

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JA63/2017

In the matter between:

MINISTER OF JUSTICE

AND CORRECTIONAL SERVICES

First Appellant

THE DIRECTOR GENERAL:

JUSTICE AND CORRECTIONAL DEVELOPMENT

Second Appellant

THE GAUTENG REGIONAL HEAD: JUSTICE

AND CONSTITUTIONAL DEVELOPMENT

Third Appellant

THE ACTING DIRECTOR HUMAN RESOURCES:

JUSTICE AND CONSTITUTIONAL DEVELOPMENT

Fourth Appellant

and

TSAKANI ISABEL TSHIFHANGO

First Respondent

ELIZABETH KUKI MAKHONDO

Second Respondent

Heard: 22 February 2018

Delivered: 13 March 2019

Coram: Waglay JP, Phatshoane ADJP and Savage AJA

JUDGMENT

PHATSHOANE ADJP

- [1] This is an appeal against the judgment and order of the Labour Court (Prinsloo J) delivered on 23 March 2017 reviewing and setting aside the decision to downgrade Ms TI Tshifhango and Ms EK Makhondo, the first and second respondents (“the respondents”) from salary level 8 to salary level 7 and ordering the Minister of Justice and Constitutional Development, the Director General of Justice and Constitutional Development, the Regional Head of Justice and Constitutional Development and the Acting Director Human Resources of Justice and Constitutional Development, the first to the

fourth appellants (“the appellants”), to provide the respondents with reasons for the downgrade of their salary level; including affording them an opportunity to make submissions; and considering them. The appeal is with leave of the Court *a quo*.

- [2] The litigation has a chequered history characterised by several referrals to various fora for resolution. Initially, the respondents approached both the High Court and the Labour Court on 03 and 05 June 2015 for an order interdicting the appellants from implementing the downgrade of their salary levels pending the respondents’ exhaustion of internal remedies. Their applications were struck from the roll for lack of jurisdiction and urgency, respectively. They then lodged their dispute with the General Public Service Sector Bargaining Council (“GPSSBC”) and later the Public Service Coordinating Bargaining Council (“PSCBC”). They also explored domestic grievance procedures at the workplace but their dispute could not be resolved.
- [3] In the end, the respondents launched the present application in terms of s158 (1)(h) of the Labour Relations Act, 66 of 1995 (“the LRA”) seeking, *inter alia*, to review and set aside the appellants’ decision to downgrade them from salary level 8 to level 7 and to reinstate them to salary level 8 which they deemed their appropriate salary level notch. The outcome of this application is the subject of this appeal.

The factual background

- [4] The respondents were employed as administrative officers on salary level 7 by the Department of Justice and Constitutional Development “the department”. During February 2004, the department embarked on a Job evaluations

process. Premised on the results of this process, the first respondent's salary level was upgraded from level 7 to 8 on 15 December 2010 and backdated to 27 August 2008 while that of the second respondent was upgraded from salary level 7 to 8 on 01 December 2012 when she was transferred from Mpumalanga to Gauteng Regional Office.

- [5] The controversy emerged few years later, during May 2015, when the respondents were informed, in the course of the staff meetings that were held on 13 and 22 May 2015, respectively, that the department made an error in upgrading their posts from salary level 7 to 8 and that they were to be downgraded with immediate effect. In the letters dated 21 May 2015, which they received from the department on 22 May 2015 they were notified:

'(T)he Regional office Gauteng Human Resources Division has received an instruction from the Chief Operation Officer at National Office that the position that you are currently occupying has been job evaluated on salary level seven (7) and has been approved as such.

Kindly be informed that you have been wrongly upgraded from salary level seven (7) to salary level eight (8) and therefore you will be downgraded to the correct salary level.

The downgrade will be implemented on persal from 01 June 2015.

Further be advised that [the] overpayment of [the] salary made to you from date that you have been upgraded will be recovered in line with section 38 of the Public Service Act.'

- [6] The respondents explained that there were other employees similarly circumstanced who were never downgraded after the alleged error was discovered. They made further wide-ranging claims of unfair discrimination;

unfair labour practice; and unilateral changes to the terms and conditions of their employment. For present purposes, it is not necessary to traverse those issues. At the heart of their contestation is that they had been on salary level 8 for a period of approximately seven and four years, respectively, and had not been consulted by the appellants on the planned downgrading. They claim to have reasonably expected to acquire and/or retain salary level 8.

