IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no: JR 1843/05

In the matter between:

POLOKWANE LOCAL MUNICIPALITY **Applicant**

And

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL **First Respondent**

AM CARRIM, N.O. **Second Respondent**

MS SC DE VILLIERS **Third Respondent**

JUDGMENT

Molahlehi J

Introduction

1] The applicant in this matter seeks an order to review and set aside the award issued by the second respondent, the Commissioner under case number LPD110405, dated 4 July 2005.

Background

2] The third respondent, Ms De Villiers (the employee), was employed

by the applicant during January 1992, as chief clerk: enquiries and cut off list. During July 1999, the employee applied to have her job upgraded from level 8 to level 6. She testified during the arbitration hearing that the reason for requesting the upgrading of her post was *"due to addition of work and responsibilities as well as supervisory or position itself."*

3] The employee submitted the required job evaluation forms on 3rd October 2000; the position was never evaluated because her forms went missing. The position of an accountant: cut off and enquiries, was created during 2002 and it was placed at the post level which was higher than that of the employee. Even after the creation of the post, according to the employee, she continued to perform some of the functions of post level 6 because the post was not filled.

4] Because of the dissatisfaction with the state of affairs, the employee lodged a grievance, which was convened for a hearing during December 2003.The outcome of the grievance was that the post of accountant: cut off and enquiries should be advertised as a matter of

urgency.

5] The position of an accountant: cut off and enquiry was advertised during April 2004. One of the qualifications required for the position was a B.Com degree. The employee was short listed even though she did not have the B.Com qualification. The outcome of the interview was that the employee was unsuccessful.

6] The employee then referred the dispute to the third respondent on 8th November 2004, pertaining to failure to pay the acting allowance and upgrading of her position to a higher level.

7] The case of the applicant in relation to upgrading the position of the employee is that there were a number of factors that impacted on the job evaluation process. The applicant does not dispute that the employee did submit her job evaluation forms but indicated that somehow the forms went missing.

8] According to the applicant the Northern Province Division of the

South African Local Government Bargaining Council (SALGA) imposed a moratorium on the job evaluations on all municipalities on 2nd August 2001. This point has not been disputed by the third respondent.

9] The transitional period from the old municipality to the new system introduced by the Local Government: Municipal Structures Act 107 of 1998, and the Local Government Municipal Systems Act 32 of 2000, had an impact on the job evaluation process. Whilst the employees of the Transitional Local Councils (TLCs) were deemed to have been transferred to the new municipalities in terms of s 197 of the Labour Relations Act 65 of 1995 (the LRA), their positions were somehow transient until they were placed into new positions in terms of the new structures developed by their respective municipalities.

10] As concerning the issue of standby allowance the case of the employee is that she only received standby allowance with effect

from 1st August 2004, whereas she worked after hours from 1st October 2001 until 31 July 2004. She testified that she was compensated R25, 00 for each call she received after hours from members of the community concerning electricity cut offs. She further testified that she was required to always be available on the phone whenever members of the community called regarding cut offs of their electricity. She was not paid if no calls were made.

The grounds for review and the award

11] The unfair labour practice is defined by section 186(2)(a), inter alia to mean an unfair act that arises between an employer and an employee involving-

> *"unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee;"*

12] The applicant contended that the arbitrator committed a gross irregularity in failing to determine, first whether he had jurisdiction before entertaining the dispute.

13] It is trite that the Commissioners of the CCMA are obliged to ask themselves whenever disputes come before them whether they have jurisdiction to entertain those disputes put before them. See Northern Cape Provincial Administration v Humbidge No and others (1999) 7 BLLR 648 (LC). The jurisdictional points raised by the applicant, were raised under the following headings:

Rights and interests

14] The first point raised relates to the contention that the Commissioner committed a fundamental error in failing to distinguish between disputes of rights and interests. Had the Commissioner undertaken this enquiry, according to the applicant he would have found that the dispute between the parties was not arbitrable as it was a dispute concerning interests rather than rights.

15] In her dispute referral the employee recorded her dispute under the heading **"Issues in Dispute"** in the following terms:

> "My position should, as requested in 1999 be evaluated and upgraded – still receiving acting allowance, but only from December 2003. Want to be

compensated from January 1997. Standby allowance not received from 11. 10. 2001 only as from August 2004"

16] And further on in the same referral under the heading **"What decision would you like the arbitrator to make?"** She states:

"1. To be on a level 6 and to be compensated as from January 1997.

2. To be compensated as from 10th October 2001 till July 20004 on stand by allowance."

17] In the certificate of non resolution of the dispute, the conciliating Commissioner categorized the dispute as concerning:

"(i) Standby allowance

(ii) Re-evaluation of the current position.

18] The categorization of the dispute is consistent with what the employee stated in the grievance referral form. She stated under the heading **"Settlement Desired:"** *"Upgrading of this position to a level 6 (evaluate this position)".*

19] The Commissioner in his award identified the issues for his

determination as follows:

> *"1. Whether the respondent committed an unfair labour practice by not paying the applicant standby allowance.*
>
> *2. Whether the respondent acted unfairly by not re-evaluating the current position of the applicant alternatively paying her acting allowance."*

20] As concerning the issue of upgrading the post of the employee from post level 8 to level 6, the Commissioner concluded that failure by the applicant to, *"attend to or follow-up the re-evaluation of the applicants post constitutes an unfair labour practice."*

21] In failing to distinguish between a dispute of right and of interest in as far the issue of upgrading of the position from level 8 to 6, the Commissioner committed a fundamental error in law. The grading or evaluation of a post is a matter of mutual interest, there is no agreement between the parties that provides otherwise.

