



Not Reportable

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Case no: CA 13/2013

In the matter between:

THE INDEPENDENT MUNICIPAL AND ALLIED

TRADE UNION

Appellant

And

THE CITY OF CAPE TOWN

First Respondent

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

Second Respondent

C DE KOCK N.O-

Third Respondent

Heard: 21 August 2014

Delivered: 23 April 2015

Summary: Interpretation of a collective agreement - Amalgamation of municipalities - transfer of employees into the amalgamated municipality – municipality entering into a collective agreement with the trade union to set criteria and procedure for the placement employees within the new staff establishment. Employees dissatisfied with their placement and referred dispute to the Bargaining Council in terms of the collective agreement - arbitrator's power in terms of the collective agreement to set aside placement – arbitrator extending his power to place employees on the correct posts. Power to place employees on the establishment vested on the municipal manager - Arbitrator usurping municipal manager by placing employees on the establishment- Labour Court's judgment upheld - appeal dismissed.

CORAM: Tlaletsi DJP, Hlophe et Kathree-Setiloane AJJA

JUDGMENT

Tlaletsi DJP

Introduction

- [1] The appellant is appealing against the judgment and orders of the Labour Court (*per* Rabkin-Naicker J) in terms of which four awards issued under the auspices of the second respondent were reviewed and set aside with no order as to costs being made. The Labour Court granted the appellant leave to appeal to this Court. The dispute related to the interpretation and application of a collective agreement concluded between the first respondent (the City) and the appellant, Independent Municipal and Allied Trade Union (IMATU) on 1 November 2006. A brief factual background is necessary for a better understanding of the dispute.

Background

- [2] It is common cause that following the promulgation of the Local Government Municipal Structures Act¹ (the Structures Act), the City was established out of the

¹ Act No 117 of 1998.

seven disestablished municipalities in the Cape Town Metropolitan area. The amalgamation involved the transfer, in terms of section 197 of the Labour Relations Act² (the LRA), of the services of all existing employees into the City, with 1 September 2000 being the effective date.

- [3] The consequence of this arrangement was that the City employed a staff complement on varying terms and conditions of employment, which had been inherited by virtue of the operation of section 197. There were now essentially seven different staff structures, which were not compatible with the need to operate a single municipality. By way of example in the case of nurses, after the amalgamation, the City employed nurses who were variously described by the former separate municipalities as: Enrolled Nurse, Nurse, Special Grade; Senior Enrolled Nurse, Senior Staff Nurse and Staff Nurse / Senior. Although these employees performed broadly the same functions, their designations and conditions of service varied depending on the municipality they came from before the amalgamation.
- [4] It is common cause that the City engaged in a consultation process with the unions representing the employees in terms of sections 189 and 189A of the LRA aimed at restructuring the municipality. As at January 2005, the employees employed below level 4 on the City's structure had already been placed as a consequence of the restructuring initiative.
- [5] On 3 January 2005, an agreement known as the Placement Agreement was concluded between the City and the appellant in terms of section 189 and 189A of the LRA. The agreement provided in its introductory part, *inter alia*, that:
- '1.3 It is therefore agreed that employees in level 5 and below have been placed in positions within the City on their pay scales and terms and conditions of employment and these employees will not be retrenched in terms of the employer's notice of retrenchment dated 20 July 2004.
- 1.4 Affected employees that have not been placed in terms of the process set out herein below will not be retrenched in terms of the employer's notice of retrenchment dated 20 July 2004. Such employees will be offered reasonable

² Act No 66 of 1995.

alternative positions on their current pay scales and terms of conditions of employment.’

