IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Not Reportable

Case no: DA 22/ 2021

In the matter between:

KWADUKUZA MUNICIPALITY	**Appellant**
and	
U LUTCHMAN	**First Respondent**
RSM MZOLO	**Second Respondent**
SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL (SALGBC)	**Third Respondent**
G GERTENBACH NO	**Fourth Respondent**

Heard: **14 September 2023**
Delivered: **02 May 2024**
Coram: **Waglay JP; Mlambo JA and Malindi AJA**

JUDGMENT

MALINDI AJA

Introduction

[1] The two employee respondents, Mr Lutchman and Mr Mzolo, were employed by the appellant Municipality on 3 October 2005 and 23 June 2005, respectively.

[2] On 19 July 2006, the Municipality passed a resolution (2006 Resolution) to the following effect:

'1. That the salary grade of Electricians be changed from level 6 to level 6/ 5 with effect from 01 July 2006.
2. That all Electricians (Level 6) who has [sic] been in the employ of Council for 5 years and more, having Medium Voltage experience… and have passed the … Switching Course at Ethekwini Metro Training Centre, be advanced to the bottom notch of level 5:
(a) Electrician - less than 5 year's continuous service (Remain on post level 6) until condition (b) below is satisfied.
(b) Electrician - 5 years and more continuous service (Be advanced to the bottom notch of level 5…'[1] [Own emphasis]

[3] At the time of the resolution, Mr Lutchman and Mr Mzolo were salary grade level 6 employees employed as assistant artisan electricians. Upon satisfying the criteria set in the resolution, they would advance to salary grade level 5 in terms of a system referred to as the '*Van der Merwe System'* (Old System). According to this grading, the lower the level, the higher the salary.

[4] The two employees met the criteria on 2 October 2010[2] and 22 June 2011, respectively. However, before they reached the period of experience in years and before completing the training levels required, the South African Local Government Association (SALGA) sought to introduce a uniform job grading system across municipalities. This process was conducted by the Principal Job Evaluation Committee and its results were moderated by the National Moderation Commission. It resulted in the adoption of a new grading system referred to as the '*Task Grading System*' (New System) which included the categorisation of artisan electricians at Task Level Grade 10, being equivalent to the Van der Merwe Level 6. The new grading was with effect from 1 July 2010.

[1] Record vol 1 at p 67.
[2] Record vol 2 p 178 at para 4.6.

[5] On the same day, 1 July 2010, SALGA, the Independent Municipal and Allied Trade Union (IMATU) and the South African Municipal Workers Union (SAMWU) (trade unions) entered into a collective agreement entitled the "*Categorisation and Job Evaluation Wage Curves Collective Agreement*" (Collective Agreement). The result is therefore that a collective agreement came into being which binds municipalities across the board to adopt this categorisation.[3]

The parties

[6] The appellant is KwaDukuza Municipality, a municipality established in terms of the Local Government: Municipal Structures Act[4] (Systems Act).

[7] The first respondent is Mr Lutchman, an employee of the appellant.

[8] The second respondent is Mr Mzolo, an employee of the appellant. Counsel for Mr Lutchman informed the Court that Mr Mzolo's whereabouts are currently unknown as he has failed to respond to any process of court. Therefore, this appeal proceeds only in respect of Mr Lutchman.

[9] No relief is sought against the SALGBC, the third respondent.

[10] The fourth respondent is Mr Gertenbach, cited in his official position as the arbitrator under the auspices of the SALGBC. No relief is sought against him.

Background

[11] The matter proceeded by way of a stated case before the arbitrator. The common cause facts were as set out in the introduction and need not be regurgitated here. In addition, a bundle of documents, including the Collective Agreement referred to above, was placed before the arbitrator and it was agreed that their contents are what they purport to be.

[3] Record: vol 2 at p 108.
[4] Act 117 of 1998.

[12] An award in favour of the Municipality was issued by the arbitrator, finding that the Municipality's failure to pay the two employees a salary above their job grade level 6 was not unfair. However, the Labour Court concluded that since the Municipality's Executive Committee (EXCO) had resolved to do so in 2006 and that the Collective Agreement did not prevent the implementation of the 2006 Resolution, the failure to implement the resolution was unfair.

[13] The Municipality appeals the judgment and order of the Labour Court.

The Labour Court

[14] In the Labour Court, the employees submitted that each municipality has the authority to regulate its own staff establishment. They submitted that the 2006 Resolution was to this effect and therefore remained valid as it had not been rescinded by the appellant.

