IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

Not Reportable
Case no: C428/2010

In the matter between:

DEPARTMENT OF HEALTH — Applicant

and

DENOSA OBO BAARTMAN — First Respondent

ARTHI SINGH N.O — Second Respondent

PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL — Third Respondent

Date of Hearing: 19 May 2011

Date of Judgment: 10 October 2011

JUDGMENT

VAN VOORE AJ

1. This is an application in terms of section 145 of the Labour Relations Act (the LRA)1 to review and set aside an arbitration award of the second respondent (the commissioner) handed down in arbitration proceedings under the auspices of the Public Health and Social Development Sectoral Bargaining Council (the bargaining council). The application is opposed by the Democratic Nurses Organisation of South Africa (Denosa) on behalf of Ms Baartman.

2 Ms Baartman is a professional nurse employed by the Department of Health (Western Cape), the Applicant. Baartman has been employed by the applicant since 1988. Baartman is a professional nurse currently employed at the Kraaifontein Community Health Centre. A dispute had arisen between Ms Baartman and the Applicant. The dispute was referred to arbitration and the commissioner made an arbitration award. The dispute concerned, *inter alia*, the interpretation and application of Resolution 3 of 2007, being a collective agreement on the implementation of an 'Occupational Specific Dispensation for Nurses (the OSD)'. In the arbitration award the Commissioner found, *inter alia*, that:

1 66 of 1995.

2.1 The Applicant had not correctly interpreted and applied the OSD for nurses and that Baartman should be 'translated' to the post of Assistant Manager: Nursing with effect from 1 July 2007.

2.2 The answering affidavit in this matter was filed two days late and Denosa on behalf of Baartman has applied for condonation. The degree of lateness is very short. The circumstances that lead to the late filing of the answering affidavit are fully canvassed and explained. A reasonable explanation has been offered. In my view the Applicant has not been unduly prejudiced by the fact that the answering affidavit was filed two days late. Denosa on behalf of Baartman does have some prospects of success and the case is clearly one of importance. In the circumstances condonation is granted.

3 In determining the dispute referred to arbitration no oral evidence was lead. The Applicant and Denosa on behalf of Baartman agreed on a set of material and common cause facts and the commissioner made an arbitration award on the basis of those facts. In this regard the arbitration award specifically records the following:

"2 No evidence was lead. The parties informed me that there was no dispute of fact and it was agreed that the parties would submit written Heads of Argument in writing. This was done. However, it was evident from the Heads of Argument that there was a dispute on the facts. I accordingly requested that the matter be re-scheduled for a hearing. A second hearing was scheduled for the 11 March 2010. The matter was discussed in my presence and the parties reached an agreement on the facts.

3 The parties were requested to provide more detail argument. This was done and the last argument was received on 3 April 2010. The parties also submitted bundles of documents to me.

Background

5 The Applicant is a professional nurse employed by the Respondent at the Kraaifontein Community Health Centre. The parties are in agreement that as at 30 June 2007, the Applicant performed the functions of a manager in that she was the overall nurse in charge at the centre and that she supervised more than one unit.

6 The nursing component of the facility is divided into 3 separate units, namely trauma, anti-retroviral unit and maternity. Each of these units is headed by a unit manager who is a nurse. All these unit managers who were translated to the position operational manager. The three operational managers report to the applicant, who in turn reports to the facility manager.

7 The Applicant was translated to the position of the Operational Manager Nursing Primary Health Care with effect from 1 July 2007.

8 It is the Applicant's case that she ought to have been translated to the position of Assistant Manager Nursing (Primary Health Care) given the functions that she performed at the time of the translation.

9 It is common cause that the Applicant falls under the specialty stream as envisaged in clause 3.1.3 of resolution 3 of 2007. "

Review Grounds

4 The applicant's review grounds are that the commissioner committed misconduct in terms of section 145 of the LRA in that she had incorrectly decided that Baartman had performed the functions of a manager and that she was the "overall nurse in charge" at the Community Health Centre and that the commissioner exceeded her powers in terms of section 145 in making a finding that Baartman should be "translated" to the position of Assistant Manager :Nursing, even though this post was not in existence.

5 However the arbitration award specifically records (paragraph 2) that Denosa on behalf of Baartman and the Applicant reached an agreement on the facts. Those facts are described in paragraphs 5 to 9, *inter alia*, of the arbitration award. The commissioner's arbitration award rests on those agreed facts. Notwithstanding the various attempts by the Applicant, it is bound by the facts that it agreed, in the commissioner's presence, to be common cause and it cannot now escape the ordinary consequences of such an agreement as to common cause facts. In particular one of the

common cause facts recorded by the commissioner is that Baartman "performed the functions of a manager in that she was the overall nurse in charge at the Centre and that she supervised more than one unit" (paragraph 5 of the arbitration award). It is impermissible, on review, for a party to seek to undo an agreed set of facts. Those facts served before the commissioner and both the Applicant and Denosa on behalf of Baartman are bound by those facts.