- [6] The placement process was a competitive one and was based on a process of attempting to match employees to posts on a direct close match or major change basis. The employees who were not placed were to be offered reasonable alternatives.
- [7] A dispute developed between the City and the appellant regarding the application of the Placement Agreement and this led to the conclusion of a “Settlement Agreement” on 25 October 2005. What this agreement sought to do was to regulate the placement of certain level 4 employees as well as those who believed that they were *de facto* level 4 employees into the existing organisational structure.
- [8] Following local government elections held in 2006, a change in political leadership occurred which resulted in the City appointing a new executive team in terms of s 57 of the Local Government Municipal Systems Act³ (the Systems Act). This necessitated the realignment of the positions reporting to the executive management structures.
- [9] The collective bargaining process between the City and the appellant resulted in the conclusion of an agreement known as Collective Agreement on Organisational Realignment and Parity (the ORP Agreement) by the two parties. The parties sought to, *inter alia*, achieve the promotion of job security, parity and the retention of skills and to avert and mitigate adverse effects of the organisational re-alignment process on employees. The purpose of the ORP Agreement is:
- ‘2.1 To conclude the placement process started in December 2000 which resulted in the amalgamation of seven previous administrations into a single entity; and
- 2.2 To implement an orderly structuring and placement process which is equitable, accountable and transparent and based on the application of fair and objective criteria; and

³ Act No 30 of 2000.

2.3 To provide mechanisms for eliminating the current inequalities arising from the use of seven different grading schedules, salary scales and conditions of services without negatively impacting on any current employee; and

2.4 To provide for cost effective and expeditious procedures for the resolution of disputes that may arise in the implementation of the Agreement; and

2.5 To provide for matters in connection therewith.'

[10] The ORP Agreement expressly states that it applies and binds the City and the appellant and its members. It however operates to the exclusion of employees appointed in terms of s 57 of the Systems Act. The principles agreed upon for placement were the following:

5.1.1 A placement process is hereby established for the placement of all employees into the City's new organisational structure on a permanent basis.

5.1.2. Employees in substantive positions employed on fixed term contracts (excluding employees at levels 2 & 3, provided that the parties can agree otherwise) shall be offered permanent positions based on the terms and conditions referred to in clause 6.

5.1.3 This process will be done on the basis that the current staff complement and their current functions will form the basis of the new organisational structure below the level of senior managers. Employees will be placed in the new organisational structure on a close match basis utilising the job content of the employee and the function of the business unit into which the employee will be placed.

5.1.4 The City will ensure that all employees are accommodated in the City's new organisational structure in terms of the placement process set out herein.

5.1.5 The placement process must meet the requirements of procedural and substantive fairness and will be applied fairly and consistently. No employee may be unfairly advantaged or disadvantaged by the placement process.

5.1.6 The placement process outlined in this Agreement will not under any circumstances lead to retrenchment of employees.

5.1.7 Some employees may be required to relocate to new work stations. However, the employer will provide the necessary support in relocation assistance, as per this Agreement.

5.1.8 Displaced employees will be accommodated on the basis of reasonable alternative placements offers being made.'

[11] The ORP Agreement provided further that the City had created a standard grading schedule and will match all existing job designations to this grading schedule, based on the job content of existing job designation; and that the said grading schedule will be used as a basis for making placement offers to the employees; that notwithstanding what has been stated above, no employee will be adversely affected financially by being matched to the new schedule and further that every new job on the schedule will be eligible for confirmation of grade via a job evaluation process agreed to within the second respondent (SALGBC).

[12] The criteria to be used by the City to match employees to designations are the following:

'5.3.1 The current designation, subject to clause 5.2.1 above, will be used as the primary indicator of an employee's current functions.

5.3.2 Where the employee's job content has increased in scope and complexity and where such change would ordinarily have resulted in the job being submitted for evaluation, the employer will match the employee to a more appropriate designation, commensurate with the changed job content.

5.3.3 Where this results in a difference in progression of one or more grades between the employee's current designation and the new designation, such matching will be subject to confirmation via a verification process.

5.3.4 Affected employees will be informed of the verification process underway and will be invited to provide input, prior to such employees receiving formal placement offers. Employees will be entitled to be represented during this process.

5.3.5 The City will communicate details of the verification procedure to the Trade Union in writing.'

[13] The ORP Agreement had stipulated the following Placement Procedure:

'5.4.1 All employees shall be offered placement based on the process outlined in the above two clauses (5.2 & 5.3) subject to the following criteria:

5.4.1.1 Unchanged posts: that is posts that have no change to job content. Where the job content of the employee matches exactly (unchanged posts 100% of the key functions [duties and responsibilities]) the content of the job on the new organisational structure, and the number of posts equal to or greater than the number of employees, direct placement is undertaken.

