

RESCISSION RULING

Panellist/s: Leonard van Leeuwen
Case No.: GPBC 1581/2020
Date of Ruling: 13 August 2021

In the MATTER between:

Department of Home Affairs
(Union / Applicant)

and

PSA obo Molepo, M E
(Respondent)

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DETAILS OF HEARING AND REPRESENTATION

1. This is an Application for Rescission of a Ruling that I had issued on 17 June 2021, under Case Number GPBC 1581/2020 in the dispute between Department of Home Affairs, the Applicant ("the Affected Party") and the PSA obo Molepo, M E, the Respondent, at the Arbitration Hearing held on 17 June 2021, at the offices of the Applicant in Witbank.
2. The Applicant had, referred an Unfair Labour Practice Dispute to the Bargaining Council in terms of Section 186(2)(a), in relation to promotion after she had applied for a position but had been unsuccessful in her application.
3. The matter was set down for an Arbitration Hearing on 17 June 2021 at 09:00 at the offices of the Applicant in Nelspruit. The Respondent and the commencement of the arbitration raised a preliminary point namely that they had subpoenaed certain information from the Applicant who had not provided such to them namely the minutes of the interviewing panel, copies of the first three listed Applicants CV's and qualifications, the submission by the interviewing panel recommending the incumbent and the score sheets of all the shortlisted candidates and requested that I instruct the Applicant to make available such information to them. The Applicant had opposed the said request and stated that the Respondent should make a formal application in this regard as required by the Promotion to Access to Information Act as the information is privileged. After having listened to both parties' submission I made a ruling in terms of Rule 30 of The Rules for The Conduct for Proceeding Before the General Public Service Sector Bargaining Council (GPSSBC) ordering the Applicant to disclose the said information to the Respondent as I viewed it to be in the interested of fairness and relevant in order for me to determine the dispute fairly.
4. The Applicant filed an application for Rescission of the ruling on 30 June 2021 as per the documents attached. Proof of service to the Respondent was attached. The Respondent filled their notice to oppose the application and answering affidavit with the Council on 13 July 2021 where after the Applicant filed their replying affidavit with the Council on 19 July 2021.
5. The Rescission application was determined on paper by me on 10 August 2021.

ISSUE TO BE DECIDED

6. I am required to determine whether the dismissal ruling should be rescinded in accordance with Section 144 of the Labour Relations Act 66 of 1995 as amended (The LRA).

SURVEY OF PARTIES SUBMISSIONS AND ARGUMENTS

Submissions by Applicant

7. The Respondent was informed that the records of the interviews can only be made available to her by the information officer after she had made an application in terms of section 18(1) of the Promotion of Access to information Act 2 of 2002 which she had failed to do. This was also brought to the Panellist attention during the arbitration as the documents cannot be made available without the proper procedure being followed due to reasons relating to confidentiality.
8. In terms of Section 11 of the Promotion of Personal Information Act, 4 of 2013 one requires consent from the person whose information is requested. The Act further at section 19 requires that the information remain confidential and secured. The ruling also did not take into consideration section 14 of the Constitution of the Republic of South Africa which provides that everyone has a right to privacy. They however acknowledge that everyone has a right to access to information held by the state in terms of Section 32 of the Constitution subject however to following the correct procedure and should said officials become aware that their information was provide without the correct procedure being followed it could lead to claims against the Department.
9. Some of the information requested of employees are private and confidential and cannot be disclosed without the consent of the employee.
10. Section 210 of the LRA is noted but that the Constitution is the supreme law of the Country and supersede any other law.
11. The Panelist did not take the above into account when he made his ruling and as such, they believe the ruling was made erroneously and as such they are entitled to a rescission of the ruling in terms of section 144(a) and (b) of the LRA.

Submissions by Respondent

12. The Promotion of Access to Information is not the only source through which information could be requested.
13. Rule 30 of the Rules for the Resolution of disputes before the Bargaining Council states that any party to an arbitration may request an Panellist to make an order as to the disclosure of relevant documents or evidence. And that these rules are contained in Resolution 3 of 2017 which was signed by both parties which is binding on both parties.
14. Section 16 of the LRA makes provision for the disclosure of information and should there be a dispute with regards to such disclosure a dispute can be referred to the Commission in terms of section 16(10) of the LRA for determination by a Commissioner.
15. That section 210 of the LRA states that if there is any conflict relating to matters being dealt with by the LRA, arises between the LRA and the provision of any other law, except the Constitution or any law expressly amends the LRA, the provisions of the LRA would prevail.
16. The panellist asked what is confidential about a Curriculum Vitae (CV) and the Applicant could not indicate accept that it is confidential. If there is any confidential information, it can be scratched out. They could also have acquired from the employees involved if they had any objection to providing the said information which was not done. The employees in question had waived their right to privacy when they willingly submitted their CV's when they applied for the position and as such cannot bring a claim against the Applicant as they would have been aware that the Constitution makes provision that everyone has the right to accesses information which is held by the State.
17. Section 23 of the Constitution states that everyone has the right to fair labour practice which would therefore include the right to accesses to information as provided in in section 32 of the Constitution.
18. The correct procedure was followed when the Council issued a subpoena, and the Commissioner thereafter made a ruling in respect of the information that it must be disclosed.
19. The Applicant has failed to show that they have sufficient and overwhelming cause to justify the ruling be rescinded.

