

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case No: CA 4/2018

In the matter between:

NATIONAL UNION OF MINEWORKERS

obo N COETZEE & 4 OTHERS

Appellant

and

ESKOM HOLDINGS SOC LTC

First Respondent

CHRIS BENNETT N.O.

Second Respondent

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

Third Respondent

Heard: 27 August 2019

Delivered: 04 October 2019

Coram: Davis JA, Murphy and Kathree-Setiloane AJJA

JUDGMENT

MURPHY AJA

- [1] The appellant (“the NUM”) appeals, on behalf of five employees (“the employees”), against an order of the Labour Court (Steenkamp J) setting aside the award of the second respondent (“the commissioner”) holding that the first respondent (“Eskom”) had committed an unfair labour practice and

ordering it to upgrade the employees to higher grades and to pay them back pay.

The facts

- [2] In 2011, Eskom commenced a restructuring exercise aimed at transformation with various strategic organisational imperatives and the implementation of a new organisational structure. Prior to that, in 2007-2008, Eskom had changed from the Patterson to the TASK (Tuned Assessment of Skills and Knowledge) job grading system. As will appear more fully later, problems arose in the transition from the Patterson to TASK.
- [3] In March 2014, Eskom adopted a written policy ("the migration policy") titled "Principles for Employee Migration during Transformation" intended to guide the organisation throughout the re-organisation process. The migration policy established consultative fora, and set out the principles and rules governing the proposed migration of employees from the old organisational structure to the new one.
- [4] The process involved developing the new structures (consisting of positions with job profiles), consultation with organised labour, sending the existing and proposed job profiles to a job evaluation committee ("JEC") for grading, and the populating of the new organisational structures by placing individual employees into the positions.
- [5] In terms of paragraph 2 of the migration policy, it applied to all Eskom Bargaining Unit employees and would start applying "once the relinking of employees from existing Divisions to new Operating Units or Functions or Divisions has taken place." The purpose of the policy was "to provide the Eskom business with standard principles and rules to apply to Bargaining Unit employees when migrating from the current organisational structures to the new structures".
- [6] This appeal is concerned with the grading of the positions of the employees and the placement of them subsequent to the restructuring exercise. The employees (Messrs Zatu, Coetzee, Lambert, Smit and Wolstenholme) all work

in the Materials Management Department of the Nuclear Chain Operations: Nuclear Commercial division at Eskom's nuclear power station at Koeberg. Zatu is presently a Warehouse Supervisor on grade T10 in the new structure. He was first employed in August 2006 as a storeman. In 2007 he was promoted to Snr Storeman Field Serv T06. Since July 2008 and before the restructuring he was designated as a Supervisor Tech Technical Serv T10. The other four employees are presently Senior Storepersons on grade T06. From at least 2008, until the restructuring in 2015, they were designated as Senior Storeman Issuing, also on grade T06. Coetzee and Lambert commenced employment in March 1983; Smit in August 1983; and Wolstenholme in December 1984.

- [7] There is no job profile on record for the old Senior Storeman: Issuing T06 position which four of the employees held prior to the restructuring, or for Zatu's prior position, Supervisor Tech Technical Serv T10. Zatu gave uncontested evidence that the Supervisor Tech Technical Serv position did not, in fact, exist in the Koeberg Operating Unit. This is confirmed by an organogram for the Nuclear Business Support Organisation Structure dated 30 November 2010 ("the 2010 organogram"). