IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: CA9/2023

In the matter between:

IMATU obo SPANGENBERG & OTHERS	**Appellant**
and	
OVERBERG DISTRICT MUNICIPALITY	**First Respondent**
SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL	**Second Respondent**
COMMISSIONER DANIEL DU PLESSIS N.O.	**Third Respondent**

Heard: **17 September 2024**
Delivered: **15 November 2024**
Coram: **Savage ADJP, Mlambo AJA and Davis AJA**

JUDGMENT

DAVIS, AJA

Introduction

[1] This is an appeal against the decision of the court *a quo* which had set aside an arbitration award of the third respondent. The third respondent (arbitrator) had found that the second respondent had committed an unfair labour practice in causing the appellant employees' job descriptions to be revised with the effect that their jobs were graded lower than what had been contained in a set of recommendations, made by first respondent's Job Evaluation Unit and approved by the Provincial Audit Committee (PAC). He thus ordered that the first respondent pay each employee R15 000 as compensation and an amount which each employee would have received had the initial job evaluation been properly implemented.

[2] The court *a quo* substituted the award of the arbitrator after it had found that the first respondent acted in a procedurally unfair manner when it revised the job descriptions of the appellant employees. The court *a quo* held that the first respondent had committed an unfair labour practice relating to the benefits of the employees represented by the appellant.

[3] The essence of the order of the court *a quo* is contained in the following paragraphs of the order:

> '1. By 15 February 2023, the grievants, singly or jointly, and the applicant must submit any written representations they wish to make to the Western Cape Provincial Audit Committee, mentioned in Clause 2.7 of the TASK Job Evaluation Policy adopted by the Overberg District Municipal Council on 3 December 2013, on why any of the initial or revised evaluation are correct.
>
> 2. By 30 March 2023, the Western Province Provincial Audit Committee ('PAC'), shall decide which if [sic] the initial or revised evaluations are correct

after considering any such representations by the grievants and the applicant, which decision shall be final.

3. The decision of the PAC under paragraph 3.2 shall be implemented by the applicant with retrospective effect to May 2015, within 30 days of the decision being made.'

[4] The appeal is lodged against these orders. Hence the appeal before this Court was argued exclusively on this limited ground.

The factual matrix

[5] Given the limited nature of this appeal, the background to the arbitration award and subsequent hearing before the court *a quo* can be summarised briefly.

[6] On 3 December 2012, the first respondent formally adopted the so-called TASK Job Evaluation Policy which represented a job grading methodology which had been developed by auditors Deloittes.

[7] A range of disputes emerged but these were finally settled when the municipalities in the Overberg District signed a memorandum of agreement on 10 June 2015 for the purpose of implementing the TASK Job Evaluation System in order to achieve "*uniform norms and standards in the description of similar jobs and their grading and to underpin job comparison*".

[8] The key to the policy was contained in Clause 7 of the TASK Policy which reads thus:

'7 JOB EVALUATION PROCESS

7.1 If a job has changed substantially and permanently, a job incumbent or his/her relevant manager may make an application through the departmental head that the job be re-evaluated; provided that such functions were performed for more than 6 months.

7.2 The TASK Job Evaluation Process shall be done on a continuous basis by the JE Unit for as long as there are new posts being added to the staff establishment of the municipality as per s 66 of the Local Government Municipal Systems Act, 2000 (Act No 32 of 2000 as amended)

7.3 If required, the JE Unit shall gather the relevant facts from both the incumbent of the jobs as well as the relevant manager and the Head of Department of the job in question to ensure adequate information is available for the evaluation of the post;

7.4 A competition of a job description should be preceded by a proper job analysis;

7.5 The incumbent of the post as well as the relevant manager and Head of Department shall be required to sign off the job description prior to the JE Unit grading the job on the TASK Job Evaluation System;

7.6 In the event of no consensus reached, the Manager or his/her nominee will determine the content of job description;

7.7 The evaluation takes place by

(a) Determination of the skill level of the post

(b) The scoring of the factors relating to Complexity, Knowledge, Influence and Pressure;

(c) The scoring of the sub-factors relating to Complexity, Knowledge.

