

VIC & DUP/JOHANNESBURG/LKS

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO. J937/97

J1284/97

In the matter between:

BALFOUR/SIYATHEMBA TRANSITIONAL LOCAL

AUTHORITY _____ Applicant

and

COMMISSION FOR CONCILIATION MEDIATION AND

ARBITRATION

First Respondent

JULIA TSOTETSI

Second Respondent

—
J U D G M E N T
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MLAMBO, J:

[1] There are two applications before me. One is a review of an arbitration award from the CCMA (the Commission) and the other is in terms of Section 158(1)(c) to make the award an order of court. The applicant in the review is the respondent in the second application. For ease of reference

I will refer to the applicant in the review as the Local authority. The second respondent in the review is the applicant in the second application and I will refer to her as Tsotetsi.

[2] The Local authority requested the court to consolidate the two applications for purposes of enrollment. This request was granted but despite this the Section 158(1)(c) application was enrolled on an unopposed basis on 23 April 1998 and the review application, also on an unopposed basis was enrolled on 6 June 1998. When the Section 158(1)(c) application was called both parties were represented. I ascertained from both parties representatives, Mr Scheepers for the Local authority and Mr Letsimo for Tsotetsi, that they desired both applications to be heard and disposed of that day. I first heard argument regarding the review.

[3] In the review application the Local authority seeks to review and set aside an award made by a commissioner from the Commission. Tsotetsi is an employee of the Local authority. Tsotetsi had applied for a Home Owners Allowance in terms of the Home Owners Allowance Scheme administered by the Local authority.

[4] The property in relation to which she requested the

allowance is situated at no. 6 Rissik Street, Sharon Park, Dunnottar. The council of the Local authority charged with considering such applications refused the application on the ground that Tsoetsi did not qualify for a home owner's allowance in terms of the Home Owners Allowance Scheme. The reason for the disqualification as found by council is that the property is situated outside the jurisdiction of the Local authority.

[5] Another reason advanced by the Local authority for the rejection of Tsoetsi's application was that no agreement had been reached with her as provided in the definition of "reasonable distance" of the Home Owners Allowance Scheme. Therefore she did not qualify for a housing allowance outside the jurisdiction area of the Local authority.

[6] Tsoetsi declared a dispute and referred it for conciliation by the Bargaining Council for the Local authority undertaking. No resolution could be achieved and Tsoetsi requested arbitration under the auspices of the commission. The arbitration was heard by commissioner Nigel Willis.

[7] The commissioner issued an award on 17 September 1997 to the following effect:

"1. The employer wrongfully refused to grant the employee the housing subsidy for which she made application. The employer should grant the employee the housing subsidy for which she made application. The housing subsidy should come into effect retrospectively from the date upon which the decision was made not to grant her the subsidy."

[8] The grounds for review are that:

1. The award is irregular and so grossly unreasonable that it warrants the interference that the commissioner did not apply his mind.

2. It is clear from the definition of the term "reasonable distance" that Tsoetsi was not entitled to a housing allowance as she was residing outside the area of jurisdiction of the Local authority.

3. Her job description does not necessitate and/or justify her inclusion in the housing scheme.

4. The Local authority and Tsoetsi did not reach any agreement in terms of the housing scheme rules to grant Tsoetsi a housing allowance in respect of property outside the jurisdiction area of the Local authority.

5. The Commissioner did not take cognisance of the

definition of "reasonable distance" as provided for in clause 1 of the Home Owners Allowance Scheme when he made his award.

[9] All facts are common cause save for the definition of "reasonable distance". Tsotetsi avers that the definition of within a "reasonable distance" means that she could have property anywhere within the borders of the Republic of South Africa. The Local authority, however, avers that within a "reasonable distance" should only mean that the property should be in its area of jurisdiction.

[10] It is common cause that the issue is governed by the Home Owners Allowance Scheme within the Housing Agreement of the Bargaining Council for the local government undertaking. This agreement is a collective agreement within the meaning of Section 23 of the Act. Clause 2.2 of the agreement reads:
"2.2 Situational requirement:

The property must be situated within the borders of the Republic of South Africa, a self-governing state or an independent state (previously self-governing area) which previously formed part of the Republic and must be within reasonable distance of the local authority where the employee is employed."