5.4.1.2 Minor changed posts: (close match), that is posts where the match is more than 50% of the key functions (duties and responsibilities). Where the job content of the employee matches substantially the content of the job on the new organisational structure and the number of posts are equal to or greater than the employees, direct placement is undertaken.

5.4.1.3 Competitive process: Where there are more employees than positions in 5.4.1.1 & 5.4.1.2, such employees will be required to compete for the positions provided that the competition will be limited to those employees who matched the positions on a minor or unchanged basis and further provided that this clause will not apply to Directors' positions.

5.4.1.4 Director's positions which are either major changed, vacant or where more than one employee has a possible match, shall be advertised internally prior to any external advertising of such positions.'

[14] Clause 8 of the ORP Agreement, dealing with confirmation of placements provided that:

'8.1 Notwithstanding anything to the contrary herein, no individual placement may be confirmed until a dispute resolution process relating to that specific placement has been finalised. The placed employee may be required to act in the approved post until such time as the dispute has been resolved and the placement date has been confirmed.'

[15] The ORP Agreement provided for an objection procedure in the event that an employee was unhappy with his/her placement. The objection must be in the prescribed form lodged within 10 working days of the decision notifying the employee of his/her placement. Upon receipt of the objection, the City was obliged to convene forthwith an objection committee consisting of an equal number of

employer and trade union representatives. This committee was required to meet on a weekly basis to consider the objections by applying the principles of the placement process contained in the ORP Agreement. The aim of the objection committee was to reach consensus on matching the maximum number of employees to proposed designations and functional units. The City was obliged to make available to the objection committee all information that is necessary for the determination of the objection. In the event of the objection committee being unable to reach consensus on a particular objection, the matter would be regarded as unresolved and the employee had the right to lodge a dispute in terms of the dispute resolution procedures available.

- [16] The procedure to be adopted for the resolution of a dispute was that of an expedited arbitration process as provided for in the bargaining council. The expedited arbitration had to be commenced within 21 days of referral. Clause 12.4 of the ORP Agreement dealing with the powers of the arbitrator provided that:

‘12.4 The arbitrator shall be entitled to make any appropriate award including the setting aside of placements where appropriate. All arbitration awards shall be rendered promptly by the arbitrator and unless otherwise agreed by the parties, no later than 14 days from the conclusion of the arbitration.’

The Dispute

- [17] The respondent referred various disputes on behalf of its members to the Bargaining Council concerning the interpretation and application of the ORP Agreement.

- [18] The employees in question had been placed as follows by the City into the new structure:

‘C178 (Crown and Others): the 19 employees were previously employed as Leading Fire Fighters in the disestablished South Peninsula Municipality. They were placed as Senior Fire Fighters in the new structure.

C201 (Nel and Bailey): They were formally employed as Assistant Divisional Officers in the South Peninsula Municipality. They were now placed as Station Commanders of Lakeside and Ottery Fire Stations respectively.

C256 (Okkers, Eksteen, Van der Byl and Abrahams): Okkers and Eksteen were Divisional Officers in the SPM. Van der Byl and Abrahams were Senior Divisional Officers in the disestablished Blaauwberg Municipality. They were all placed as Divisional Commanders in the new structure.

C366 (Abrahams) was placed in the new structure as a Clerk 2.'