7.8 The JE Unit shall then compile a JE Outcome Report for the PAC with appropriate audit trail;

7.9 The PAC shall be furnished with all relevant documentation within (7) working days prior to the date of the PAC meeting to ensure sufficient time for preparation;

7.10 A representative of the JE unit shall present the result to the PAC.

7.11 The Chairperson of the PAC shall sign off the result of the job evaluation process prior to the JE Unti communication (*sic*) same to the Municipal Manager for implementation on the effective date.'

[9] By 30 November 2015, the work of the Job Evaluation Committee had been completed. Its recommendations were approved by the Provincial Audit Committee. In December 2015, Mr David Beretti, the municipal manager of the first respondent, halted the implementation of these recommendations in respect of some 12% of the staff who were concerned that some support department management posts had been more highly graded than those of the managers of the municipality's largest operational department performing service delivery functions. Furthermore, in some cases, Mr Beretti was concerned that the new grades resulted in a post being raised by a salary equivalent of two grades compared with the existing salary of an incumbent. A management team was then constituted in order to review the gradings which amounted to 12% of the staff.

[10] On 20 April 2016, Mr Beretti wrote a letter to the affected employees which included the following:

> 'I have identified a number of concerns with the outcomes, which, if implemented as is, would result in inconsistencies, errors or anomalies. Some of the problems are as a result of poorly written jobs descriptions which do not accurately describe the content of work. These jobs descriptions need to be revised. Your job description has been identified as one of these which require revision.
>
> Human resources, together with your line manager, will discuss this with you in the course of this month. As soon as I received the revised job descriptions, and will resubmit them to the District Job Evaluation Committee.'

[11] It appears to be common cause that the affected employees were not invited to make any further submissions on their job descriptions before revisions were implemented. These revisions were completed on 22 August 2016 which, in turn, created the dispute which required resolution by way of arbitration.

[12] In finding against the first respondent the arbitrator held as follows:

> 'The Municipal Manager signed over all of this rights and obligations regarding the TASK process to the JEC and PAC. This was done in line with his obligations

in terms of the Municipal Systems Act. Once the PAC had come to a final conclusion, the results had to be implemented. Mr Beretti had no discretion. In terms of the Municipal Systems Act he must act in line with policies. These is no agreement or policy that gives the PAC the authority to revisit a prior endorsement and by so doing the PAC acted *ultra vires*. These is also no policy or agreement by virtue of which the job evaluations could have been referred to the West Costs JEC. He found that it was the responsibility of the municipality's own JEC and that in terms of the MOA, the west Costs JEC did not have the power to perform evaluations for the ODM. Accordingly, the West Costs evaluations had no legal consequences whatsoever and consequently the PAC's consideration of the revised evaluations was similarly irrelevant. In addition, Beretti overstepped his powers by revising the endorsed evaluations. The arbitrator held that having done so, his actions could no longer be fair, "irrespective of the explanation or motives behind the action.'

[13] The issue which is central to the present dispute is that the arbitrator awarded two forms of relief, being R15 000 to each applicant as compensation for the infringement of his or her right to a fair labour practice and further that the first respondent be ordered to pay each employee what they would have received on the basis that the job evaluation which had first been approved by the PAC had been implemented at that time.

The judgment of the court *a quo*

[14] Sitting in the court *a quo,* Lagrange J found that the key question which the arbitrator had been called upon to determine concerned the fairness of revising some of the job evaluations. Given this specific question, it is somewhat difficult to divine the exact reasoning which led Lagrange J to set aside the arbitration award.

[15] Reading the judgement holistically it appears that the learned judge found that because the arbitrator had rejected first respondent's motives for the reassessment as

being irrelevant, he failed to consider the interests of either the employer or the affected employees in this particular case. Furthermore, he held that:

> '[T]he final assessment was again done by the same body which had considered and approved the first evaluations, so the ad hoc revision procedure embarked upon still depended on a similar process to the one envisaged in the policy, except that another municipality's JEC was involved and employees did not have a clear opportunity to make representations on the proposed revisions which would disadvantage them in relation to the outcome of the first assessment process.'

[16] Accordingly, in the view of Lagrange J, the arbitrator had misdirected himself in the manner in which he approached the dispute. In particular, his findings constituted a misdirection based on errors of law which had led him to fail to consider significant material considerations which ought to have been weighed up; in particular, the motivations for the reassessments and the opportunity of the affected employees to make relevant representations on the proposed revisions.

