



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case NO: JA 18/12

In the matter between:

AJ DU PLESSIS AND 2210 OTHERS

Appellants

and

THE SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

First Respondent

PROFESSOR K GOVENDER N.O.

Second Respondent

EKURHULENI METROPOLITAN MUNICIPALITY

Third Respondent

Heard: 02 May 2013

Delivered: 04 October 2013

CORAM: WAGLAY JP, TLALETSI ADJP, DAVIS JA

JUDGMENT

TLALETSI, JA

Introduction

- [1] This is an appeal against the order of the Labour Court (per Louw AJ) in a review application brought by the third respondent in that court for an order *inter alia*, reviewing and setting aside the arbitration award issued by the second respondent ('the arbitrator') under the auspices of the first respondent ('the Bargaining Council').
- [2] The Labour Court issued an order in terms whereof the award of the arbitrator was reviewed and set aside. Aggrieved by this decision, the appellants unsuccessfully applied for leave to appeal in that Court. Leave to appeal was granted to the appellants pursuant to a petition to the Judge President of this Court.
- [3] The litigation in this case emanates from a referral of a dispute by the appellants to the Bargaining Council regarding what they categorised as a dispute about the interpretation and/or application of the Wage Agreement entered into between the South African Local Government Association (SALGA), the Independent Municipal and Allied Trade Union (IMATU) and the South African Municipal Workers Union ('SAMWU') signed on 5 November 2003. The referral was made in terms of section 23 of the Labour Relations Act 66 of 1995 ("the LRA") as amended.¹ The appellants who are employees

¹ Section 23 of the LRA provides that: A collective agreement binds—

- (a) the parties to the collective agreement;
 - (b) each party to the collective agreement and the members of every other party to the collective agreement, in so far as the provisions are applicable between them;
 - (c) the members of a registered trade union and the employers who are members of a registered employers' organisation that are party to the collective agreement if the collective agreement regulates—
 - (i) terms and conditions of employment; or
 - (ii) the conduct of the employers in relation to their employees or the conduct of the employees in relation to their employers;
 - (d) employees who are not members of the registered trade union or trade unions party to the agreement if—
 - (i) the employees are identified in the agreement;
 - (ii) the agreement expressly binds the employees; and
 - (iii) that trade union or those trade unions have as their members the majority of employees employed by the employer in the work-place.
- (2) A collective agreement binds for the whole period of the collective agreement every person bound in terms of subsection (1) (c) who was a member at the time it became binding, or who becomes a member after it became binding, whether or not that person continues to be a member of the registered trade union or registered employers' organisation for the duration of the collective agreement.

of the Ekurhuleni Metropolitan Municipality ('the Third Respondent') were at all relevant times members of either SAMWU or IMATU.

- [4] The Wage Agreement in question provided, in Clause 5, for a percentage increase of the salaries of the municipal employees operating under the auspices of the Bargaining Council. Clause 5.6 provided that:

'The parties agree on the categorisation of municipalities in principle to which effect they hereby undertake to finalise a collective agreement on categorisation within a period of three months from the date of signature thereof.'

The issue in dispute is how the percentage increases were to be implemented by the third respondent.

- [5] For a better understanding of the case presented by the appellants and their contentions in the Labour Court, it is necessary to set out the factual background relied upon by the appellants. These facts are gleaned from the pleadings as well as the oral and documentary evidence tendered by the parties and are largely common cause. Historically, there was a statutory grading system created in terms of the Remuneration of Town Clerks Act ("RTCA")² which determined the criteria for the establishment of wage levels for town clerks in the various municipalities across the country. The grading was based on the size and other factors of the different municipalities. The same approach was followed in regard to the remuneration of elected officials in the Remuneration of Public Office Bearers Act³ in that the same criteria was adopted in regard to the determination of the remuneration of public office bearers to benchmark local authorities of similar size and sophistication.
- [6] The reasoning for establishing a grading system in this regard was that town clerks and elected officials in similar sized municipalities would have similar

(3) Where applicable, a collective agreement varies any contract of employment between an employee and employer who are both bound by the collective agreement.