6 In analyzing the common cause facts and the submissions on behalf of the Applicant and Baartman the commissioner in the arbitration award specifically records the following:

> "24There is no dispute about whether or not the Applicant qualifies for translation. The only issue in dispute is whether or not she was translated correctly. This issue goes to both the interpretation and the application of the agreement.
> …
>
> 26 The purpose of the OSD is to attract and retain nurses in the clinical nursing profession. Clearly the aim is to improve the position of nurses who qualify for translation. There is logic and

> merit in Lose's argument that it cannot be correct that the Applicant now finds herself in an inferior position in relation to her subordinates. The fact that the salary level of the Applicant has improved after translation, does not in itself render the translation correct. Logic and common sense should dictate that it is unfair for the Applicant to be translated to the same position as that of her subordinates. In other words the Applicant's position as a whole, after translation, has not become more attractive. In any event, the Respondent does not dispute the fact that the Applicant is entitled to a position superior to that of her subordinates.
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> …
>
> 27. … I see no reason why the Applicant cannot be translated to the position of Assistant Manager: Nursing at another facility."

7 In light of the common cause facts, which the Applicant cannot now undo, the finding that Baartman "performed the functions of a Manager and that she was the overall nurse in charge at the centre and supervised more than one unit" is properly supported by the material before the commissioner. In the circumstances, there is no proper basis for the Applicant's contention that the commissioner incorrectly decided that Baartman performed the functions of a manager and that she was the overall nurse in charge at the Community Health Centre. In the circumstances that ground of review must fail.

8 The commissioner awarded that Baartman should be translated into the position of "Assistant Manager :Nursing". During the arbitration proceedings the Applicant had advanced no factual or other basis that would stand in the way of this finding made by the commissioner. The commissioner considered the Applicant's arguments or submissions including its contentions that the position of Assistant Manager does not exist at the Kraaifontein facility. At paragraph 27 of the arbitration award, the commissioner concluded that:

> "The agreement does not limit translation to existing posts at the particular establishment where the nurse is employed. Furthermore, I have perused relevant Directives from the Minister which in terms of the collective agreement, provide direction on the manner of implementation of the OSD.
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> …
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> The fact that the Kraaifontein facility is not ready to implement the OSD correctly, does not have to be end of the matter. The Department of Health has under its wing many facilities and institutions. I see no reason why the Applicant cannot be translated to the position of Assistant Manager: Nursing at another facility."

9 The facts before the commissioner support this conclusion.

10 Under our law the test on review is not whether a Court, faced with the facts and circumstances that served before an arbitrating commissioner, would come to the same or different conclusion but rather, whether the commissioner's findings and conclusions falls within a range of reasonableness.

In the matter of *Sil Farming CC t/a Wigwam v CCMA*[2] Van Niekerk AJ held that:

> "A commissioner arrives at a decision which no reasonable decision maker could reach if the decision is unsupported by any evidence, or by evidence that is insufficient to reasonably justify the decision arrived at or where the decision-maker ignores uncontradicted evidence."

Further, in the matter of *Bestel v Astral Operations Ltd*[3] the Court held that:

> "Although the judgment in *Sidumo, supra, superceded* the test for review as contained in the decision of this Court in Carephone (Pty) Ltd v Marcus 1999 (3) SA 384 (LC) [also reported at [1998] 11 BLLR 1093 (LAC) – Ed] at paragraph 37, the following dictum in the latter judgment is helpful in order to illustrate the nature of the test:
> 'Is there a rational objective basis justifying the conclusion made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at..'"

2 unreported LC judgment
[2011] 2 BLLR 129 (LAC) at para 17.

11 In my view the commissioner's assessment of the evidence and the conclusions and findings reached by the commissioner are supported by the facts that served before the arbitration proceedings. The commissioner's award including her findings as to Baartman's 'translation' to the position of Assistant Manager: Nursing at another facility fall within a range of reasonable decisions. In particular this finding of the commissioner does not involve any usurping of the powers of the Applicant. In the circumstances it is impermissible for this Court on review to interfere with the arbitration award.

12 Accordingly I make the following Order:

(a) the review application is dismissed;

(b) theApplicant is ordered to pay the first respondent's costs.

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VAN VOORE AJ

Appearances:

For the Applicant:	Adv. R. Nyman instructed by the State Attorney
For the Respondents:	Adv. GA Leslie instructed by Chennells Albertyn