REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not reportable

CASE NO: C 139/11

In the matter between:

CYNTHIA DAVIS **APPLICANT**

and

FALSE BAY COLLEGE (WESTLAKE CAMPUS) **RESPONDENT**

Heard: 25-26 February 2013
Judgment delivered: 30 April 2013

JUDGMENT

VAN NIEKERK J

Introduction

[1] In January 2008, the applicant was employed by the respondent as a lecturer in English. She remains so employed. The applicant contends that she was underpaid during the period July 2008 to December 2011, and claims R190

LABOUR COURT

025.85 from the respondent. The basis of the applicant's claim is that at the time of her appointment, she was engaged as a permanent employee and that her agreed monthly remuneration would comprise a basic salary, plus 37% of that amount in lieu of benefits. In the alternative, the applicant contends that if it should be found that she was engaged as a contract worker (i.e. an employee not permanently employed), then she is entitled to the 37% premium in terms of clause 11 of Public Service Co-ordinating Bargaining Council Resolution 1 of 2007. In the further alternative, the applicant contends that she is entitled to the 37% premium on the basis that by refusing to pay her the premium, the respondent has and continues to discriminate unfairly against her.

[2] The respondent disputes that it is liable to the applicant and has in turn brought a claim in reconvention claiming R79 113, 85, the amount by which it contends that the applicant has been overpaid since March 2009.

Factual background

[3] The applicant was previously employed by the provincial department of education (the WCED), as an English teacher and head of department, at the Wynberg Girls High School. In 1973, she was medically boarded.

[4] In 2007, the applicant responded to an advertisement placed by the respondent for a lecturer in English. She was invited to an interview. The applicant's recollection of the interview was poor, but she maintained that she was offered and that she accepted employment as a permanent employee at the rate of remuneration for which she contends. This was denied by both Fenn and Hoon, who testified that although the advertisement was silent on the point, the post was for a fixed term and that this was communicated to the applicant. It is not disputed that the applicant received an sms from the respondent offering her the position of lecturer in English at the respondent's Westlake campus, and that she replied by sms, accepting the offer.

LABOUR COURT

[5] The applicant's employment was uneventful until July 2008, when she was paid less than the amount paid to her in previous months. This continued for some six months, after which the amount previously paid was reinstated, at least mid March 2010. This course of events was triggered by what the respondent says was the erroneous impression that clause 11 of Resolution 1 of 2007, a collective agreement concluded by the bargaining council, applied to the applicant. Clauses 11.3 and 11.4 of the Resolution read as follows:

> '11.3 A contract worker means a person employed for a fixed term, including an educator appointed in a temporary capacity, but excluding a casual worker or an employee to whom a retirement age applies.
> 11.4 The benefits attached to the appointment of a contract worker shall be granted on the following basis:
> 11.4.1 A contract worker employed for less than six months shall receive his/her basic salary plus 37% in lieu of benefits, excluding leave benefits.
> 11.4.2 A contract worker employed for six months or longer shall receive his or her basic salary plus benefits (excluding leave benefits) or his/her basic salary plus 37% in lieu of benefits (excluding leave benefits)
> 11.4.3 Leave entitlements for a contract worker shall be granted on a pro rata basis linked to the term of his/her contract.'

[6] The respondent contends that since the applicant had retired from the service of the WCED, on a correct application of the terms and conditions of employment applicable to WCED employees (and hence to the applicant), she was not entitled to payment of 37% of basic salary in lieu of benefits, and that the amounts paid to her on a monthly basis from January to June 2008 (inclusive) and from January 2009 to March 2010 were paid erroneously.

The issues

[7] The first issue to be determined is whether the applicant was employed as a permanent employee, on the basis that she would be paid a basic salary plus 37% thereof in lieu of benefits.

LABOUR COURT

[8] In the applicant's pleadings, two versions were advanced. In her statement of case, the applicant averred that the terms of the contract were that she was appointed on a full time permanent basis at a gross monthly salary of R17 615.11. In the applicant's replication, she states that she accepted an offer of remuneration in an amount equivalent to that paid to her when she had been employed by the WCED as a category F teacher, subject to the same percentage annual increases accorded to WCED teachers. She avers that at the time of her employment at Wynberg Girls High School, she received a basic salary plus 'an additional payment equivalent to 37% of her basic salary in lieu of benefits'. These versions are contradictory. At the time of the applicant's employment at Wynberg Girls, she was a permanent employee and as such, was not entitled to the 37% premium payable to contract workers. In any event, her employment with the WCED terminated some five years before the adoption Resolution 1 of 2007, which created a right on the part of contract workers to a payment in lieu of benefits. This in itself is determinative of the present dispute – if the applicant's version (i.e. that her salary would be determined by reference to what she had previously earned as a WCED employee), this would not entitle her to the relief that she seeks. The applicant could not have understood that at the time of her employment by the respondent, by pegging her salary to that of her previous WCED remuneration, she was entitled to an additional payment of 37% on top of her basic salary.