- [19] Those employees who were dissatisfied with their placements lodged their objections with an internal objections committee comprised of employer and employee representatives as provided in the ORP agreement. Since the employees' objections were not resolved to their satisfaction, the appellant referred the dispute to the SALGBC on their behalf for arbitration. The employees contended that the City had placed them incorrectly. The dispute was conducted, primarily, on the basis of written representations made by both parties. However, in the case of the Leading Fire Fighters, the arbitrator heard the oral evidence of Mr Ian Schnetler, City's Chief Fire Officer at the time.
- [20] In deliberating on the dispute, the arbitrator recorded the issue for determination to be whether the employees had been correctly placed by the City as provided for in the ORP agreement. By way of an example, in the case of Boshoff, the arbitrator recorded the issue for determination to be whether he was correctly placed in the designation of Senior Fire Fighter at grade T9, in the City's new organisational structure, based on the process prescribed by the ORP Agreement.
- [21] During the arbitration process, the City challenged the powers of the arbitrator. As a result, the arbitrator had to determine what his powers were in terms of the collective agreement. In so doing, the arbitrator found that the dispute referred by the appellant was of the type capable of being referred to the SALGBC, in terms of Clause 12 of the ORP agreement, for arbitration., and that the ORP agreement provided that the arbitrator shall be entitled to make any appropriate award, including the setting aside of placements where appropriate. The arbitrator held further that the word placement should include 'designation' insofar as disputes lodged in terms of the ORP agreement are concerned. The arbitrator observed that the ORP agreement did not give an arbitrator the power to order placement of an employee, where it was found that the placement made by the City was incorrect. The arbitrator recorded that if he had the power to set aside a placement, then he

“must surely” also have the power to order the respondent to place an employee in the correct designation. He held further that any other finding would amount to an absurdity, as he would simply set aside the placement and leave the parties with an unresolved dispute. The arbitrator held further that any award made by him setting aside a placement by the City, and substituting it with what he thought was the correct placement was capable of being back dated.

- [22] The arbitrator, having decided what his powers were, considered the merits of the dispute namely, whether the employees had been correctly placed by the City. He found that the employees had not been correctly placed by the City, and proceeded to substitute these placements as follows:

‘C178 (Crown and Others). The employees to be placed as Platoon Commanders;

C201 (Nel and Baile) They be placed in the designation of Divisional Commander as per the City’s new organisational structure at grade T14. These employees were not placed into specific positions within any particular division.

C256 (Okkers, Eksteen, Van der Byl and Abrahams) All these employees be placed into a generic “Functional / Operational / Head / Manager” post (Okkers and Eksteen at grade T15 and Van der Byl and Abrahams at grade T16.)

C366 (Abrahams) She was to be placed in the post of Assistant Professional Officer.’

- [23] The arbitrator determined the effective date for placement to be 1 July 2008. In addition, he ordered the parties to attempt to reach an agreement on the amount of back pay that was to be paid to the employees arising from the placements as ordered by him, failing which either of the parties could approach the Bargaining Council on application for the purpose of quantifying the amount payable.

The Review

- [24] Aggrieved by the decisions of the arbitrator, the City instituted review proceedings against the awards made by the arbitrator. Its grounds of review were that the arbitrator exceeded his powers, committed an irregularity and that the award was unreasonable.

- [25] The Labour Court found that the arbitrator exceeded his powers as reflected in his understanding that the word “placement” included the word “designation”, and that a proper reading of the ORP agreement with particular focus on the words of clause 5.1 reveals that “placement” meant matching an employee with the categories contained in the “benchmark list”; that in the absence of an approved staff establishment as required by law, the arbitrator had no power to designate the posts into which individual employees could be placed, nor to do so with retrospective effect. The Labour Court found the award to be reviewable and set it aside on this basis alone, having found no need to consider other grounds of review. The Labour Court further declined to remit the disputes to the Bargaining Council because of the considerable time that had passed since the conclusion of the ORP agreement, as well as the amendment of section 66 of the Systems Act. The Labour Court concluded that there was no possibility of substitution of the awards in question given the way in which the arbitrations were conducted.

The Appeal

- [26] The appellant has in the main raised three grounds of appeal against the judgment and order of the Labour Court. Firstly, it contends that the arbitrator was entitled to set aside the City’s proposed placement to the extent that he was of the view that it was incorrectly done, and to substitute the proposed placement with a different one, based on the proposed designations contained on the benchmarking jobs list. It, therefore, contends that the arbitrator had not inappropriately clothed himself with the power reserved for the municipal manager in terms of the Systems Act as found by the Labour Court, and that it was left to the municipal manager to either approve or reject the new staff establishment. If the decision of the municipal manager is ultimately not to accept the new staff establishment it would therefore mean that the award made by the arbitrator would not be implemented.
- [27] Secondly, the appellant contends that in so far as the Labour Court correctly found that the arbitrator incorrectly conflated the terms “placement” and “designation”, and that what he ought to have done was to have matched an employee with the categories contained in the benchmarking list, the Labour Court erred by not simply correcting the awards accordingly. The corrections, which the appellant suggests that the Labour Court ought to have made to the awards are that: (a) the

employees were incorrectly matched to the proposed designations on the benchmarking job list; the employees ought rather to have been matched to the proposed designation claimed by them; (b) the City be ordered to reconsider the final placement of the employees in light of that finding; and (c) in the event of the placements and designations being made final in an approved staff establishment, that those placements be made with retrospective effect.