[15] They also submitted that because Mr Mostert had benefitted from the 2006 resolution by being placed on a higher Level 5 of the Van der Merwe System, the effect of which is now Task Level Grade 12 of the Task Grading System scale, they too should be similarly advanced. The Municipality's evidence is that Mr Mostert became a beneficiary of the Resolution before the Collective Agreement came into effect.[5] The respondents' submission at the Bargaining Council was that those who met the criteria "timeously" were elevated into the Task Level 12 salary and that those, such as the respondents, who met the criteria after 1 July 2010 remained on Task Level 10 with salaries aligned to the grade.[6]

[16] The Labour Court found in the employees' favour as follows:

> '[32] Accordingly, the order I make is as follows:
> [32.1] The application for review is granted with costs;
> [32.2] The award of the Third Respondent is replaced as follows:

[5] Record: Vol 1, p. 38, para 24.
[6] Record: Vol 2, p.143, para 20.

(a) the First Respondent's refusal to implement the recommendation of the Technical Services Department of 5 November 2011 is declared to be unfair;

(b) the First Respondent is directed to implement the recommendation with retrospective effect; and

in the event that the parties are unable to agree on the quantification of the award, it must be set down before the Second Respondent to be dealt with by an arbitrator other than the Third Respondent.'

[17] The reason for the finding was stated as follows:

'It was not inconceivable that, in the interests of uniformity between municipalities, any deviations from an allocated grade would have been prohibited in terms of the Collective Agreement or would have required a specific authority or process. I therefore perused the Collective Agreement (which was part of the agreed bundle of documents) to ascertain whether, properly interpreted and applied to the facts of this matter, there was any prohibition on the First Respondent placing more experienced and better qualified electricians on a higher scale than that which was indicated by assessment of their job functions alone. There was none and, in the absence of any conceivable reason why the recommendation of the Technical Services Department and the Acting Municipal Manager should not have been implemented, the First Respondent's failure to do so was clearly unfair.'

[18] Effectively, the Labour Court reasoned that the Collective Agreement does not bar individual municipalities from acting as was resolved by the appellant's Executive Committee in its 2006 memorandum of 19 July 2006 and as was recommended by the Acting Municipal Manager following the recommendations of the Technical Services Department on 5 October 2011.[7]

[19] On the other hand, Mr Pillemer submits that section 67(2) of the Local Government: Municipal Systems Act[8] (Municipal Systems Act) dictates to the Municipality what it can do under section 67(1) in terms of applicable labour legislation, the Labour Relations Act[9] (LRA). The section reads as follows:

[7] Record vol 1 at pp. 71 - 77.
[8] Act 32 of 2000.
[9] Act 66 of 1995, as amended.

’67. Human resource development

(1) A municipality, in accordance with applicable law and subject to any applicable collective agreement, must develop and adopt appropriate systems and procedures, consistent with any uniform standards prescribed in terms of section 72 (1) (c), to ensure fair, efficient, effective and transparent personnel administration, including –

(a) the recruitment, selection and appointment of persons as staff members,

(b) service conditions of staff;

(c) the supervision and management of staff;

(d) the monitoring, measuring and evaluating of performance of staff;

(e) the promotion and demotion of staff;

(f) the transfer of staff;

(g) grievance procedures;

(h) disciplinary procedures;

(i) the investigation of allegations of misconduct and complaints against staff;

(j) the dismissal and retrenchment of staff; and

(k) any other matter prescribed by regulation in terms of section 72.

(2) Systems and procedures adopted in terms of subsection (1), to the extent that they deal with matters falling under applicable labour legislation and affecting the rights and interests of staff members, must be consistent with such legislation.’

[20] Everything done under section 67 of the Systems Act would be binding. In this respect, section 23(1)(a) of the LRA reads as follows:

’23 Legal effect of collective agreement

(1) A collective agreement binds –

(a) the parties to the collective agreement…’

[21] It was further submitted on behalf of the appellant that the Collective Agreement recognised that some employees were earning higher salaries than they

would be aligned in terms of the new Task Grade System. In recognition thereof, paragraph 7.2.3 was inserted in the Collective Agreement[10] which reads as follows:

> '7.2.3 Employees whose existing basic salary is higher than the maximum notch of their applicable TASK grade, on the salary scale of the municipality in terms of this Agreement, shall retain their basic salary.'

