised by any of the parties, he failed to give due consideration to those regulations.

ARGUMENT

[10] Advocate Kroon argued that the issue of lack of jurisdiction is presented in two parts. The first being that, the reading of the award, in particular paragraph 29.1, reflects that the second respondent lacked jurisdiction to deal with an unfair transfer. The second being that the primary dispute was that of the fairness of the transfer and demotion was an issue in a dispute. On this point, he relied on the decision of the Labour Appeal Court in the matter of *Minister of Safety and Security v Safety and Security Sectoral Bargaining Council and 2 others Case no PA2/09, handed down on 29 January 2010, yet unreported*. In his submission, the case is authority to the proposition that jurisdiction does not arise on an issue in a dispute but from the issue in dispute. In amplification of his argument, he rejected a proposition from the bench that in this matter, the issue in dispute was demotion and the issue in a dispute was the transfer.

[11] He correctly conceded though that the dispute was referred as a demotion. However he argued that characterization of dispute by a referring party has been 7

held not to be decisive. He rightly conceded that it is possible for a transfer to be seen as a demotion. He however stood firm to his submission that demotion was an issue in a dispute. He argued that paragraph 29.1 of the award has no other meaning other than the one that the second respondent declared a transfer unfair when he had no jurisdictional power to do so.

[12] In dealing with the second ground, he argued that the Transfer Policy does not make mention of a *lateral* transfer. He does not know from where the second respondent got that term, so the argument went. With regard to the third ground he argued that although none of the parties raised the issue of the applicability of the grading policy, the second respondent was duty bound to refer to it. On this point he relied on the judgment of my brother Molahlehi J in the matter of *National Commissioner of the SAPS v Cohen N.O and others [2009] 3 BLLR 239 (LC) together with the decision of this court in NPA and Others v PSA and Others [2009] 4 BLLR 362 (LC).*

[13] He emphasised that there was no dispute about the rank; therefore the grading was not challenged *per se*. He argued that what the second respondent should have done was "*to extend a helping hand*" and advise the first respondent to challenge the grading instead. He implored the court to have regard to paragraphs 7.14 to 20 of his heads of argument where he dealt extensively with the issue of job evaluation.

[14] Dealing with the fourth ground, he submitted that the second respondent did *very little*. All he did was to compare the positions without having job description of 8

those posts. On this point he relied on an opinion expressed in the award of *NEHAWU obo Syster v University of the Western Cape [2000] 7 BALR 819 (IMSSA)*.

[15] Advocate Grobler appeared on behalf of the first respondent. He correctly jettisoned the argument that the fact that jurisdiction was not raised with the second respondent such is not a bar for it to be raised and entertained in this court. He defended the award of the second respondent. He argued that it is a well reasoned award. He conceded though that the wording in paragraph 29.1 is unfortunate. However, the court must look at the reasons given. He emphasised with specific reference to the record that the dispute was about demotion, which manifested itself through a transfer. He argued that the issue of a transfer is irrelevant.

[16] He, relying on the LAC judgment referred to earlier, argued that the issue in dispute was the demotion and transfer was the issue in a dispute. He argued that the first respondent, being the person who perfomed the duties in the two posts in question was in a better position to say that there is difference in status. He conceded that if there was evidence, which was absent, regarding the grading, perhaps that evidence would have been stronger compared to the *ipse dixit* of the first respondent. He submitted that the facts in the LAC judgment are distinguishable from the matter before court. He emphasised that despite an undertaking on record that evidence would be led to show that the first respondent was not demoted, there was no such evidence. He concluded that 9

the second respondent cannot be criticised when there was no competing evidence that the status was lowered.

ANALYSIS OF EVIDENCE AND ARGUMENT.

[17] It is important to highlight and accept that in a matter where jurisdiction is being challenged, the issue is not whether the decision is that which a reasonable commissioner would have reached, but whether on the facts objectively viewed, was there basis to find jurisdiction. The LAC in the matter referred to above reconfirm that view. Therefore the approach to be adopted in this judgment would be the same.

Did the second respondent lack jurisdiction?

[18] In dealing with this question, it is perhaps helpful to say that the issue of jurisdiction manifest itself in two forms. The first is in what is referred to as objective jurisdictional facts. This relates to facts that must objectively exist before exercising power. The other is the power itself. (South *African Defence Aid Fund v Minister of Justice 1967 (3) SA 31 (C) and Kimberly Junior School and another v Head Northern Cape Education Department and others (2009) JOL 23706 (SCA)*. It is clear that in this matter, the jurisdictional challenge is pegged on the wording in paragraph 29.1 of the award. Had the award not being worded in the manner in which it is, the issue of jurisdiction would not have arisen. Hence it was not an issue at the arbitration. 10