[11] Mr Scheepers who appeared for the Local authority

argued that a correct application or explanation of this clause means that the property should be within the jurisdiction of the local authority from which the allowance is sought. Mr Letsimo who appeared for the second respondent argued to the contrary. I was referred to the definitions section of the agreement. "Reasonable distance" is defined as follows:

"For the purposes of the determination of the location of a property deemed to be that distance within the jurisdiction area of the relevant Local authority or any other distance as eventually agreed upon at local level, with cognisance of the job requirements of the relevant employee, provided that prior clearance in respect of new appointments be acquired."

[12] The Housing agreement was agreed to by unions and local authorities under the auspices of the Bargaining Council for Local government undertaking. Tsoetsi's union, The South African Municipal Workers Union, is a party to the agreement which means it binds Tsoetsi as member of this Union. This agreement is therefore a collective agreement within the meaning of Section 23 of the labour Relations Act No 66 of 1995.

[13] It is clear from a reading of clause 2.2 and the definition of "reasonable distance" that to qualify

Tsotetsi's property must either be within the jurisdiction area of the Local authority concerned, the applicant in this case, or the property could be outside such Local authority's jurisdiction area if the parties had agreed to that for purposes of the housing allowance.

[14] The Commissioner's reasons for his award are that:

"Nevertheless the agreement must be interpreted according to law. It is trite that "reasonable" is always to be interpreted by reference to an objective standard and not a subjective one. In other words, a tribunal must try to put itself in the shoes of the ordinary reasonable citizen (which is not the same as the ordinary municipal ratepayer in Balfour) to make the interpretation. In my view, 35kms, is in the circumstances of the employee within a reasonable distance of the Balfour Local authority.

Within a "reasonable distance" cannot be interpreted to mean "satisfy other reasonable requirements."

[15] It is common cause that a copy of the Housing Agreement was submitted to the Commissioner during the arbitration as part of the evidence. Nowhere in the award does the commissioner refer to the definition of "reasonable distance" as provided by the Housing agreement. It appears

that he simply relied on his own interpretation of the phrase and found that 35 km was within a reasonable distance. Whilst I agree with him that in interpreting such clauses an objective standard is applicable. I don't see any basis why he ignored the interpretation of the clause in the Housing Agreement. If there was no definition of this clause in the agreement perhaps his interpretation could be understood. However the definition is contained in an agreement agreed to by the parties. I can find no basis why the definition in the Housing Agreement was ignored or not taken into account.

[16] It is clear that as Tsoetsi's property is situated outside the jurisdiction area of the Local authority she does not qualify for the housing allowance. She could conceivably qualify if there was agreement between her and the Local authority that she can obtain property outside the area of jurisdiction of the Local authority. No such agreement exists. She therefore does not qualify for such allowance on this basis too.

[17] I am therefore of the view that the commissioner erred when he found that Tsoetsi qualified to be granted a home ownership allowance. I therefore find that the Commissioner did not apply his mind to the matter as required by the Act

and for that reason his award is not appropriate and must be set aside in terms of Section 145.

[18] I now have to consider whether it is expedient to refer the matter back to the commission for further attention by another Commissioner. I am of the view that to refer it back would serve no purpose in view of my finding that the language of the House Ownership Agreement is very clear that Tsotetsi does not qualify for the housing allowance. There is therefore no need to refer this dispute back for further consideration by the commission. I therefore determine it on the basis that the applicant does not qualify for the housing allowance.

[19] It is a statement of the obvious that because of my decision to set aside the award the application in terms of Section 158(1)(c) cannot succeed. I therefore dismiss it.

[20] As regards the question of costs, it is correct that although Mr Letsimo, on behalf of Tsotetsi, was allowed to argue, no opposing papers had been filed regarding the review. I do not deem it appropriate to order her to pay costs.

The order I make therefore is that:

1. The award is reviewed and set aside.

2. The court determines the dispute as follows: the second respondent did not qualify for a housing allowance as her property is situated outside the jurisdiction area of the applicant.

3. There is no order as to costs.

4. The application in terms of section 158(1)(c) is dismissed.

5. There is no order as to costs.

MLAMBO J

LABOUR COURT : JOHANNESBURG

For the applicant : Mr Scheepers of Andre van Rensburg
Attorneys

For the respondent : Mr Letsimo of South African
Municipal Workers Union

Date of hearing : 23 April 1998

Date of judgment : 4 June 1998