



**THE LABOUR COURT OF SOUTH AFRICA, DURBAN**

Not Reportable  
Case No.: D615/2023

In the matter between:

**THE MEC OF THE KWAZULU-NATAL  
DEPARTMENT OF SPORT, ARTS AND CULTURE**

**Applicant**

and

**THE GENERAL PUBLIC SERVICE SECTORIAL  
BARGAINING COUNCIL**

**First Respondent**

**BHEKINHLANHLA STANLEY CELE N.O.**

**Second Respondent**

**NKOSIKHONA CYPRIAN DLAMINI**

**Third Respondent**

**Heard: 25 June 2024**

**Delivered: 29 October 2024**

---

**JUDGMENT**

---

**HANSJEE, AJ**



## Introduction

[1] This matter was enrolled for and heard on 25 June 2024. Condonation was granted and thereafter judgment was reserved in respect of the opposed review application.

[2] The Applicant seeks to have the arbitration award made by the Second Respondent in favour of the Third Respondent dated 6 August 2023, under case number GPBC690/2022, reviewed and set aside.

[3] The arbitration award subject to the review application relates to an unfair labour practice involving any unfair act or omission that arises between an employer and an employee involving unfair conduct by the employer relating to the provision of benefits to an employee. The provision of benefits herein relates to the non-payment of an acting allowance that the Third Respondent argued he was entitled to for acting in the positions of Assistant Director and Deputy Director.

[4] The Second Respondent found that the Applicant committed an unfair labour practice for failing to pay the Third Respondent an acting allowance as provided for in the acting allowance policy from January 2021 until July 2023. The Second Respondent awarded in favour of the Third Respondent the difference between salary level 8 and salary level 12 from 01 January 2021 until 31 January 2023 and calculated the acting allowance payable totalling R1 166 537, 75 to be paid by the Applicant on or before 30 September 2023, subject to SARS TAX statutory deductions.

## Background

[5] The Third Respondent is an employee of the Applicant and at the time when the dispute arose, was employed as a Principal Cultural Officer at salary level 8.

[6] On 27 September 2021 the Third Respondent sent a memorandum to the head of Sports, Arts and Culture, Mr N.P. Chonco, in terms of which he motivated to



be paid compensation for being compelled to perform duties of both Assistant Director level 10 and Deputy Director level 12 for the period January 2021, without being officially appointed to act in both those positions. The Third Respondent was not paid any compensation or acting allowance which resulted in him lodging a grievance. The grievance was considered by the Applicant to be invalid, and the matter was considered to be finalised on 14 March 2022.

[7] Aggrieved by the decision the Third Respondent referred a dispute to the First Respondent which remained unresolved at Conciliation on 28 June 2022. The dispute was referred to arbitration which commenced on 11 April 2023 and finalised on 18 July 2023.

#### Grounds Of Review

[8] The Applicant contends that the arbitration award is reviewable in that the Second Respondent:

- 8.1 committed misconduct in relation to the duties of an arbitrating commissioner;
- 8.2 committed a gross irregularity in the conduct of the arbitration proceedings;
- 8.3 exceeded his/her powers; or
- 8.4 that the arbitration award was improperly obtained.

[9] The Applicant submits that the Second Respondent committed a gross irregularity in the conduct of the arbitration proceedings in that he misconceived the nature of the inquiry that he had to undertake as a result thereof he arrived at a decision which is irrational, and which could not have been reached by a reasonable decision maker.

#### Evaluation



[10] Section 145 of the Labour Relations Act<sup>1</sup> provides that any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the commission may apply to the Labour Court for an order setting aside the arbitration award. It is settled in law that the review proceedings are constrained to the record of the arbitration proceedings.

[11] An arbitrating commissioner makes a decision upon evidence presented before him / her during the arbitration proceedings.

[12] The Third Respondent's claim relating to an unfair labour practice was in respect of him being compelled to perform duties of both Assistant Director level 10 and Deputy Director level 12 since January 2021. The Third Respondent's case was that in addition to his role as Principal Cultural Officer: Amajuba District, he performed duties of two additional roles.

[13] The Second Respondent found it fair to order the Applicant to pay the Third Respondent an acting allowance in the higher position between the two positions of Assistant Director and Deputy Director. In paragraph 50 of the arbitration award, the Second Respondent undertakes a calculation and arrives at a total amount of R1 166 537, 75.

[14] In the Applicant's Supplementary Affidavit a calculation is attached as annexure A as to what the allowance payable is. This evidence did not form part of the arbitration proceedings before the Second Respondent.

[15] The parties were not given an opportunity to address the calculation of the acting allowance awarded and neither did the Third Respondent present evidence to properly support the amount as awarded in the arbitration award. Accordingly, the parties were prevented from fairly dealing with the calculation relating to the acting allowance payable.

---

<sup>1</sup> No. 66 of 1995, as amended.



[16] In paragraph 34 of the arbitration award the Second Respondent found favour with the Third Respondent's claim on the basis of an arbitration award under granted under case number GPBC591/2018 in respect of one S.P. Baqwa. The Second Respondent failed to take into consideration that Baqwa's case was indeed substantially distinguishable from the Third Respondent in that there was a formal appointment of Baqwa in terms of the acting allowance policy. Baqwa was the Assistant Director and was formally appointed to the position of a Deputy Director for which position his claim of the acting allowance was made. In paragraph 34 of the arbitration award the Second Respondent finds that Baqwa was paid for acting as an Assistant Director.

[17] Further, the Third Respondent as Principal Cultural Officer, at salary level 8 was compelled to perform duties of both Assistant Director level 10 and Deputy Director level 12 for the period January 2021. This indicates acting in a position that is 4 levels higher. In this regard due consideration and the relevant evidence led in respect of the acting allowance policy has been ignored and the Third Respondent, without justification, found it fair to order the Applicant to pay the Third Respondent the acting allowance in the higher position between the two positions of Assistant Director and Deputy Director, without interrogating the exceptional circumstances and justifiable reasons for the appointment to act in a post which is two or more levels higher than the Third Respondent's current position<sup>2</sup>.

[18] Accordingly, the Second Respondent committed a gross irregularity in the proceedings by considering evidence that was not presented before him in the arbitration proceedings in respect of the calculation and misconducted himself by ignoring relevant evidence in respect of the distinguishable factors in the Baqwa case.

[19] Under the circumstances the Second Respondent produced an unreasonable award.

[20] In the premises, the following order is made:

---

<sup>2</sup> Arbitration bundle A: employer's bundle, clause 7.7 of acting allowance policy, page 48



Order

1. The Arbitration Award dated 6 August 2023 is reviewed and set aside.
2. The disputes subsisting between the Applicant and Third Respondent be remitted back to the First Respondent for Arbitration *de novo* before any commissioner other than the Second Respondent.
3. There is no order as to costs.

S. Hansjee

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant: Adv. G O Van Niekerk SC

Instructed by: State Attorney

For the respondent: Adv. N Lalla

Instructed by: Logan Naidu Attorneys