(4) Unless the collective agreement provides otherwise, any party to a collective agreement that is concluded for an indefinite period may terminate the agreement by giving reasonable notice in writing to the other parties.

² Remuneration of Town Clerks Act 115 of 1984.

³ Act 20 of 1998.

levels of responsibility and similar duties and should therefore receive similar remuneration. The criteria adopted referred to issues such as the number of voters, the budget and size of the local authorities in order to establish what grading should be accorded to municipalities and to determine what level of remuneration should be paid to town clerks and elected officials.

- [7] The statutory system similar to the grading system for town clerks and elected officials was never established for the remuneration of municipal employees. However, what happened is that wage agreements, which were concluded at national bargaining level, were applied on a graduated basis in line with the grading of local authorities. The reasoning in this regard, according to the appellants, was that employees in municipalities of similar size and sophistication had to earn similar remuneration and, more specifically, to ensure equitable implementation of the national wage increases in the local government sector nationally.
- [8] The appellants contended that the grading system forms an integral part of the current collective bargaining system. The grading of the municipalities for purposes of applying the wage agreements, as a matter of practice, tracked the grading accorded to municipalities for purposes of remuneration of town clerks and elected officials.
- [9] What led to the present dispute is that on 11 August 2000, the Minister responsible for local government issued Government Notice 803 which set out the criteria that should be used in determining the remuneration of public officials in terms of the POBS. It stipulated that municipalities would be graded on a point system based on the rates income and the number of voters in each municipality.
- [10] On 19 September 2000, the Greater East Rand Metropolitan Council ('GERMC') the predecessor to the third respondent passed a resolution that determined itself as a level 13 municipal council. This resolution was based on the points obtained by the municipality in applying the prescribed criterion. Subsequent to this resolution, the appellant commissioned an investigation into its correct grading as a municipal council. The result of the investigation

was that the council was supposed to be graded a grade 16 municipality and not grade 13.

- [11] It is common cause that on 4 December 2000 a new grading system for the determination of the grades of municipalities was introduced.⁴ The new system had six grades instead of the previous 16. The criterion for the determination of the grades was, however, almost the same as the previous one.⁵ On 13 December 2000, the third respondent took a resolution to adopt the new grade 6 as the correct grade for remunerating its elected officials.
- [12] It is further common cause that on 30 January 2003, the third respondent's council passed a resolution in terms whereof it regarded itself as a grade 13 municipality for the purpose of remunerating its employees. This resolution had the effect that the Wage Agreement of 2003 agreed to at the central bargaining unit had to be implemented on the basis that the third respondent was a grade 13 municipality. It therefore meant that the appellants were to be remunerated on the basis that the third respondent was a grade 13 municipality and not a grade 15 that was applied to the office bearers.
- [13] The respondents were dissatisfied with this result and referred a dispute to the first respondent in terms of section 23 of the LRA which, as pointed out already, involved the interpretation of Clause 5.6 of the 2003 Wage Agreement. The dispute could not be resolved through conciliation and was referred to arbitration. The dispute was arbitrated by the second respondent.
- [14] In his award, the arbitrator recorded the issue before him to be whether 'a trade usage had developed in the sphere of local government in terms of which municipalities discharging similar responsibilities, obligations and duties remunerated their employees on a similar basis. If so, should the [third] respondent, as a consequence of the collective agreement entered into be deemed as Grade 15 municipality for the purposes of remunerating its employees?'

⁴ Government Notice 1326. The new system was based on two criteria, namely, the rates income and the number of registered voters of a municipality.

⁵ It transpired during arbitration that in fact the highest grade available to a municipality in terms of the previous system was actually grade 15 and not 16.