[19] As the record reflected, the applicant was satisfied that the issue in dispute at the arbitration was the demotion of the first respondent which manifested itself after the transfer that was effected on the 18 February 2008. Put it differently, had the first respondent not felt that the transfer amounted to a demotion, he would, it appears so, not have risen any issue. The applicant was well prepared at the arbitration to show that there was no demotion. In its submissions, it was emphatic that there was no demotion. It relied on decisions of the LAC to demonstrate that there was no reduction in status. It relied on *Van der Riet v Leisurenet t/a Health and Racquet Club (1998) 5 BLLR 471 at 480 paragraph 36 and Nxele V Department of Correctional Services (2008) 12 BLLR 1179 (LAC)*

[20] One is tempted to say that the fact that the applicant seeks to find jurisdictional problems on the wording of the paragraph is opportunistic. If one has regard to the wording, the second respondent is clearly referring to the demotion issue. The fact that he said the transfer is unfair does not remotely suggest that he was arbitrating an unfair transfer dispute. I shall deal with this issue later. Demotion can manifest itself in many ways. It can arise through the reduction of salary, change in terms and conditions of employment and indeed transfer. In *Nxele* the LAC had the following to say which demonstrates the point:

"*I agree with counsel for the appellant that the mere fact that the appellant's rank and remuneration were not going to change does not mean that the transfer to Pollsmor could not or did not constitute a demotion. I agree, too, that status, prestige and responsibilities of the position are relevant to the determination whether or not a transfer in particular constitute a demotion".* 11

Come to think of it, demotion and transfer share commonalities. In a demotion there is a movement equally in a transfer there is. If a movement leads to a reduction in status, such is a demotion, irrespective what the employer may wish to term it. The fact that an employee challenges the effect of a transfer would not of necessity mean that he or she is challenging the transfer *per se*. Put it differently, if a transfer leads to a change in terms and conditions of employment which amount to demotion, an employee is entitled to bring a claim of unfair labour practice in terms of section 186(2). That shall be so even if a transfer is procedurally and substantively appropriate as it were. The cause of action would not be premised on the fairness or otherwise of the transfer.

[21] In my view the issue of the transfer is more an issue in a dispute but certainly not an issue in dispute in this matter. The transfer was the *causa* of the demotion. Had there been no transfer, the demotion would not have arisen. In terms of Section 186 (2), what is objectionable is the unfair conduct in relation to aspects mentioned in there. Those are promotion, demotion and provision of benefits. An arbitrator considering a dispute about an alleged unfair labour practice should be satisfied that the conduct in question relating to one of the aspects, is unfair. In other words, if the conduct that led to a demotion is fair, then a demotion does not amount to an unfair labour practice as defined.

[22] The same applies to a promotion and provision of benefits. For an example if employer A only provides benefits to tall people only. A short person resorting under the provisions of Section 186(2) can approach the CCMA or the Bargaining

Council and complain. His or her main complain would be non-provision of benefits. The arbitrator in dealing with the matter must find as matter of law that the conduct of only benefitting tall people is unfair. The fact that he or she finds as such does not suggest that the dispute was about the fairness of benefiting tall people.
[23] Similarly, the fact that the second respondent found, as he should, that the conduct that led to the demotion, which happens to be a transfer, is unfair does not mean that what he was determining was an unfair transfer dispute. In fact the wording is not unfortunate as conceded by Advocate Grobler. It is appropriate. The transfer is the conduct that led to the demotion. Finding that it is unfair is actually consistent with the definition in the Act. Contrary to what Advocate Grobler argued, the LRA recognises that there may be a fair demotion. To take it further, in an instance where a demotion arose as result of it being a penalty imposed at the disciplinary inquiry, the focus in determining whether the demotion is lawful as it were, would be the disciplinary inquiry for instance. If a finding is made that the conduct of disciplining was unfair then the demotion is unlawful as it were. However, I emphasise, it does not make the dispute one of the fairness of the disciplinary inquiry.
[24] Unlike in the LAC judgment referred to earlier and relied upon by Advocate Kroon, in this matter, the first respondent did not apply for transfer and was turned down. In the LAC matter, Mr Badenhorst applied for transfer and same was turned down. He then chose to lodge a dispute about interpretation and 13

application of a collective agreement in terms of Section 24 of the LRA. In this matter, the transfer was the conduct or an act if you like of the applicant.
[25] In my view, there is nothing wrong with the wording. The wording does not suggest that the dispute was about the fairness of the transfer. Accordingly the jurisdiction ground is bound to fail.
Is the decision based on a fundamentally incorrect premise?
[26] The alleged fundamentally incorrect premise referred to is the usage of *"lateral"* transfer. According to Advocate Kroon, the word does not appear in the policy, therefore it must be a term coined by the second respondent from nowhere. Advocate Grobler conceded that the word does not emanate from the policy. From the record, it is revealed that the term actually emanates from the applicant. The caption of its letter of transfer dated 18 February 2008 makes reference to the term. All what the second respondent did, which informed his continued usage of the term, was to question the first respondent as to his understanding of the term used. He testified that he understands it to mean moving with his status and responsibilities. In his (the first respondent) case he did not move with his status and responsibilities; therefore it was not *"lateral"* in his understanding. In cross-examination this version was not challenged.
[27] Therefore the finding hereunder is unassailable: 14

"*I am therefore satisfied that the applicant (first respondent) has proved on a balance of probability that his transfer was not a lateral transfer and therefore the post he now currently holds is lower in responsibility and status. Therefore, that to me amounts to demotion."*

The finding is not only consistent with the evidence before him, it is also consistent with what the courts have said is a demotion. (*Ndlela v SA Stevedores Ltd (1992) 13 ILJ 663 (IC) and Nxele supra*). First respondent testified that if he does not move with his status and responsibility, that does not amount to *lateral* transfer as the applicant sought to convey in the letter of 18 February 2008.