- [7] In defence of the claims made by the respondents, the appellants filed papers which raise disputes of fact. I will revert to this aspect. For present purposes, it suffices to say that they aver that the respondents' salary upgrades were effected pursuant to an administrative error made at the Gauteng regional offices. The upgrade did not arise as a consequence of the job evaluation exercise but was in conflict with the outcome of that process. They explained that an error may have occurred following the outcome of the job evaluation exercise performed in relation to administrative officers in the employ of the Magistrate's Courts and/or in the Office of the Master of the High Court. The latter jobs had been evaluated and approved on salary level 8 on 27 August 2008 in terms of an internal Memorandum dated 21 August 2008 headed: "Job Evaluation of 44 Vacant Funded Posts of Administrative Officers on the approved establishment of the Office of the Magistrate's Courts. The appellants contend that the process of evaluating these Jobs at salary level 8 did not apply to other administrative officers who were not employed in the Magistrate's Courts and the Office of the Master such as the respondents *in casu*.

- [8] The appellants refuted the respondents' allegation that there were employees similarly situated who were on salary level 8 and intimated, insofar as there might be employees who continue to occupy administrative posts on salary level 8 other than those engaged in the services of the Magistrate's Courts and the Offices of Master, that would be an error which ought to be corrected.

- [9] Purporting to act pursuant to s38 (1)(a) of the Public Service Act, 1994¹ (“the Act”), the appellants say that the department sought to correct the respondents’ salary level back to 7 and to recover the amount of money overpaid to them. This action raised the ire of the respondents and precipitated this litigation.

The statutory framework

- [10] In terms of s 37(1) of the Act:

‘(1) Employees shall be paid the salaries and allowances in accordance with the salary scale and salary level determined by the Minister in terms of section 3(5).’

- [11] Section 3(5) (a) provides:

‘Subject to the Labour Relations Act and any collective agreement, the Minister may make determinations regarding any conditions of service of employees generally or categories of employees, including determinations regarding a salary scale for all employees or salary scales for particular categories of employees and allowances for particular categories of employees.’

- [12] Section 38 stipulates:

¹ Proclamation No 103 of 1994.

'(1) (a) If an incorrect salary, salary level, salary scale or reward is awarded to an employee, the relevant executive authority shall correct it with effect from the date on which it commenced.

(b) Paragraph (a) shall apply notwithstanding the fact that the employee concerned was unaware that an error had been made in the case where the correction amounts to a reduction of his or her salary.

(2) If an employee contemplated in subsection (1) has in respect of his or her salary, including any portion of any allowance or other remuneration or any other benefit calculated on his or her basic salary or salary scale or awarded to him or her by reason of his or her basic salary—

(a) been underpaid, an amount equal to the amount of the underpayment shall be paid to him or her, and that other benefit which he or she did not receive, shall be awarded to him or her as from a current date; or

(b) been overpaid or received any such other benefit not due to him or her—

(i) an amount equal to the amount of the overpayment shall be recovered from him or her by way of the deduction from his or her salary of such instalments as the relevant accounting officer may determine if he or she is in the service of the State, or, if he or she is not so in service, by way of deduction from any moneys owing to him or her by the State, or by way of legal proceedings, or partly in the former manner and partly in the latter manner;

(ii) that other benefit shall be discontinued or withdrawn as from a current date, but the employee concerned shall have the right to be compensated by the State for any patrimonial loss which he or she has suffered or will suffer as a result of that discontinuation or withdrawal.

- (3) The accounting officer of the relevant department may remit the amount of an overpayment to be recovered in terms of subsection (2) (b) in whole or in part.'

The Judgment of the Court *a quo*

[13] The Court *a quo* was satisfied that, in terms of s38(1)(a) of the Act, where an incorrect salary level, scale or reward is awarded to an employee, the consequence is that the relevant executing authority is obliged to correct it and no discretion is exercised in that regard. However, it found that there was a decision that had been made or action taken by the appellants because a determination of whether an incorrect salary level, scale or reward was awarded to an employee must be preceded by some form of assessment or an investigation. The power bestowed upon the executing authority by s 38 of the Act had to be exercised within the ambit of the principle of legality, fairness, rationality and reasonableness.

[14] The Court *a quo* further found that any action taken prior to the implementation of s38 must be procedurally fair. This would entail, *inter alia*, affording the individuals, whose rights or benefits stood to be adversely affected, the opportunity to be heard. It reasoned that the respondents were not apprised that the downgrading of their salary levels was being considered; they were not provided with reasons for the downgrade; and afforded the opportunity to make representation before the decision by the department, to correct their purported erroneous salary grading, was put into effect.