20. **ANALYSIS OF SUBMISSIONS AND ARGUMENTS**

21. Section 144 of the LRA provides that any Commissioner who has issued an Arbitration Award or Ruling, or any other Commissioner appointed by the Director for the purposes, may on that Commissioner's own accord or on the Application of any affected party, vary or rescind an Arbitration Award or Ruling -
- a) erroneously sought or erroneously made in the absence of any party affected by that Award;
 - b) in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission;
 - c) granted as a result of a mistake common to the Parties to the proceedings; or
 - d) made in the absence of a Party, on good cause shown.
22. The application is brought in terms of Section 144 (a) and (b) of the LRA.
23. In terms of Rule 33 of the Rules, an application for the variation or Rescission of an Arbitration Award or Ruling must be made within fourteen (14) days of the date on which the Applicant became aware of the Arbitration Award or Ruling.
24. The ruling which the Applicant is seeking to rescind was issued on 17 June 2021. The Application for rescission was submitted on 30 June 2021 which is within the required 14 days as stipulated in the Rules.
25. In the ruling I ordered that the Applicant must make available the minutes of the interviewing panel, the score sheets of the short-listed candidates, the recommendation of the interviewing panel and the CV's of the first three rank candidates to the Respondent.
26. The Applicant is seeking to rescind the said ruling in terms of section 144 (a) and (b) of the LRA as they are of the view that the ruling was erroneously issued by myself as I had failed to take into account the prescriptions of Section 18 of the Promotion Of Access to Information Act, 2 of 2002 which provided that an application should be made on a prescribed form to the Information officer to gain access to information, Section 11 of the Protection of Personal information Act, 4 of 2013 which deals with consent, justification and objections in relation to information requested as well as section 14 of the Constitution of the Republic of South Africa, 1996 which states that everyone has the right to privacy.
27. The Bargaining Council is accredited by the Governing Body of the CCMA in terms of section 127 of the LRA as amended to perform dispute Resolution functions. Section 28(1) (d) of the LRA as amended provides for the Council to perform dispute resolution functions in terms of Section 51 of the LRA

28. To enact the above the parties to the Bargaining Council signed a Collective Agreement, 3 of 2017 namely the Rules for the Conduct of Proceedings before the GPSSBC which was drafted in terms of the Councils Constitution which would apply in the resolution of disputes before the Council.

29. Section 210 of the LRA further states

“If any conflict, relating to the matters dealt with in this Act, arises between this Act and the provisions of any other law save the Constitution or any act expressly amending the Act, these provisions of the Act will prevail.”

30. Having regard to the above I dealt with the application for access to information in terms of Rule 30 of the Rules for Conduct of Proceedings before the GPSSBC. Rule 30 (1) reads as follow.

“At any time after the request for arbitration, either party may request a panellist to make an order as to the disclosure of relevant documents”

31. I am of the view that a delt fairly with the application for information based on the authority or discretion given to me in terms of Rule 30(1) of the Rules.

32. Section 144 (a) means that a ruling or award made in the absence of a party is erroneously made and may be rescinded or varied-

31.1 If there was an irregularity in the proceeding such as where proper notice of set down was not given which was not the case in this instance as both parties where present on day in question; or

31.2 If it was not legally competent for the Commissioner to make the ruling or award such as where the Council did not have the jurisdiction to make such a ruling which is also not the case; or

31.3 At the time the ruling or award was issued there exist facts which the Commissioner was unaware of at the time he made the ruling, which would have precluded him from making such a ruling. It is basically on this ground that the Applicant is relying on in their application.

32 It needs to be mentioned that the Respondent had already applied for a subpoena which was issued by the Council with regards to the above-mentioned information which the Applicant despite being served with had refused to comply with hence the Respondent bringing the same application once again before me.

33. Both parties were given an opportunity to address me on the issue regarding the issue in dispute namely the information that was requested. The Applicant raised and addressed me on the same issues which they are relying on in the present application. As such there is no new information or facts brought to my attention that would render me to make a different ruling as I am of the view that the Applicant had sufficient time when they were served with the subpoena to engage with the persons whose information forms the subject of the ruling to inform them that their information was requested and that it would form part of the subject matter in litigating of this the said main dispute relating to the issue surrounding promotion. They were given a further opportunity to engage with the people in question after my ruling to inform them of such, yet it appears they had not done so. Surely one would not expect them to divulge information such as identity numbers, phone numbers and residential addresses of the persons whose information is requested to the Respondent as it does not have any bearing on the dispute and would be regarded as privileged or protected information. This information can as such be deleted before the CV's are provided to the Respondent.
34. The Applicant is a State entity whose dealings and operations are open to scrutiny by the Public and as such any documents in their possession is open to scrutiny if it in my view does not relate to the security of the Country as provided for in section 32 of the Constitution.
35. I am further of the view that the information is relevant for the fair determination of the dispute as the Applicant's conduct in selecting and appointing a person to a position is in question is under scrutiny, which is inline with section 23 of the Constitution which states every person the right to a fair labour practice.
36. The Applicant further relied on section 144(b) of the LRA for a ground in applying for rescission of the ruling. This section does not provide for the amendment of a decision but is rather intended to allow for ambiguities such as the amount of compensation to be clarified if the Panellist had failed to indicate it or for the correction of the spelling of names and calculation errors to be corrected to name a few which none was brought to my attention in this application. Nor is open to a party to apply for rescission on the grounds that the Panellist reasoning is incorrect. If this is the situation then the ruling should be taken on review.
37. Having regard to the above I find that the Applicant had failed to provide justifiable reasons for the ruling to be rescinded and such their application stand to fail.
38. I make the following Ruling below:

RULING

39. The Application for Rescission is granted.
40. The Ruling that I issued under Case Number GPBC 1581/2020, dated 17 June 2021, remains the outcome on record.
41. The Bargaining Council is directed to reschedule the matter for Arbitration.

Signed and dated at **EMALAHLENI** on this the **13TH** day of **August 2021**.

A handwritten signature in black ink, appearing to be 'L. van Leeuwen', enclosed within a large, loopy oval stroke.

Leonard van Leeuwen
Panelist