IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Case No: JR 648/ 04

In the matter between:

S. MASHELE	First Applicant
M. MESO	Second Applicant
B. HOWARD	Third Applicant
F. MUTHELO	Fourth Applicant

and

GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL	First Respondent
JOHAN LE ROUX N.O.	Second Respondent
DEPARTMENT OF FINANCE AND ECONOMIC DEVELOPMENT	Third Respondent

---

JUDGMENT

REVELAS AJ

[1] The four applicants, all employees of the third respondent, seek to set aside an award made by the second respondent ("the arbitrator"), wherein it was held that the four applicants were not entitled to certain acting allowances in terms of the Public Service Resolution 1 of 2002. The applicants had referred a dispute about the non-payment of acting allowances to the General Public

Service Sectoral Bargaining Council ("the Council"). The dispute before the arbitrator was determined without oral evidence being led by the parties.

[2] The applicants contended that the arbitrator failed to apply his mind to the evidence and relevant issues before him, in accordance with the provisions of the General Public Service Sectoral Bargaining Council ("the G.P.S.S.B.C.") Regulations.

[3] They argued that they were appointed in writing in higher posts as from 11 September 2001 by Dr F W de Brandt, who was duly authorised (as the Director of Resource Management of the third respondent) and when the Regulations came into effect, they were still acting in those positions and were entitled to an allowance.

[4] The arbitrator summarised the following as being common cause in the proceedings before him:

"Background and matters of common cause.

1. The applicants were appointed to act in higher positions with effect from 11 September 2001.

2. At the time when they were appointed as such they were not entitled to be paid an acting allowance.

3. On 1 April 2002 Resolution 1 of 2002 came into effect and determined that upon the meeting of certain requirements every employee acting in a higher

position would be entitled to be paid an acting allowance.

4. The applicants were still acting in a higher position on 1 April 2002 and were acting as such untill July 2003.

5. During this period they were not paid an acting allowance.

The relevant clauses in Resolution 1 of 2002 (the resolution) read as follows:

"3.1.1 An employee appointed in writing to act in a higher post, by a person who is duly authorised, shall be paid an acting allowance provided that –

(a) the post is vacant and funded; and

(b) the period of appointment is uninterrupted and longer than six weeks.

3.1.2 The employee must accept the acting appointment in writing.

3.1.3 …

3.1.4 …

3.1.5 …

3.1.6 …

3.1.7 An employee may not act in a higher post for an uninterrupted period exceeding twelve months.

3.1.8 …

3.1.9 An employee who commenced acting in a higher post before the implementation of this agreement, must be

> reappointed in such post to qualify for the benefits under this agreement. The twelve-month period referred to in paragraph 3.1.6 above will run from the date of appointment in terms of this agreement”.”

[5] The evidence presented before the arbitrator was that none of the applicants were reappointed and they in any event never accepted such a position in writing, as prescribed by clause 3.1.9 of the Resolution. This was conceded by Mr Manoko who acted on behalf of the applicants. He argued that the provisions of clause 3.1.9 do not preclude the applicants from being paid the acting allowance because the third respondent had a duty to reappoint them and failed to do so. He argued that this is borne out by the words “must be reappointed” in the clause. This failure, he argued, resulted in their inability to accept the offer in writing. The further argument advanced on behalf of the applicants was that since they had acted in the higher positions at the time of implementation and thereafter should be an indication that their respective positions were “vacant” and their existence meant that they were “funded”.

[6] The respondent was represented by Ms Mabiletsa who stressed the point that it was the employer’s prerogative to appoint employees and since this was not done, the applicants did not qualify for the benefits in terms of the clause in question. She correctly argued that the word “must be” did not place an obligation on the employer to appoint, but suggested they qualified the latter point of the sentence. Put in practical terms, it means that in order to qualify for benefits in terms of the section, there must have been a reappointment.

[7] Ms Mabiletsa also drew the arbitrator's attention to the very important fact that the applicants had been made aware of the correct position throughout continuous consultations with them which finally culminated in a workshop held on 16 May 2002.

[8] The arbitrator found that in the absence of a duty to appoint on the part of the third respondent, no unfair labour practice had been committed. The arbitrator interpreted the following part of clause 3.1.9: "An employee who commenced acting in a higher post before the implementation of this agreement must be reappointed in such a post to (the arbitrator's emphasis) to qualify for the benefits". He reasoned that if the intention was to reappoint all employees who acted in higher positions, then a full stop (period) would have been inserted before the word "to", which was used in that context to introduce the infinite by expressing a consequence. In this regard the arbitrator relied on the definition of "to" in the 8th edition of the Concise Oxford Dictionary. The arbitrator upheld Ms Mabiletsa's reasoning. There is nothing irrational or unreasonable about the arbitrator's reasoning.

[10] There was no duty on the third respondent to reappoint the applicants. At best the applicants may have had an expectation to be reappointed, in which case they should first have established their right to be reappointed or promoted and motivated it with facts and different argument. I am of the view that the operation of Resolution 1 can have unfair results, but I am not able to interfere with legislation.

[11] Based on the evidence before the arbitrator, I find that he committed no reviewable act, and, accordingly, the application is dismissed. I decline to make a costs order.

_____

Elna Revelas

Acting Judge of the Labour Court

Date of hearing: 27 September 2006

Date of judgment: 10 January 2007

On behalf of the Applicant:

Adv. W J Hutchinson, instructed by Lebea and Associates

On behalf of the Respondent:

The State Attorney