[15] The Court *a quo* was disinclined to restore the *status quo ante* or determine whether the respondents were correctly or incorrectly graded on salary level 7.

It was of the view that this question had to be resolved internally upon consideration of all the facts including the respondent's representation and the applicable prescripts. As already alluded to, it reviewed and set aside the decision to downgrade the respondents' salary level from level 8 to 7 and fashioned an order in terms of which the appellants had to: provide reasons for the downgrade to the respondents; evaluate and consider their representations; and determine whether they were awarded an incorrect salary level that required correction.

The grounds of appeal

[16] Before us, in summary, it was contended that:

16.1 The Court *a quo* erred in not finding that the "decision" to downgrade the respondents' salary level from 8 to 7 involved "no decision at all" but was purely mechanical and aimed at determining whether there was an error and if so to implement s38 of the Act;

16.2 On the basis of the *Plascon Evan Rule*² the Court *a quo* was bound to accept the appellants' version, (as the respondents in the Court *a quo*) and grant them the relief they sought;

16.3 The Court *a quo* erred in holding that: (1) when exercising a power in terms of s38 of the Act, the executing authority takes a decision which

² *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

involves establishing whether an incorrect salary level, scale or reward had in fact been awarded to an employee; and (2) that the decision-making process had to be effected reasonably and within the confines of the principle of legality, fairness, rationality, and had to comply with a fair procedure;

16.4 Contrary to what had been found by the Court *a quo* the principle of legality did not require a functionary to act in a manner that was procedurally fair;

16.5 The Job evaluation exercise was a process that was determined and implemented at a high level from which the employees were completely divorced. The respondents were therefore not in a position to make any meaningful contribution. Whether there was an error in the grading of the posts was an objective enquiry and not dependent upon any input from the respondents; and lastly

16.6 The Court *a quo* erred in finding that “*it cannot be*” that the respondents had no recourse if the application of s38 of the Act was triggered by mistake.

The evaluation

[17] This appeal mainly revolves around the construction placed on s38(1)(a) of the Act by the Court *a quo*. Predicated on this is the question whether on a proper interpretation of s38(1)(a) the respondents were entitled to a hearing before the correction of the error by the executing authority.

- [18] The present state of the law concerning interpretation, in general, was expressed in these terms in *Natal Joint Municipal Pension Fund v Endumeni Municipality*³:

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

- [19] Section 38(1)(a)(b) is narrowly focused on the correction of an incorrect salary, salary level, salary scale or reward awarded to an employee. The

³ 2012 (4) SA 593 (SCA).

language used in s38(1)(a) is clear and the intention plain: insofar as an incorrect salary, salary level, salary scale or reward is awarded to an employee, the relevant executive authority is bound to make the correction with effect from the date on which it commenced. This much is unambiguous. A plain reading of the provision says nothing about any consultation or hearing that ought to be afforded to an employee prior to the correction of the incorrect salary level. There could be no reason for reading in words to qualify the unambiguous text. Apparent from s38(1)(b) the correction shall be effected notwithstanding the fact that the employee concerned was unaware that an error had been made in the case where the correction amounts to a reduction of his or her salary. Seen in this context, no amount of representations the respondents could have made would have had any impact on the decision to be taken. In my view, s38(1)(a) ought not to be interpreted in a manner that restricts the State's right to correct an incorrect salary level. Section 38(1)(a) was designed to remove any discretion that the executing authority may otherwise have enjoyed. His or her obligation to correct an incorrect salary level or salary scale, with effect from the date when it commenced, arises by operation of law.

- [20] The Court *a quo* erred in basing its finding, that there ought to have been a hearing prior to the correction of the respondents' salary level, on the principle of legality. The doctrine does not itself require a functionary to afford a person a hearing; what it requires is for the functionary to abide by the law. If on one hand a statute or other law requires the functionary to afford the subject a hearing, then the doctrine of legality requires that functionary to act in accordance with that statute. If on the other the statute is silent or does not require a functionary to afford the subject a hearing the doctrine of legality will not impose such an obligation. I am not persuaded that the executing authority misconceived his power and/or acted irregularly in not observing the *audi* principle in the circumstances where the statutory provision makes no room for this. The Court *a quo* erred in concluding that the power bestowed upon

the executing authority by s38 of the Act had to be exercised within the ambit of the principle of legality, fairness, rationality and reasonableness.