[9] It is not disputed that the advertisement to which the applicant responded was silent on the nature of the post and the remuneration offered. The applicant's recollection of the interview at which the nature of her position and her remuneration were discussed was poor. She stated that she simply assumed that the post was permanent, and that no- one indicated otherwise to her. In contrast, Fenn testified that most lecturer posts were offered for a fixed term, since they were dependent on the number of students registering each year for the course concerned.

LABOUR COURT

[10] Fenn testified that posts such as that offered to the applicant were funded by the state, and that the remuneration attached to the posts was based on WCED pay scales. The respondent had no authority in terms of its funding model to depart from those parameters. This evidence was confirmed by Hoon, who confirmed that since the enactment of the Further Education and Training Colleges Act, 2006, the WCED ran the respondent's pay roll and determined rates of pay by reference to all of its rules and regulations. There were exceptional cases, where lecturers' posts were funded from sources other than the WCED, in which case the additional amounts were accounted for on the respondent's own payroll. It is not disputed that the applicant's post did not fall into this category.

[11] Hoon testified that she informed the applicant that her salary would be determined by the WCED, and that until the first payment was made, neither party was aware of the precise amount that would be paid. This evidence is corroborated by the personal information form completed by the applicant on 8 January – the entry for 'rate of pay' was left blank. Had the applicant agreed to remuneration in a specific amount, this would have been reflected on the personal information form completed by the applicant and communicated to the WCED. There would also have been no need for the applicant to complete the WCED's A2 application forms. The information provided in those forms could only have had as its purpose the application by the WCED of its regulations to determine the applicant's salary. Hoon testified that she informed the applicant of this fact, and there is no reason to call her evidence into question.

[12] Further, the applicant's conduct indicates that she was aware both that her appointment was for a fixed term and that her salary was to be paid by the WCED according to its rules and regulations. First, the applicant does not dispute that she completed a personal information form on 8 January 2008 in which she indicated that her post was 'contract' as opposed to 'permanent' or 'part- time'. The applicant also does not dispute that she periodically completed WECD "Application forms for a teacher post" for submission to the WECD. Fenn clearly recalled interviewing the applicant, and both he and

LABOUR COURT

Hoon stated that the nature of the post would have been disclosed to all applicants. Hoon's evidence that towards the end of 2009 the applicant applied for a new post, was interviewed and appointed was not contested. After the applicant had sought assistance from her attorneys, she entered into more than one fixed term contract 'under protest' but her current contract was concluded on an unqualified basis. Further, when for the first time the applicant's salary was paid without the 37%, she took up the issue with the WCED, not the respondent. The applicant's conduct in this regard is also consistent with the correspondence that she addressed to the WCED on 4 September 2008, which in essence is an appeal to the WCED to apply its regulations correctly. There is no mention in that correspondence of any agreement to the effect that the applicant be paid other than in accordance with WCED rules. On the contrary, the applicant's complaint was that '*There can be no principled or legitimate reason whatsoever, why my salary should be adjusted downward simply because I receive a pension. A circumstance like this is discriminatory and unethical, and denies me the right to equity and parity*.'

[13] On a conspectus of all the evidence, in my view, the probabilities are that the applicant has been employed on a series of fixed term contracts from 1 January 2008 to date, on terms to the effect that she would be paid in accordance with WECD policy and regulations.

[14] The question that then arises is whether, as a contract employee, the applicant is entitled to payment of the 37% premium in lieu of benefits. In so far as the applicant relies on PSCBC Resolution 1 of 2007 (and assuming for present purposes that Resolution 1 is at least indirectly binding on the parties) it is not disputed that the resolution is a collective agreement for the purposes of s 24 of the LRA. That being so, as required by s 24 and clause 19 of the agreement, any dispute about the application and interpretation of the agreement must be dealt with by the council's dispute resolution procedures, i.e. conciliation and arbitration. This court does not have jurisdiction to entertain such a dispute, except where the interpretation of a collective

LABOUR COURT

agreement is ancillary to the main issue in dispute. The applicant's case is that the respondent failed to apply the agreement correctly and that on a proper interpretation of the agreement, she is entitled to be paid the premium she claims. This is squarely a matter of interpretation and application, and therefore not one in respect of which this court has jurisdiction.

