



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable/Not Reportable

Case no: JS 162/13

In the matter between:

THABO JUBED MESHA

Applicant

and

**DEPARTMENT OF LOCAL GOVERNMENT &
HOUSING**

First Respondent

**DIRECTOR-GENERAL: LABOUR RELATIONS
(R HLONGWANE)**

Second Respondent

Heard: 01 August 2017

Delivered: 24 August 2017

JUDGMENT

MAMOSEBO AJ

Introduction

- [1] The applicant, Mr Thabo Mesha, seeks an order in terms of s77(3) of the Basic Conditions of Employment Act, 75 of 1997 (BCEA), declaring the first respondent, Department of Local Government and Housing (the Department), in breach of an employment contract, damages and compensation equivalent to 24 months' salary at the agreed level of R750 000.00 per annum, from February 2011 or any other suitable relief. The Department has in the meantime altered its name to the Department of Human Settlement but nothing revolves on this alteration.
- [2] The question that falls for determination is whether there was a salary adjustment agreement in existence and, if so, was Mr Mesha entitled to damages and or compensation as claimed as a result of the alleged breach of that agreement?
- [3] The Department advertised a vacant position of Deputy Director: Corporate Communication in the Directorate of Communication Services which Mr Mesha applied for. He received an appointment letter dated 05 February 2008 in terms of which he was offered a salary notch of R311 358.00 per annum (level 11); while the salary range was between R311 358.00 – R360 909.00 (maximum). He accepted the offer by signing the letter of acceptance on 08 February 2008. That was the only written piece of evidence pertaining to his salary that was binding on the parties.
- [4] Mr Mesha claims that the Chief Director in his line function, Mr Victor Moreriane, telephonically advised him to accept the offer at level 11 and allegedly promised to have the salary grade reviewed to level 12 within 12 months. He also claimed that one of the panellists who remained unnamed also commented that he was better suited for level 12 as he had performed well in the interview. However, the salary has never been reviewed nor upgraded to date.
- [5] Mr Mesha completed an application wherein he motivated for his salary upgrade in 15 April 2011. The format applied was such that provision was made for

hierarchical levels for the recommendation and/or approval of the application. Mr Mesha's immediate supervisor, Ms Morongwe Mashoko, Director: Corporate Communications reluctantly recommended the application on 05 May 2011. In her oral evidence, she however clarified the position to the effect that she was asked by Mr Moreriane, her Chief Director and also her immediate supervisor, to sign the recommendation. She did so on condition that Mr Mesha fulfilled the stipulation in this clause in the application for performance review:

'Moreover, Mr Mesha's competencies and ability to help contribute towards the success of the Corporate Communications Unit would have been tested and assessed to warrant a higher salary level.'

She was not satisfied with Mr Mesha's performance and hence not convinced that he qualified for an upgrade.

- [6] According to Ms Mashoko, his performance in 2008/2009 and 2009/2010 was not up to standard. This assertion was corroborated by Mr Moreriane who stated that he was disappointed to learn of Mesha's poor performance because he was aware of Mesha's capabilities. Notwithstanding Mr Moreriane still convinced Ms Mashoko to sign the application on the same date the upgrade was recommended.
- [7] According to Mr Moreriane, he recruited Mr Mesha to apply for the advertised post because they worked together previously and was *au fait* with his competencies and capabilities. Mr Moreriane recruited four candidates, inclusive of Mesha, who all interviewed for and appointed to the level 11 posts, Deputy Directors. Mr Moreriane chaired the interviews and disclosed to the interviewing panel in advance that the candidates were known to him. All four signed employment contracts.
- [8] According to Mr Moreriane, when Mr Mesha applied for this position, he was unemployed and in dire need of an income. No sooner had he been appointed Mr Mesha approached him in his office and discussed his grim financial and

domestic situation and clamoured for the possibility of an upgrade. Mr Moreriane advised Mr Mesha that in government departments the practice is to conduct annual performance reviews with a possibility of an upgrade and that he must bide his time. He strenuously denied having made any promises to Mr Mesha as alleged by him. Mr Moreriane stated that in any event performance reviews fall outside the scope of his responsibilities.