[22] In keeping with the Collective Agreement, on 30 September 2010, the Department of Human Resources issued a letter entitled "*ELECTRICAL DEPARTMENT - ELECTRICIAN MR U LUTCHMAN (LEVEL 6)*". The letter reads further that:

> 'In light of the above resolution it is advised that all electricians are evaluated on the new task level 10 and any electrician receiving a better salary would then be personal to holder.'

On appeal

[23] Mr Seery for the respondent employees, submits that because Mr Mostert was placed on a higher grade 12 in terms of the 2006 Resolution, so should the respondents be accommodated. He essentially relies on the same submissions made in the Bargaining Council and the Labour Court. Secondly, Mr Seery submits that section 67 of the Municipal Systems Act empowers municipalities to regulate their staff establishment. As stated above, that ability is subject to applicable law and any collective agreement.

[24] In regard to the recommendations of the Technical Services Department and the Acting Municipal Manager, the appellant submits that the recommendations of the Technical Services Department and the Acting City Manager dated 5 October 2011[11] are incapable of implementation and/or cannot be implemented because of the binding nature of the Collective Agreement. This submission is correct.

[10] Record vol 2 at p 112.
[11] Record vol 1 at p 76.

[25] The appellant submits that since the approved grading[12] aligns with applicable salaries[13] the appellant cannot determine its own scale of salaries to an approved job grade.

[26] Lastly, the appellant submits that the Mostert issue should not be conflated with the respondent employees' because Mr Mostert had met the 2006 Resolution criteria before the coming into effect of the Collective Agreement. For that, and other reasons, the Collective Agreement stipulated that, regardless of the job grading that an employee ultimately is allocated to, their remunerations will not be adversely affected if they are located job grading places at a lower salary. It is common cause that, although Mr Mostert is a Task Grade Level 10 under the Collective Agreement, he was categorised at Level 5, being the equivalent of the new Level 12 for salary advancement after meeting the 2006 Resolution criteria.

The law

[27] Section 213 of the LRA defines collective agreement as follows:

> '"collective agreement" means a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered *trade unions*, on the one hand and, on the other hand –
>
> *(a)* one or more employers;
>
> *(b)* one or more registered employers' organisations; or
>
> *(c)* one or more employers and one or more registered employers' organisations…'

[28] Any collective agreement is binding in terms of section 23(1) of the LRA.

[29] The unions entered into a collective agreement with SALGA which is an employers' organisation representing all municipalities in the country.

[12] Record vol 2 at p 137.
[13] Record vol 2 at pp 71 – 77, read with p 112.

[30] SALGA is the National Employers' Association representing all municipal members whose aim and objective is to regulate the relationship between its members and their employees as defined in section 213 of the LRA. It is so recognised in terms of Section 2(1) of the Organised Local Government Act.[14]

[31] In *Independent Municipal and Allied Workers Union and another v Khoza NO and another*,[15] the Labour Court had to deal with a review application in which one of the issues for determination was the meaning of the term "*Contractual to Holder*". Contractual to Holder (CTH) is used interchangeably with Contractual to Incumbent (CTI). The arbitrator, whose award was being reviewed, had referred to the definition of "contractual *to holder*" as contained in the Transvaal Conditions of Service Agreement which is defined as follows:

'"**Contractual to holder"** with regards to –

(a) Salary/ salary scale –

Means that the employee retains the salary / salary scale pertaining to the post before its downgrading abolition and retains all adjustments and regradings so that the incumbent will never be in a less favourable position vis-á-vis other posts which were previously evaluated on a par with the post, in other words as if the post was never downgraded.

(b) Other benefits –

Means that the employee retains all better benefits that he is entitled to in terms of the contract until his services are discontinued with the council or until such other time, depending on the conditions of his appointment or on the stipulation of the contractual agreement.'

[32] In a settlement between the parties, they agreed as follows:[16]

'The Respondent agrees that irrespective of the classification of a post in terms of the Placement Agreement by the Respondent, the incumbent of a post in the new Organisational Structure, shall be remunerated in accordance with the comparable benchmark level as already determined by the respondent of the grade 13 Local Authority Bargaining Council scales:

[14] Act 52 of 1997.
[15] [2015] ZALCJHB 387 (8 June 2015) at para 24.
[16] Ibid at para 17.

Provided that should the salary and benefits of an employee be higher than the benchmark level, that employee shall retain his/ her current salary and benefits, regardless of the result of the job evaluation in terms of "TASK".
In the event of a post being evaluated lower than the benchmark level, the incumbent of that post shall retain the benefit of the higher salary attached to such post:
Provided that the future annual salary adjustment shall be withheld until the incumbent's salary equals the salary scale of the TASK JOB evaluation.'