- [15] The appellants contended that the third respondent, in implementing the 2003 Wage Agreement on the basis that the third respondent was a grade 13 municipality and not a grade six or 15 municipality had deviated from the custom that had existed for the past 20 years, namely, that the same criteria that would be used to determine the grade of the municipality for the purposes of determining the salaries of town clerks and/or public officials, would apply when determining the remuneration of the employees. They contended that the practice was that the same grade would apply for remunerating both public officials and the employees.
- [16] The arbitrator considered the relevant legislation and the collective agreement, as well as the oral evidence of the appellants' three witnesses namely, Mr Neville Rudman (the Chief accountant who was employed in the Human Resource Division in 1990 and after nine years moved to the financial section), Mr Daniel Goosen (who was Director of Human Resources in 1987 in Springs which later together with other municipalities constituted the third respondent), Mr Christofel Wolfaardt (who was up to 2004 employed as Chief Accountant and was working on salary scales at the third respondent from 1987 to 2002/3) as well as the third respondent's witness, Mr Thulani Nciza (the Manager: Collective Bargaining at the third respondent and previously a shop steward and later Regional Secretary for SAMWU).
- [17] The arbitrator's conclusion and summary of the reasons for the award are captured in paragraph 59 of the award which reads thus:
- 'In conclusion, I am satisfied that there was an established trade custom and usage in the local government sector that municipalities would be graded in accordance with their responsibilities, duties and obligations. The grade of the municipality determined by the salary scales used to remunerate its employees. Employees of similar graded municipalities were similarly remunerated. I am satisfied on the evidence that this trade usage or custom survived the repeal of the RTCA and continued under the present dispensation. Presently, municipalities are not prohibited by law from re-grading and on my interpretation of the Constitution, are permitted to re-grade in the absence of national or provincial law stating otherwise. A binding collective agreement on the issue of re-grading may also significantly impact

on the powers of the municipalities in this respect. However, when a municipality elects to re-grade, it has to ensure that the new grade directly correlates with its responsibilities, duties and obligations. The Wage Collective Agreement was premised on the continued existence of these customs. When the respondent decided to re-grade itself in January 2003, it was obliged in terms of the existing trade custom and usage and by the Wage Collective Agreement to upgrade itself as Grade 15. The decision by the respondent to grade itself Grade 13 is in violation of the Wage Collective Agreement read with the applicable and binding trade custom and usage. The applicants' right in this matter thus accrues directly from the Wage Collective Agreement."(Emphasis added)

[18] The arbitrator concluded by making the following award :

- 'a) For the purposes of remunerating its employees, the respondent must be deemed to be a Grade 15 municipality as from the date in 2003 on which it implemented the Grade 13 salary scales.
- b) The respondent must, in accordance with the salary scales applicable to a grade 15 municipality, pay the applicants retrospectively from the date it implemented the Grade 15 salary scales in 2008 to the date in 2003 when it implemented the Grade 13 salary scales.
- c) The sum to be paid will be the amount that would have accrued to the applicants had the respondent paid on salary scales applicable to Grade 15 municipality minus the amounts actually paid to the applicants and any lawful deductions.
- d) The respondent is ordered to pay the costs incurred by the applicants in respect of the matter heard by me. The costs are to be assessed in accordance with Clause 2.39 of Part D of the SALGBC Main Collective Agreement.'

Proceedings in the Labour Court

[19] The third respondent instituted review proceedings in the Labour Court in terms of section 145 (2)(a) of the Act. The grounds of review relied upon were, *inter alia*, that the arbitrator misdirected himself in that he asked and answered the wrong question; failed to apply his mind to the correct issue; he

incorrectly stated that it was accepted that grade six under the POBS was equivalent to grade 15 under the RTCA system and thereby failing to appreciate that the comparability of the RTCA system and POBS system was fiercely contested since the third respondent's case throughout was that it was inappropriate to equate the two systems which, *inter alia*, used different factors in quite distinct systems; failed to appreciate the appellants' case referred to arbitration being the that the Wage rates being paid were a wrong application of a collective agreement as contemplated in section 23 of the LRA because the custom alleged had not been followed; that the appellants acquired a right to demand the custom be followed i.e. that the municipality was obliged to assess itself in terms of certain criteria and upgrade itself.