- [9] Ms Motjatji Manong, occupied the position of Acting Chief Business Officer: Corporate Services, the equivalent of a Deputy Director General. She was substantively the Chief Director: Human Capital Management (commonly known as Human Resources). When Mesha's application for an upgrade reached her, she requested a portfolio of evidence from Mr Moreriane to support the application. It is then that Mr Moreriane realised that Mesha's performance was not on par with required standards and expectations. He convened a meeting which was attended by Ms Mashoko and Mr Mesha to address not only an impasse between them but to deal with the issues relating to his application.
- [10] Mr Moreriane stated that Mr Mesha stormed out of that meeting in the midst of discussions. He then came to the realisation that the upgrade sought could not be justified and the information required by Ms Manong was lacking. Nevertheless, no written communication was furnished to either Mr Mesha or Ms Manong by Mr Moreriane to this effect. Despite Ms Manong's letter of reminder to Mr Moreriane nothing was forthcoming. As a result, the application never reached Mr Job Mnguni, The Chief Financial Officer, for his recommendation nor the Head of Department, Mr Mongezi Mnyani, for his approval. I interpose to point out that Mr Tawana, appearing for the respondents, had indicated earlier that he intended calling Ms Manong as the Department's witness. To avoid a piecemeal approach I allowed him to lead her evidence which was not covered when she was led by Mr Mesha. She had been at court from the previous day waiting to testify hence an additional reason for her interposition.

- [11] The last witness called by Mr Mesha was Ms Dineo Gomba, the Senior Legal Advisor and Deputy Information Officer for the Department. She had generated an e-mail addressed to both Mr Mesha and Mr Tawana on 14 May 2014 which reads:

'Mr Mesha, the Department intends to settle this matter internally and consequently you are hereby requested to remove this matter from the roll and provide us with proof thereof.'

- [12] Ms Gomba stated that she wrote the aforementioned e-mail at the request of the Head of Department who at that stage had not been briefed on what had transpired concerning this matter. She advised the HOD of the inconsistencies that she had observed in the Department on issues involving employees. She says she was in a meeting with other colleagues when Mesha's matter was discussed. She acknowledged that she had not familiarised herself with the documents or the contents in Mesha's file. During cross-examination she also expressed the following:

'I think they are in breach of a promise or agreement' She also said: "if there is a process it must be followed through. A memorandum must be signed whether approved or not approved."

This, she conceded, was said without having established what the query by Ms Manong involved. Her criticism of the delay by Ms Manong was unjustified because, evidently, the unavailability of supporting documentation for submission to Ms Manong by Mr Mesha and his immediate supervisors was to blame.

- [13] Mr Mesha claims that internal remedies had been exhausted by April 2012 when he lodged a grievance with the Department, which grievance remained unresolved. He approached the General Public Service Sectoral Bargaining Council (GPSSBC) which referred the matter for conciliation on 10 September 2012 and still remained unresolved as at 12 November 2012. Consequently, it was referred for arbitration. However, based on a jurisdictional point *in limine*

raised by the employer representative, Mr Mesha intimates that his only option was to approach this Court for the appropriate relief.

- [14] The crux of Mesha's case revolved around Moreriane's impugned undertaking which, according to him, amounted to an oral contract which was breached and justified his claim for damages and compensation. Mesha created a very strong hype around this aspect even though it was not backed up by any evidence written or oral; except perhaps, the hope appended around the e-mail by Gomba which made reference to the settlement of the matter internally.
- [15] Ms Gomba as a witness did not strike me as open-minded and objective. She levelled an unwarranted scathing accusation against Manong that she unduly kept this application in abeyance without processing it for approval based on conjecture as she had no intimate knowledge of the matter. As the department's legal advisor she should have been more circumspect.
- [16] Returning to the conversation between Mesha and Moreriane. Mesha alleged the following in his statement of case:

'I realised when presented with the employment contract that the salary notch presented to me during negotiations differed to what was promised. I raised my concerns with the Chief Director Moreriane and we reached a verbal agreement to upgrade the salary to the next level 12 upon completion of my probation after February 2009.'

- [17] This assertion cannot be correct and it was not supported by any of his witnesses who were his seniors at the time. They provided a different perspective on how the process works as well as who the authorised functionaries were relative to appointments and salaries. I am not persuaded that there was an oral agreement that varied the terms of the appointment contract which Mesha accepted on 08 February 2008. Clearly, as stated by Moreriane and Manong, Moreriane also had no authority to vary the terms of that contract. Moreriane testified that he never promised nor did he enter into an oral agreement with Mesha.