22] In dealing with the distinction between rights and interests disputes Rycroft and Jordan in A Guide to SA Labour Law (1992) on page 169

say:

> "*Broadly speaking, disputes of right concern the infringement, application or interpretation of existing rights embodied in a contract of employment, collective agreement or statute, while disputes of interest (economic disputes) concern the creation of fresh rights, such as higher wages, modification of existing Collective agreements etc. Collective bargaining, mediation and, as a last resort , peaceful industrial action, are generally regarded as the most appropriate avenues for the settlement of conflicts of interests while adjudication is normally regarded as an appropriate method of reserving disputes of rights. "*

23] In dealing with unfair conduct relating to promotion Du Toit et al in Labour Relations Law, Butterworth page 462 say:

> "Employees acting in a more senior position do not have an automatic right to be promoted to that position when it becomes available."

24] 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.

25] In my view the fact that the employee acted in the position for a long time or performed a function of a higher post did not entitle her to be placed in the higher post or her post to be upgraded from post level 8 to post level 6. In other words the fact that the employee acted in the post for a longer period or performed a function of a higher post did not create an obligation on the part of the applicant to promote or upgrade the post of the employee from level 8 to level 6. See in this regard Spoornet and United Transport & Allied Trade Union obo Holtzhause (2003) 24 ILJ 267 at page 270E.

26] Therefore, the employee did not have a right arising from acting or performing functions of a higher post to be appointed to that post or for her post to be upgraded. Thus, in the absence of a right to be appointed to the higher position or the right to have the post upgraded, the Commissioner did not have jurisdiction to entertain the dispute.

Acting allowance

27] As concerning the acting allowance the applicant contended that the

Commissioner's approach was erroneous in that payment of an acting allowance could not fall within the ambit of a benefit as contemplated in s 186 (2)(a) of the LRA. In this regard the applicant relied in support of its submission on the case Schoeman & Another v Sumsung Electronics SA (PTY) Ltd 1997 18 IJL 1098 (LC), where the Court held that payment of commission was part of the basic terms and conditions of employment and was not a benefit but amounted to remuneration. In that case a benefit was described as something which constitutes a material benefits like pensions, medical aid or the housing subsidy that arises out of a contract for four or five.

28] It is trite that an employer would be guilty of an unfair labour practice if its conduct concerns interference with the provisions of benefits to an employee. Because unfair labour practices concern disputes of rights and not of interest, for the CCMA to acquire jurisdiction over unfair labor practice relating to the provision of benefits, it has to be shown that those benefits are provided for in the contract of employment or policy.

29] In Horspesa v Northern Cape Provincial Administration (2000) 21 ILJ 1066 (LAC), Labour Appeal Court, had to consider whether failure by the employer to pay an acting allowance to the nursing sister for

acting as a matron in the absence of an agreement to that effect, was an unfair labour practice. The Court in finding against the nursing sister held that unfair labour practice provision was concerned only with disputes of rights arising *"ex contractu and ex lege."*

30] In the present case there was no evidence before the Commissioner indicating that there existed a right ex *contractus* or *ex lege* for the employee to be paid an acting allowance.

31] The same applies to the issue of standby allowance prior to 1st August 2004, when the standby allowance was extended to other categories of employees including the employee. Prior to this date there was no provision in the contract of employment of the employee or policy entitling the employee payment of standby allowance.

Prescription of monetary claims

32] The second point concerning jurisdiction raised by the applicant relates to prescription. The applicant contended that the bulk of the financial claim raised by the employee had prescribed, is terms of the Prescription Act 68 of 1969. There is authority that the provisions of

the Prescription Act, does apply to the provisions of the Labour Relations Act 65 0f 1995. See Mpanzama *v Fidelity Guards Holding (Pty) Ltd* [2000] 12 BLLR 1459 (LC) and *Cape Town Municipality v Allie NO* 1981 (2) SA 1 (C).

33] In *Uitenhage Municipality v Mooley* 1998 (19) ILJ 757 (SCA), the Court held that the provisions of s12 (1) of the Prescription Act were applicable to a determination of whether the debts which were due to the employee were recoverable in terms of the Basic Conditions of Employment Act 3 of 1983 (the BCEA).

34] The case of the employee is that she should have been paid a standby allowance for the period 10th October 2001 to 30th July 2004. In as far as the acting allowance is concerned; the employee claimed that the acting allowance was due to her from January 1997.

35] In the light of the above, I agree with the applicant that the first respondent did not have jurisdiction to entertain the dispute as framed by the employee. It is for this reason alone that the arbitration award stands to be reviewed. I accordingly do not deem it necessary to deal with the other alleged defects of the arbitration award in as far as the review application is concerned.

36] In the premises the arbitration award of the Commissioner is reviewed and set aside. The arbitration award of the Commissioner is substituted with the following award:

> "The applicant, *Ms SC De Villiers, has failed to prove that the respondent, Polokwane Local Municipality, has committed an unfair labour practice. The applicant's case is dismissed."*

37] There is no order as to costs.

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MOLAHLEHI J

Date of Hearing: 27 November 2007

Date of Judgement: 7th March 2008

APPEARANCES:

For the Applicant: ERNEST HUTCHINSON
Instructed by: Lebea & Associates

For the Respondent: JAN STEMMET
Instructed by: Stemmet & Osman Inc.