[20] It was further contended that the arbitrator misdirected himself by stating that he was investigating a system of municipalities "performing similar obligations and discharging similar responsibilities to be similarly graded" which was not the case articulated by the appellants. Finally, it was contended, that the arbitrator's conclusion that a custom was proved that obliges the third respondent to upgrade itself is not rationally connected with the evidence adduced or with the elements of the alleged custom.

[21] In its judgment, the Labour Court remarked that since the respondent was relying on misconception, in order for the misconception of issues to constitute a ground for review, it must be material such that the misconception or misdirection had prevented a fair trial of the issues. The Labour Court held that, in its view, the arbitrator identified the correct issues to be determined, namely, whether there was a tacit term in the Wage Agreement of 2003 to the effect that the municipality should remunerate its employees based on a grading system which is directly linked to the magnitude of its responsibilities, duties and its service delivery obligations which the arbitrator found was based on an established trade and custom. The Labour Court held that the reasonableness of the award must be determined by establishing whether such a custom or trade usage survived the repeal of the RTCA.

[22] The Labour Court, thereafter, made the following findings:

- a) The arbitrator did not at any stage consider the import of clause 5.6 of the Wage Agreement of 5 November 2003 coupled with the evidence of Nciza and as a consequence failed to weigh up the evidence in a balanced manner and disregarded this relevant and important evidence before him.
- b) Since the parties had agreed as part of the Wage Agreement of 2003 that they would reach agreement sometime in the future as to how municipalities would be categorised for the purposes of remunerating employees, it was an indication that the parties had abandoned the old custom and practice in terms of simply adopting the grading applicable based on the principles either emanating from RTCA or the POBS. It cannot as such be concluded that the previous custom and trade practise formed a tacit term of the Wage Agreement of 2003. The result is therefore that the arbitrator did not understand the import of clause 5.6 of the Wage Agreement in question. His decision is therefore not one which a reasonable decision maker could have reached in the circumstances.
- c) The failure by the parties to enter into negotiations to agree on the categorisation of the municipality and their failure to finalise a collective agreement within a period of three months from 1 July 2002 and extended to 4 February 2003 did not give the arbitrator the power to step into the shoes of the parties and categorise the third respondent based on his own opinion as to how and on what basis the third respondent should grade itself for purposes of remunerating its employees.
- d) The arbitrator, by concluding that the third respondent should in 2003 be deemed to be a grade 15 municipality, alluded to equity factors which were quite irrelevant to the rights issues before him. This was evident by stating that he could see no reason and logic or in principle for a municipality to be graded in the top rank for purposes of remunerating the political office bearers and in a much lower category

for the purposes of remunerating its employees. This in fact introduced an equity norm into an inquiry as to what might justify a defence.

[23] Having concluded that the arbitrator failed to apply his mind to the validity of the unambiguous language of the Wage Agreement of 5 November 2003 and did not have jurisdiction to categorise the third respondent, the Labour Court made an order setting the award aside and made no order with regard to the costs of the review application.

The appeal

[24] The appellants raised several grounds upon which the judgment of the Labour Court is challenged. These may be summarised thus: The Labour Court erred:

- a) by concluding that the determination of the existence of a trade usage was irrelevant to the review application;
- b) in concluding that the custom and practice to the effect that similarly sized local authorities remunerate its employees on a similar basis was abandoned by the parties because of clause 5.6 of the Wage Agreement of 5 November 2003;
- c) by concluding that the arbitrator was not empowered to determine the categorisation of the third respondent;
- d) in viewing the 2008 Collective Agreement as simply resolving a strike;
- e) in finding that the arbitrator had no jurisdiction or the powers to categorise the third respondent when that was the issue that he had to decide and the parties having agreed that the Bargaining Council had jurisdiction to arbitrate their dispute.

[26] Advocate Myburgh SC, who appeared on behalf of the appellants in this Court, made several submissions which make it unnecessary to deal with each and every submission made by his predecessor in the Labour Court and who also prepared the heads of argument filed on behalf of the appellants.