[15] In any event, and even if it were open to the applicant in these proceedings to rely on the terms of the Resolution as the basis for her claim, there are at least two arbitration awards issued in circumstances similar to the present in which it has been held that a medical boarding constitutes a retirement for the purpose of clause 11.3. In *SADTU obo MMS Bezuidenhout and Dept of Education Western Cape* (PSES 334-10/11WC) and *SADTU obo Jacobs and Dept of Education Western Cape* (PSES 99-11/11WC) the arbitrators respectively held that applicants who had been medically boarded are to be regarded as having reached retirement age, that they were therefore not contract workers for the purposes of Resolution 1 and therefore not entitled to the 37% allowance. The logic of this decision is unassailable – those employees (like the applicant) who retire early for medical reasons are in receipt of benefits in their capacity as pensioners, including a contribution to medical aid funding. The *raison d'etre* of the Resolution is clearly to provide contract workers with benefits, since they are not ordinarily in receipt of them. There is no reason to call the correctness of the arbitrators' rulings into question; on the contrary, in my view, they represent a proper interpretation of clause 11 of Resolution 1.

LABOUR COURT

Unfair discrimination

[16] In so far as the applicant contends that the respondent unfairly discriminated against her, her claim is based directly on s 9 of the Constitution. The Constitutional Court has held that it is not permissible for an applicant to base a claim directly of the Constitution in circumstances where legislation has been enacted to give effect to the right relied upon (see *SANDU v Minister of Defence* 2007 (5) SA 400 (CC)). In that judgment (at paragraph [248]) Ngcobo J said the following:

'We have recently adopted the constitutional principle that where legislation has been enacted to give effect to the provisions of the Constitution, it is impermissible for a litigant to bypass that legislation and rely directly on the provisions of the Constitution in the absence of a constitutional challenge to the legislation so enacted. We formulated this principle as follows in *SANDU*, in the context of section 23(5) of the Constitution:

> ". . . where legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard."

Explaining the rationale for this principle, we said:

> "Accordingly, a litigant who seeks to assert his or her right to engage in collective bargaining under section 23(5) should in the first place base his or her case on any legislation enacted to regulate the right, not on section 23(5). If the legislation is wanting in its protection of the section 23(5) right in the litigant's view, then that legislation should be challenged constitutionally. To permit the litigant to ignore the legislation and rely directly on the constitutional provision would be to fail to recognise the important task conferred upon the legislature by the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights…'

[17] The applicant's referral to the CCMA and subsequently the bargaining council makes no reference to any act of unfair discrimination, nor does it invoke s 6 of the Employment Equity Act, the legislative embodiment of the constitutional right of equality in the workplace. To the extent that the applicant's claim of a right to equality is advanced only on the basis of the direct application of s 9 of the Constitution and the submission that the applicant has been discriminated against on the basis of her state of health (or former state of health), the claim must fail.

LABOUR COURT

Claim in reconvention

[18] Given that the respondent's version has been preferred, there is no reason to deny the respondent its claim in reconvention, based as it is on the bona fide and reasonable but erroneous belief that the applicant was entitled to payment in terms of clause 11 of Resolution 1. This basis of the claim was not the subject of any serious challenge. The respondent's claim in reconvention therefore stands to be upheld.

Costs

[19] Finally, in relation to costs, the court has a broad discretion in terms of s 162 of the LRA to make orders for costs according to the requirements of the law and fairness. In the present instance, while the respondent has succeeded in its defence of the applicant's claim and its claim in reconvention, the applicant has pursued her claim to that which she believes she is entitled in good faith. The court ought to be mindful of the effect that costs orders might have on individual employees who in circumstances such as the present approach the court for the adjudication of their claims. Orders for costs routinely granted may well have the effect of discouraging individuals from referring disputes against their employers to court, thus creating the impression that justice is denied those who do not have the means to fund a potential adverse order for costs. I also take into account the fact that the applicant continues to be employed by the respondent, and the prejudice that an adverse costs order might present to the employment relationship. Finally, the conduct of the respondent in addressing the enquiries made by the applicant regarding her salary has been less than exemplary, to say the least. I would venture to suggest that had the respondent acted promptly and supplied the applicant with the information and explanations that she sought, this case may not have seen the light of day. Instead, the respondent appeared content to pass the proverbial duck and failed actively and expeditiously to take steps to resolve the issues that had arisen concerning the terms of the applicant's employment.

LABOUR COURT

For these reasons, I make the following order:

1. The applicant's claim is dismissed.
2. The respondent's claim in reconvention is upheld. The applicant is ordered to pay the respondent the sum of R 79 113.52, together with interest thereon at the rate of 15.5% from date of payment of the amounts overpaid.
3. There is no order as to costs.

Andrè van Niekerk
Judge of the Labour Court

Appearances

For the applicant: Mr. W Field, Bernat Vukic Potash & Getz, Cape Town

For the respondent: Adv. Leslie, instructed by Harold Gie, Cape Town

LABOUR COURT