[17] Based on the finding that the affected employees did not have a fair opportunity to be heard on the proposed regrading before the PAC decided to do so, Lagrange J found that the essential basis by which the arbitration award was based stood to be set aside for procedural irregularities suffered by the affected employees as well as to the employer. Accordingly, the appropriate remedy, in the view of the learned judge, was to rectify the defective process by taking account of the *bona fide* concerns of the person charged to provide job descriptions while allowing the affected employees an opportunity to contest the revisions. It is on this basis that the order of the court *a quo* to which I have made reference earlier was made.

Evaluation

[18] Much of the dispute between counsel concerned the scope of the appeal to this Court based upon the nature of the wording of the application for leave to appeal. In its

application for leave to appeal, the appellant contends that the court *a quo* had erred and misdirected itself as follows:

> '1.1 made an order against a party which was not before the court, namely the Western Province Provincial Audit Committee ("the PAC");
>
> 1.2 made an order against the PAC without requesting submissions from the parties regarding the appropriateness or desirability of the order;
>
> 1.3 made an order against the PAC without inquiring whether that party should be joined to the application; and
>
> 1.4 made an order against the PAC without giving it an opportunity to make submissions on the proposed order.'

[19] As Mr Oosthuizen, who appeared on behalf of the first respondent, correctly noted, in effect, the argument of the appellant before this Court was based on a broadening of the appeal to attack the substantive findings of the court *a quo*, none of which could be found in the grounds set out the application for leave to appeal. By contrast, the grounds of appeal were located solely in respect of the order made against the PAC. Hence in the view of Mr Oosthuizen, this Court was constrained to dispose of this appeal on the basis of the application for leave to appeal.

[20] In my view, there can be little doubt that the order of the court *a quo* was itself misconceived in that it sought to compel a party not before it to be subjected to an order and therefore to conduct itself in the manner directed in the order. The order was also made in circumstances when the PAC had not been afforded an opportunity to make submissions regarding its willingness or ability to comply with the order. At the very least, it should have been allowed a hearing or an opportunity to make written submissions regarding the impact of the order which the court granted.

[21] It is also regrettable that, as appears from the record, the court did not inform the relevant parties as to the direction of the order it intended to make in order to elicit their particular views in this connection. Furthermore, it appears that in terms of the TASK Job Evaluation Policy, the PAC's role was to sign off job evaluations submitted to it by

the relevant job evaluation unit. It was not required to act as a referee in determining which of the competing job evaluations was correct. Accordingly, the court *a quo* had assigned a role which, as Mr Bosch who appeared on behalf of the appellant submitted, fell outside of the remit of the permitted policy and would thus have required the PAC to act *ultra vires*.

[22] The question which now arises concerns the relief that this Court should grant in the light of its finding that the court *a quo* erred in a material fashion. If the order of the court *a quo* must be set aside, what are the consequences? This Court was not asked to reinstate the arbitration award as the notice of leave to appeal did not include such specific relief. However, the order of the court *a quo* set aside the arbitration award and substituted it with the order to which reference has already been made. That substitution clearly stands to be set aside in that it was based on the material errors to which I have made reference. In short, this order of substitution should never have been granted in that it does not pass legal muster.

[23] Once the core of the order is set aside in that the substitution can no longer stand, the question arises as to the consequences thereof. It must follow that, once this Court has decided to set aside the substitution of the arbitration award, the only option which is available to it is to hold that the arbitration award has no longer been substituted. It would be legally meaningless to set aside the substitution of the award of the arbitration without more. The very purpose of the substitution was to provide relief in circumstances where the award was no longer binding on the parties. The substituted order is inextricably linked to the initial setting aside of the award. Absent the substitution, it must follow that the award of the third respondent must stand.

[24] For these reasons, the following order is made:

Order

1. The appeal succeeds with costs.
2. The order of the court *a quo* of 29 November 2021 is set aside.

3. For this reason, the arbitration issued under case number WCP031608 remains binding upon the parties.

Davis AJA

Savage ADJP and Mlambo AJA concur.

APPEARANCES:

FOR THE APPELLANT:

Instructed by

FOR THE FIRST RESPONDENT:

Instructed by