Counsel submitted that the real dispute *in casu* was the interpretation and application of the Wage Agreement of 2003. The question is, therefore, whether the findings of the Commissioner are justifiable. He submitted that the issue was about how the Wage Agreement of 2003 should be applied at the third respondent and as such it was not required of the arbitrator to apply contractual principles of law but a common sense approach and fairness. Counsel submitted further that since the award of the arbitrator was being reviewed and was not a subject of appeal, it was not for the Labour Court or this Court for that matter to interpret the Wage Agreement but whether the interpretation by the arbitrator was justifiable and not whether it is a correct one. He referred to five findings that were made by the arbitrator in support of his conclusion, namely, that the custom and practice as a matter of fact existed; wage increases were based on grading; salary scales were applied to grades in existence at all material times; the Wage Agreement was premised on the existence of the custom and practice and that he found the decision of the respondent to have a disparity in grading and as such unfair and wrong.

- [27] It must be emphasised that the dispute referred to arbitration was about the interpretation and application of a collective agreement.⁶ The powers of the arbitrator to determine the dispute referred are, therefore, derived and delineated from the provisions of the Act since the referral was made in terms of s 24 of the Act.⁷

⁶ In *CUSA v Tao Ying Metal Industries and Others* [2009] 1 BLLR 1 (CC) at para 66, Ngcobo J held that the commissioner must, as required by the Act, deal with the substantial merits of the dispute, and this can only be done by ascertaining the real dispute between the parties. In deciding what the real dispute between the parties is, the commissioner is not bound by what the parties say is their dispute. He/she is required to consider all the facts presented including what the parties say is their dispute, the outcome requested and the evidence presented.

⁷ Section 24 of the Act provides that: 'Disputes about collective agreements

- (1) Every collective agreement excluding an agency shop agreement concluded in terms of section 25 or a closed shop agreement concluded in terms of section 26 or a settlement agreement contemplated in either section 142A or 158 (1) (c), must provide for a procedure to resolve any dispute about the interpretation or application of the collective agreement. The procedure must first require the parties to attempt to resolve the dispute through conciliation and, if the dispute remains unresolved, to resolve it through arbitration.
- (2) If there is a dispute about the interpretation or application of a collective agreement, any party to the dispute may refer the dispute in writing to the Commission if-
 - (a) the collective agreement does not provide for a procedure as required by subsection (1);
 - (b) the procedure provided for in the collective agreement is not operative; or

[28] It is important to note further that the Wage Agreement of 5 November 2003 is an agreement that was negotiated and entered into at national level. The parties in this dispute were not directly involved since they were represented by SALGA. The arbitrator therefore, sought to interpret and apply an agreement which was not negotiated and concluded directly by the parties. This fact alone, in my view, could not have made the task of the arbitrator any easier. The task of the arbitrator was, in my view, limited to the question whether on the interpretation of clause 5.6 of the Wage Agreement 2003 there is an implied term that the respondent would re-grade itself to the highest possible grade for a municipality of its size and pay its employees accordingly.

The Wage Agreement 2003 has a status of subordinate legislation and was also extended to non-parties in terms of s 32(2) of the LRA.⁸ This is a matter of law which this Court is entitled to take judicial notice of. It, therefore, means that the arbitrator could not lightly import an implied term into a contract that had acquired the status of subordinate legislation.

[29] It is apposite at this stage to deal with the main submission made on behalf of the third respondent because should it be upheld, it has the effect of disposing of the appeal. The issue was also considered by the Labour Court and was decided in favour of the third respondent. The issue relate to the jurisdiction of the arbitrator and is a point of law. The contention on behalf of the appellants to the effect that the Labour Court was not entitled to consider this issue is

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- (c) any party to the collective agreement has frustrated the resolution of the dispute in terms of the collective agreement.
 - (3) The party who refers the dispute to the Commission must satisfy it that a copy of the referral has been served on all the other parties to the dispute.
 - (4) The Commission must attempt to resolve the dispute through conciliation.
 - (5) If the dispute remains unresolved, any party to the dispute may request that the dispute be resolved through arbitration.
 - (6) If there is a dispute about the interpretation or application of an agency shop agreement concluded in terms of section 25 or a closed shop agreement concluded in terms of section 26, any party to the dispute may refer the dispute in writing to the Commission, and subsections (3) to (5) will apply to that dispute.
 - (7) Any person bound by an arbitration award about the interpretation or application of section 25 (3) (c) and (d) or section 26 (3) (d) may appeal against that award to the Labour Court.
 - (8) If there is a dispute about the interpretation or application of a settlement agreement contemplated in either section 142A or 158 (1) (c), a party may refer the dispute to a council or the Commission and subsections (3) to (5), with the necessary changes, apply to that dispute.'