[28] Thirdly, the appellant contends that the Labour Court erred by not remitting the matter for reconsideration by another arbitrator. This ground, which was raised for the first time on appeal, is premised on the assumption that the arbitrator had incorrectly defined his powers and that the Labour Court had correctly found that there was insufficient evidence before the arbitrator to make a rational decision regarding the correct matching of the employees. The appellant contends, based on this premise, that there was no reason why the dispute was not remitted to the Bargaining Council for re-determination by another arbitrator, and that there is accordingly no basis for the findings made by the Labour Court that the passing of time and the amendments to the Systems Act prohibited such relief.

[29] It must be reiterated that the appellant's case in the Labour Court was that the employees were entitled to the placement orders that the arbitrator made, and that the City be compelled to implement the orders made by the arbitrator. The City in response contended that the arbitrator did not have the power to make such orders. However, on appeal, the appellant changed tact, by contending that the arbitrator's orders be interpreted as mere proposals to the City. Implicit in this contention is an acknowledgment that the arbitrator did not have the power to order the City to comply with his placement orders.

[30] Section 66 of the Systems Act, as it then was before its amendment, obliged (the word 'must' is used) the municipal manager, within a policy framework determined by the municipal council and subject to any applicable legislation, to inter alia, approve a staff establishment for the municipality; provide a job description for each post on the staff establishment; and attach to those posts the remuneration and

other conditions of service as may be determined in accordance with any applicable labour legislation.⁴

- [31] It is common cause that at the relevant time no organisational structure existed listing a finite number of posts for each and every position below senior managers. By making the placements, the arbitrator usurped the duties of the municipal manager and created a staff establishment contrary to the dictates of s 66 of the Systems Act. The finding of the Labour Court, that in the absence of an approved staff establishment the arbitrator had no power to designate the posts into which individual employees could be placed and doing so retrospectively, cannot be faulted. The arbitrator had indeed exceeded his powers by acting *ultra vires* the provisions of the Systems Act. The arbitrator is not empowered to interpret a collective agreement in a manner that trumps the provisions of a statute. I am mindful of the submission made by Mr Van der Riet SC, who appeared on behalf of the appellant, that the City never contended that the posts were not available before the arbitrator and, as such, that was never an issue before the arbitrator. I find this argument to be without merit because posts cannot be said to be available in the absence of an organisational structure setting out the existence of the posts, as well as the necessary details regarding job descriptions and remuneration for such posts. This is a fact that cannot be ignored. It will be incorrect to assume that posts existed when, as a matter of fact, they did not. Furthermore, the Labour Court remarked that:

“However, it was common cause before me that at the time of the lodging of the disputes and their arbitration, no organogram existed showing the exact number and type of posts available on the new establishment. A proper reading of clause 5 reflects that in fact the ‘placement’ process depended on what jobs would exist on the new organisational structure yet to be finalised.”

The appellant has not disputed this finding.

- [32] I find the appellant’s contention, that the arbitrator’s awards are mere proposals which were subject to the approval by the municipal manager and the City, to also be without merit. In the first place, the arbitrator underwent an exercise to

⁴ The section has since been amended and the power to approve a staff establishment is vested in the municipal council after the municipal manager has developed it.

determine what his powers, in terms of the ORP Agreement, were. He found that since he had the specific power to set aside placements he “surely also ha[d] the power to order the respondent to place an employee in the correct designation” i.e the one that the arbitrator found to be appropriate. It is therefore axiomatic that the arbitrator viewed his decision to be final, and any failure by the City to comply with his order would be in contempt thereof. This much is clear from the wording used, by the arbitrator, in the awards themselves. Therefore, to suggest that the awards were mere proposals is without logic. There is no plausible basis on which to interpret the awards as being merely conditional or “provisional” as contended for by the appellant.