- [21] Properly distilled and ancillary to the question whether the respondents were entitled to a hearing before a decision to downgrade their post levels is the question whether an error had occurred in the determination made pursuant to s3(5) read with s37 of the Act. The respondents did not pertinently raise the issue whether there had been an error in the upgrading or downgrading of their salary level in their papers. There are disputes of fact on this aspect and on the reasons provided by the department for having upgraded the respondents' salary level to level 8. The parties rely on completely different memoranda in support of their respective stances.
- [22] The respondents contended that nothing triggered the application of s38 by the executing authority because the upgrade of their salary level to level 8 was not erroneously effected. According to them, the upgrade had its genesis in the outcome of the Job evaluation results which were approved on 27 August 2008 for the *Regional Offices and Courts* in respect of various posts which included the posts they occupied. They sought to find support for their argument in a memorandum dated 09 February 2010 which requested the Deputy Director General: Corporate Services to approve the uniform implementation of the already approved job evaluation results for posts on the establishment of the '*Regional Offices and Courts in the regions*' where such implementation had not been effected. They further rely on a memorandum dated 04 June 2010 from Corporate Services: CFO-Chief Directorate Budgets, the purpose of which was to source funds from identified savings on the department's budget in order to implement the approved job evaluation results on the establishment of various '*Regional Offices and Courts*.'

- [23] Juxtaposed against the respondent's argument is the appellants' contention that the respondents' salary level was fortuitously upgraded to salary level 8. This conclusion, they contended, is founded on a memorandum dated 12 February 2008 headed "Job Evaluation of Posts in the Directorate Organisational Development" which records that the posts of Assistant Director: Employee Assistant Programme; Assistant Director: Employment Equity; and Administrative Officer were subjected to the Job Evaluation process. These jobs were graded in terms of the EQUATE Job Evaluation System and presented to the Job Evaluation Panel on 11 February 2008 for consideration. In terms of this memorandum, the job of an Administrative officer was graded at salary level "6+" but it was recommended that it be graded on salary level 7. The appellants say that the respondents fell into the latter category. The recommendations of the Job Evaluation Panel that they be placed on salary level 7 were supported by the Director: Business Process Improvement and the Acting Chief Director: Value Added Services and accepted on 19 February 2008 by the Director General.
- [24] As support for their case that there had been an error in upgrading the respondents' salary level to 8, the appellants further sought to rely on the memorandum of 21 August 2008 which was issued during the same period in respect of which the respondents aver the job evaluation results upgrading their level to 8 were approved. This memorandum unequivocally relates to the job evaluation results of 44 vacant funded posts of administrative officers on the approved establishment of the Magistrate's Courts. It is axiomatic that in terms of this memorandum, the salary level of administration officers in the Office of the Master and in the Magistrate's Court were evaluated at salary level 8.
- [25] Mr Hulley, for the appellants, contended that the memorandum dated 09 February 2010, which is relied upon by the respondents as support that their

salary levels were evaluated at level 8, failed to correctly distinguish between different categories of administration officers, identified in the department's memoranda of September 2006; February and August 2008, being administration officers in the Offices of the Master and the Magistrate's Courts.

[26] In terms of the well- established *Plascon-Evans* rule, where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order.⁴ The application procedure was not designed to resolve the material factual impasse elicited on the papers which, in my view, ought to have been resolved through the leading of oral evidence and require factual resolution. A litigant who elects to proceed on motion runs the risk that disputes of fact may arise. Where it is clear that the dispute is not resolvable on the papers a Court may, *inter alia*, dismiss the application. As already alluded to, the Court *a quo* was disinclined to determine whether the respondents were correctly or incorrectly graded on salary level 7, an issue at the heart of the contestations between the parties. In my view, the Court *a quo* ought to have dealt with the disputes of fact under the prism of the *Plascon Evans* Rule. It, therefore, erred in fashioning the order as it did, directing amongst others, that the appellants determine whether the respondents were awarded an incorrect salary level that required correction. It ought to have dismissed the application.

[27] One pertinent aspect of this case which merits attention is the recovery of the overpayments purportedly made to the respondents following the erroneous grading of their salary levels. It is a weighty consideration that the respondents had been on salary level 8 for a period of approximately seven and five years, respectively, and enjoying benefits concomitant to the level in question. *Ex*

⁴ *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

facie the letters notifying the respondents that they were incorrectly graded, they were also informed that the recovery of the overpayment would be effected in accordance with s38 of the Act. The correction of their salary level has an effect of changing their conditions of services and negatively impacts on their livelihoods and financial commitments.