[28] Therefore, there is no room for arguing that there was a fundamentally wrong premise. Accordingly, this ground too is bound to fail.

Was there a "lateral" transfer?

[29] This ground is revealing of what the applicant meant when it used the term in its letter of transfer. What it meant was because the posts are both a level 13 then there was a lateral move as opposed to a downward move. Of course this understanding did not accord with that of first respondent. His understanding is dealt with above. He was the only witness at arbitration. His version on this point was not challenged. It suffices to confirm that if the rank does not change, it does not mean that a person has not been demoted. It is clear from the evidence what the term *lateral* meant to the second respondent. Therefore, there exists no basis 15

to find that he erred in any manner whatsoever. It follows that the third ground must suffer the same fate.

Did the second respondent fail to give proper consideration to the evidence?

[30] It is undisputable that the only evidence in this matter emanated from the first respondent only. Proper reading of the award reveals that the award is perfectly consistent with the evidence of the first respondent. Regarding the grading and the job description issues, none of those were placed before the second respondent. That being so I agree with Advocate Grobler that the second respondent cannot be criticised for not considering something that was not before him. The second respondent did not simply engage in an exercise of comparing posts without job description as argued. What he did was to evaluate the undisputed evidence of the applicant that the position is lower in status and responsibilities and on the balance of probabilities accepted it as he should have. It does not accord to the applicant to now argue that there was failure to give proper consideration. In his award he recorded the following:

"In fact it needs to be placed on record that initially the respondent (Applicant) called Assistant Commissioner Badi as a witness. However, at the last sitting Director Billet brought an application that her evidence should be disregarded and that the respondent's (Applicant) case should be approached on the basis that there was no evidence led on its behalf...my approach is to deal with the matter on the basis that there was no evidence on behalf of the respondent (Applicant)". 16

[31] One wonders why the applicant adopted that stance. I can only surmise that the evidence was not favourable or advancing its case. I did not hear Advocate Kroon to be challenging the quoted portion. Therefore the only evidence, upon which this award should be assessed by the reviewing court, is the evidence of the first respondent. I have already said that the award is not inconsistent with the evidence of the first respondent. Accordingly this ground is a non-starter.

The job evaluation issue

[32] The applicant seeks to mount a case that the issue of job evaluation was critical to the determination of the dispute. Failure to take it into account renders the award reviewable. I cannot agree. In my view the issue of the job evaluation policy is irrelevant and therefore not critical to the determination of the matter. In *Maepe v CCMA and another (2008) 8 BLLR (LAC)*, Zondo JP confirmed that failure to take into account a critical factor to the determination of the dispute amounts to gross irregularity. I agree and in fact I am bound by that. That factor in the *Maepe* matter was the conduct of giving false evidence. In the Labour Appeal Court's view; it bore relevance to the determination of the issue of relief. There that factor came up in evidence. The irregularity was for the arbitrator not to take it into account when considering the issue of relief. In *casu,* the issue of job evaluation did not feature anywhere in evidence. Even if it did, it was irrelevant for the determination of any issue. Again, the regulations referred to in the *Cohen* matter *supra* were relevant to the issues before the arbitrator there. Accordingly, it is my view that the award of the second respondent is not tainted by this failure. This ground too must fail. That then leaves the question of costs. 17

THE ISSUE OF COSTS.

[33] Advocate Kroon submitted that there should be no order as to costs even if the applicant succeeds. Advocate Grobler argued that there should be an order of costs since the first respondent is an individual. In terms of Section162 of the LRA, this court can make an order of costs taking into account the law and fairness. Given that the applicant failed in its attempt to review an award which was perfectly consistent with the uncontested evidence, it shall be unfair if the first respondent were to be mulcted with the costs of successfully opposing the application. It seems to me that in fairness an order of costs should be made.

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CONCLUSION.

[34] Having considered all the grounds persisted with; this court finds no basis upon which it can review the second respondent's award. Section 158 (1) (g) empowers this court to review functions performed in terms of the LRA on grounds permissible in law. No such grounds were shown to exist.

[35] In the result, I am constrained to issue the following order:- 18

1. The condonation application is accordingly dismissed.

2. The review application is dismissed

3. The applicant to pay the costs.

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G. N MOSHOANA
Acting Judge of the Labour Court
Date of Hearing: 11 February 2010
Date of Judgment: 16 February 2010

APPEARANCES

For the Applicant: Adv Kroon Instructed by State Attorney Port Elizabeth
For the respondents: Adv Grobler instructed by Michael Randell Attorneys.