⁸ Government Gazette No:26159 of 18 June 2004. See: *Unitrans Fuel and Chemical (Pty) Ltd v Allied Workers Union of SA and Another* (2010) 31 ILJ 2854 (LAC).

against binding authority of this Court and the Constitutional Court.⁹ Therefore, a failure by the Labour Court to consider the issue only because it was not raised by the parties, or because the parties decided not to raise a point of law which is apparent from the papers and the evidence would infringe the principle of legality. Put differently, a decision taken without considering the point of law which is relevant to the dispute is a decision premised on an incorrect application of the law.

- [29] What the arbitrator did in his award, was to consider the decision of the respondent taken on 30 January 2003 which graded the third respondent as a grade 13 municipality for purposes of remunerating its employees and concluded that that decision was wrong. He then ruled that the third respondent was or is deemed a grade 15 municipality. To come to this conclusion, the arbitrator failed to take into account the fact that a determination of a grade for a council involves the exercise of an administrative decision under the legislation governing municipalities. The resolution to grade a municipality to a particular grade stands as such irrespective of any view that it is incorrect or unfair. In *Manana v King Sabata Dalindyebo Municipality*¹⁰ it was stated that :

‘A municipal council acts through its resolutions. No doubt a municipal council is entitled to rescind or alter its resolutions. And no doubt an interested party is entitled to challenge its validity on review. But once a resolution is adopted in my view its officials are bound to execute it, whatever view they might have on the merit of the resolution, in law or otherwise, until such time as it is either rescinded or set aside on review.’¹¹

- [30] The grading of the municipality was not regulated by any collective agreement, including the one which was the subject of interpretation and application in casu. The arbitrator therefore, did not have the power to set aside administrative acts such as the resolution of the third respondent

⁹ See *Cusa v Tao Ying Industries and Others* at para 68 *City of Cape Town v SAMWU OBO Jacobs and Others* [2009] 9 BLLR 882 (LAC) at para 27; *President of the Republic of South Africa v SA Rugby Union* 2000 (1) SA 1 (CC) at para 141.

¹⁰ *Manana v King Sabata Dalindyebo Municipality* [2011] 3 BLLR 215 (SCA).

¹¹ *Ibid* at 22. See also *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] 3 All SA 1 (SCA); *Mgoqi v City of Cape Town and Another*; *In Re: City of Cape Town v Mgoqi and Another* [2006] 9 BLLR 873 (C); *City of Cape Town v SAMWU OBO Jacobs and Others* (supra).

through an alleged custom or practice. He therefore exceeded his jurisdiction and powers by in effect regarding the third respondent to what in his view is the correct grading instead of interpreting the collective agreement. His decision to impose his preferred grading based on fairness undermines the principle of legality and the powers of a municipality conferred by the Constitution and legislation to administer its affairs. Furthermore, there is nothing ambiguous about the Wage Agreement 2003 that required the arbitrator to determine the grading of the third respondent. The appeal should therefore succeed.

[31] What remains is the issue relating to costs. In my view it would be in accordance with the requirements of law and fairness that there be no order as to costs.

[32] In the result, the following order is made:

1. The appeal is dismissed with no order as to costs.

Tlaletsi ADJP

Acting Deputy Judge President of the Labour Appeal Court

Waglay JP and Davis JA concurred in the judgment of Tlaletsi ADJP.

Appearances:

For the appellants: Advocate Myburgh SC

Instructed by: Edward Nathan Sonnenbergs.

For the Fourth Respondent: Advocate Cassim SC

Instructed by: Du Plessis De Heus & Van Wyk.

Labour Appeal Court