[33] A further settlement agreement contained the following provisions:[17]

> '1.4 That the parties agree to use the Grade 15 salary scales and will further be guided by category "A" municipalities from the SALGBC.'

[34] The arbitrator concluded that the principle of CTI is not to put any employee in a better position than the one they were previously in but is about ensuring that the employee is not in a worse-off position. The retention is about an employee keeping that which they had and not about progression in the sense that they should have progressed or obtained that which they don't have in terms of the CTI principle. The arbitrator concluded that the principle is that of retention of higher salaries and benefits should the employee be placed in a post that has been evaluated lower than the benchmark level.

[35] In agreeing with the arbitrator, the Labour Court said:

> '…The use of the word "retains" in the CTI definition must be accorded due attention. To "retain" means to "keep in place; hold fixed". The word is used in the definition in respect to <u>both</u> the salary level and adjustments/regradings. Further, the definition provides that the incumbent will never be <u>in a less favourable position</u> *vis* a *vis* other posts which were <u>previously</u> evaluated on a par with the relevant posts (now downgraded or abolished). The interpretation of the definition to mean an entitlement to enjoy future regradings of salary

[17] Ibid.

levels of posts on a reorganised establishment (which in the result would mean that the incumbents would be in a more favourable position than those posts previously evaluated on a par with their former posts) cannot be correct.'[18] [Original emphasis]

[36] In coming to her conclusion on the definition of CTI, Rabkin-Naicker J referred to the judgment of *Pretorius v Rustenburg Local Municipality And Others*[19] where the definition of CTI or CTH and PTH (Personal to Holder) were defined as follows: 'The terms "contractual to the holder" and "personal to the holder" are defined. They appear at least to mean that the employee will not suffer a reduction in salary or other benefits, which could happen in the case of a demotion on other grounds…'

Analysis

[37] The law is explicit that a collective agreement supersedes any individual contract of employment and any other agreement entered into between the individual or collective employees and their employer if subsequent to such agreement the union, acting on behalf of the employees, enters into a collective agreement with their employer or employers' organisation.

[38] The 2006 Resolution falls to be rendered ineffectual by the Collective Agreement. It need not be formally rescinded by operation of law and the fact that on 7 July 2010, the appellant's executive committee resolved that the wage curves collective agreement be adopted and implemented with effect from 1 July 2010. They also resolved that employees "*without final outcomes reports must still be adjusted in terms of the old salary scales as supplied by KWANALOGA*".[20]

[39] The union or the employees cannot piggyback on the Mostert situation because it is common cause that he had met the 2006 Resolution criteria before the Collective Agreement came into effect. His windfall may not be reversed. Otherwise, he has an unfair labour practice claim. This was recognised by the Collective

[18] Ibid at para 26.
[19] [2007] ZALAC 15; (2008) 29 ILJ 1113 LAC at para 34.
[20] Record vol 2 at p 137.

Agreement which provided that persons in his case will not be prejudiced, hence the personal-to-holder directive.[21]

[40] The respondent employees' submission, that the appellant has the power to accommodate them the same as in Mr Mostert's case cannot avail them because not only of the binding nature of the Collective Agreement but also because of the principle that collective agreements should not be easily circumvented.

[41] I conclude therefore that the Labour Court erred in concluding that the appellant's refusal to implement the recommendation of the Technical Services Department of 5 November 2011 is unfair and directing the appellant to implement it with retrospective effect.

Conclusion

[42] For the above reasons, this Court concludes that Mr Lutchman remains a Level 10 employee with his salary as aligned to the new Task Grade System. The 2006 Resolution of the appellant and the Technical Services Department and the Acting Municipal Manager's recommendation to advance him to a salary scale above his job grade is superseded by the Collective Agreement.

[43] Therefore, the following order is made:

Order

1. The appeal succeeds with no order as to costs.
2. The order of the Labour Court is set aside and replaced with the following:

'1. The review application is dismissed.
2. There is no order as to costs.'

Malindi AJA

Waglay JP and Mlambo JA concur.

[21] Record vol 1 pp 69 – 70.

APPEARANCES:

For the Appellant:	Advocate M. Pillemer SC
Instructed by	Shepstone & Wylie
For the First Respondent:	Advocate T. Seery
Instructed by	Rakesh Maharaj & Company.