- [18] I perceived Moreriane as a credible witness who stated that he knew Mesha before the interview that led to the appointment; in fact, he recruited him. He advised Mesha to wait for the review process and was adamant that no promises were made to him. Moreriane repeatedly emphasised how he actually empathised with Mesha who was in financial dire straits. He even remarked that he seemed to gain the impression that Mesha's poor performance could have been ascribed to his domestic challenges. Moreriane stated that this was an aspect normally overlooked by supervisors and seniors which is why he became the peacemaker between Mesha and Mashoko, his immediate senior.
- [19] Notwithstanding the fact that all the four witnesses seemed to state that a person could negotiate a better salary after the interview but before the formal appointment, Mashoko, Moreriane and Manong emphasised that the negotiation for a better offer of the salary had to be with the Human Capital Unit (HR) and must precede the written offer. The Head of the Department was the accounting officer authorised in terms of prescripts to approve the final offer which would be followed by a written offer to the successful candidate. None of the other superiors could vary the terms of the written offer except when a candidate qualified for a revised salary based on his or her annual performance review which followed a specific process.
- [20] There was no dispute raised concerning the validity of the employment contract that Mesha signed. He seems to have contrived the basis for his grievance on an informal telephonic conversation he had with Moreriane: that a promise was made to upgrade his salary level from Grade 11 to Grade 12. Be that as it may, how an informal discussion of a future uncertain event could be perceived to trump a written contract with concrete incontrovertible terms is difficult to fathom. Scott JA in *HNR Properties CC and Another v Standard Bank of SA Ltd* 2004 (4) SA 471 (SCA) at 479C reiterated the following:

'In SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere 1964 (4) SA 760 (A) this Court held that a term in a written contract providing that all amendments to the contract have to comply with specified formalities is binding.

*The principle has been consistently reaffirmed, most recently by this Court in **Brisley v Drotsky** 2002 (4) SA 1 (SCA). (A non-variation clause is not necessary in a contract of suretyship by reason of the provisions of s 6 of Act 50 of 1956 – **Tsaperas and Others v Boland Bank Ltd** ...– but that does not detract from the legal force of such a clause where it exists.) Courts have in the past, often on dubious grounds, attempted to avoid the Shifren principle where its applications would result in what has been perceived to be a harsh result. Typically, reliance has been placed on waiver and estoppel. No doubt in particular circumstances a waiver of rights under a contract containing a non-variation clause may not involve a violation of the Shifren principle, for example, where it amounts to a pactum de non petendo or an indulgence in relation to previous imperfect performance. (For an interesting discussion on the topic, see Hutchison ‘Non-variation Clauses in Contract: Any Escape from the Shifren Straitjacket’ (2001) 118 SALJ 720.)”*

It must be borne in mind that Mesha’s appointment was made in 2008 and the application for the salary upgrade was only launched in 2011 without challenging the validity of the existing contract.

[21] Mesha brought his dispute under s77(3) of the BCEA which stipulates:

‘The labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of the contract.’

[22] As pronounced by Ngcobo J in **Barkhuizen v Napier** 2007 (5) SA 323 (CC) at 343C (**Barkhuizen**) (para 65):

‘[65] Indeed, many people in this country conclude contracts without any bargaining power and without understanding what they are agreeing to. That will often be a relevant consideration in determining fairness.’

[23] I am not persuaded that the applicant has made out a case for a claim of damages and compensation as prayed for. The application must therefore fail.

[24] The general principle is for costs to follow the event. It remains within the discretion of this Court whether to award costs depending on the circumstances. Mr Mesha was unrepresented in these proceedings. Taking cue from the pronouncements by the Constitutional Court in the *Barkhuizen's* judgment at para 90 (para 22 above) in respect of costs the following is paramount:

'The determination of these issues is beneficial not only to the parties in this case but to all parties involved in contractual relationships. In these circumstances justice and fairness require that the applicant should not be burdened with an order for costs. To order costs in the circumstances of this case may have a chilling effect on litigants who might wish to raise constitutional issues. I consider therefore that the parties should bear their own costs.'

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

1. The application is dismissed;
2. Each party is ordered to carry his or its own costs.

MC Mamosebo

Acting Judge of the Labour Court of South Africa

APPEARANCES:

FOR THE APPLICANT:

Mr TJ Mesha (in person)

FOR THE RESPONDENTS:

Mr S Tawana

Malebye Motaung Mtembu Inc

LABOUR COURT