- [28] Section 38(2)(b)(i) of the Act which empowers the State, as an employer, to recover monies wrongly paid to its employees directly from their salaries without due process or agreement was declared unconstitutional in *Public Servants Association on behalf of Ubogu v Head of the Department of Health, Gauteng and Others*⁵ (“PSA obo Ubogu”). The following ratio for the decision is apposite⁶:

[65] The effect of the provision is to impose strict liability on an employee. The deductions may be made without the employee concerned making representations about her liability and even her ability to pay the instalments. The impugned provision also impermissibly allows an accounting officer unrestrained power to determine, unilaterally, the instalments without an agreement with an employee in terms of which the overpayment may be liquidated.

[66] Section 38(2)(b)(i) undermines a deeper principle underlying our democratic order. The deductions in terms of that provision constitute an unfettered self-help – the taking of the law by the State into its own hands and enabling it to become the judge in its own cause, in violation of section 1(c) of the Constitution. Self-help, as this Court held in *Chief Lesapo*, “is inimical to a society in which the rule of law prevails, as envisaged in section 1(c) of our Constitution.” Although there may be circumstances when good reasons exist – justifying self-help – this is however not a case of that kind.

[67] By aiding self-help, the impugned provision allows the State to undermine judicial process – which requires disputes be resolved by law as envisaged in

⁵ (2018) 39 ILJ 337 (CC).

⁶ At 357H – 359C paras 65-68.

section 34 of the Constitution. This provision does not only guarantee access to courts but also safeguards the right to have a dispute resolved by the application of law in a fair hearing before an independent and impartial tribunal or forum. It is not insignificant that section 31 of the Act envisages recovery of money, in the case of unauthorised remuneration, “by way of legal proceedings”. The Minister of Public Service argues that Ms Ubogu’s section 34 right was not violated because that protection applies only to disputes that are capable of resolution by application of law. This contention is flawed. The Minister does not explain why the existing dispute was not capable of resolution by the application of law in a fair public hearing before a court. The mechanism through section 38(2)(b)(i), as currently formulated, is clearly unfair. It promotes self-help and imposes strict liability on an employee in respect of overpayment irrespective of whether the employee can afford the arbitrarily determined instalments and was afforded an opportunity for legal redress.

[68] On those bases, section 38(2)(b)(i) does not pass constitutional muster.’

[29] The decision in *PSA obo Ubogu* is instructive that an employee is entitled to a hearing before a decision is taken in respect of the manner in which an employee would have to reimburse the employer for the overpayments made consequent upon an incorrect salary grading. In *Western Cape Education Department v General Public Service Sectoral Bargaining Council and Others*,⁷ this Court remarked that it is implicit in the purpose of the s38 of the Act read as a whole that the exercise of a power conferred upon the executing authority by the section had to be exercised reasonably.

[30] There can be no rational basis, in respect of the planned reimbursement of the alleged overpayment, for the appellants not to afford the respondents an opportunity to make representation and/or participate in the decision that may

⁷ [2014] 10 BLLR 987 (LAC) at 996 para 29

adversely affect them. More importantly, this would provide to the respondents a platform to influence the outcome of the decision and prevent the unfettered self-help.

[31] To recapitulate, s38(1)(a) was designed to remove any discretion that the executing authority may otherwise have enjoyed when correcting an incorrect salary, salary level, salary scale or reward. His or her obligation to correct an incorrect salary level or salary scale, with effect from the date when it commenced, arises by operation of law. On the question whether there had been an error in the upgrading or downgrading of the respondents' salary levels, insofar as there were material disputes of fact not resolvable on the papers as they stood, the Court *a quo* erred in not dismissing the application. Its order falls to be set aside.

[32] I am satisfied that the requirements of law and fairness do not justify an order as to costs due to an ongoing employment relationship between the parties. In the result, I make the following order.

Order

1. The appeal is upheld;
2. The order of the Court *a quo* is set aside and substituted with the following:

“1. The application is dismissed.

2. No order is made as to costs.”

MV Phatshoane

Acting Deputy Judge President

Waglay JP and Savage AJA concur in the judgment of Phatshoane ADJP

APPEARANCES:

FOR THE FIRST TO THE FOURTH APPELLANTS: Adv Hurley SC

Instructed by the State
Attorneys

FOR THE FIRST AND SECOND RESPONDENTS: Ms TI Tshifhango and

Ms EK Makhondo (in person)