[33] The appellant contends further that it was always its understanding that after the arbitrator had set aside the placements made by the City, and substituted them with placements, which he considered to be correct after carrying out a matching exercise, it was expected of the City to compile a staff establishment in line with the awards of the arbitrator. The effect of this submission is that the municipal manager’s hands would be tied, and he will be left with no option but to create a staff establishment based solely on the awards of the arbitrator, and not in line with the mandate and statutory responsibilities of the municipality. This would, in my view, be an improper way of creating a staffing establishment for a municipality. The staff establishment should not be based on the number of employees and posts in existence, but rather on the mandate and objectives of the municipality. The situation that not all employees would be placed in positions was envisaged, hence the inclusion of clauses 5.4.1.1 and 5.4.1.2 in the ORP Agreement, which contemplate that the number of posts into which employees may be placed, may be fewer than the employees matched to such posts. Similarly, the inclusion of clauses 5.5.1 and 5.5.2, which contemplate the possibility of unplaced employees. In addition, there is the guarantee that no employee would be retrenched as a result of the process.

[34] The next ground of appeal is that the Labour Court erred in not making its own order in substitution for the awards of the arbitrator, in the terms referred to in paragraph [27] of this judgment. Mr Freund SC, who appeared on behalf of the City, correctly submitted that the Labour Court could not have erred, in the exercise

of the discretionary power conferred on it by s 145(4) of the LRA, by not making the order which the appellant now seeks, for the simple reason that the appellant had not requested the Labour Court to make such an order. The terms of the proposed order were also not placed before the Labour Court. This ground, is therefore raised for the first time on appeal. In my view, the appellant has not established that the Labour Court exercised its discretion in a manner, which is appealable.

[35] Mr Van der Riet submitted that the Labour Court erred by not remitting the matter to the Bargaining Council for determination by another arbitrator. He argued that the dispute should have been automatically referred back, and that the Labour Court did not have the power to decide against remitting the dispute to the Bargaining Council. In my view, it is not entirely correct that once the Labour Court finds that an award is reviewable, that the dispute is automatically remitted to the arbitrating authority, and that the Labour Court lacks the power to order otherwise. It would, in my view, depend on the nature of the dispute: the reasons of the court in support of the decision to review; the relief sought as well as any other factors relevant to the dispute. The list is not exhaustive.

[36] It has been correctly pointed out on behalf of the City that on the pleadings, as they stand before the arbitrator, the appeal will inevitably fail because it has already been established that, the relief originally sought by the appellant is legally impermissible and remittal will serve no purpose. Given the stance adopted by the appellant on appeal, it would appear that it is seeking remittal so as to enable another arbitrator to entertain a claim different from the claim initially sought. The appellant appears to no longer seek orders directing the City to comply with the placements made by the arbitrator to a non-existent establishment, or create a staff establishment that would be solely based on the awards of the arbitrator. In my view, it has not been established, and I am unable to find that the Labour Court improperly exercised the discretion accorded to it in terms of s 145(4) of the LRA. The Labour Court was free to determine the dispute in a manner it considered appropriate or make an order it considered appropriate, about the procedures to be followed, in determining the dispute.

[37] In conclusion, I am of the view that the appeal should, on the three grounds raised by the appellant, fail. In light of this finding, it is not necessary to decide whether

this Court can deal with the remaining grounds of review raised by the City, in the Labour Court, but which were not considered by that court. Consequently, the appeal falls to be dismissed. In my view, it shall be in accordance with the requirements of the law and fairness that there be no order as to costs.

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

- a) The appeal is dismissed.
- b) There is no order as to costs.

Tlaletsi DJP

Hlophe et Kathree-Setiloane AJJA concur in the judgment of Tlaletsi DJP

APPEARANCES:

FOR THE APPELLANT:

Mr Van der Riet SC

Instructed by Cheadle Thompson & Haysom

FOR THE FIRST RESPONDENT:

Mr Freund SC

Instructed by Webber Wentzel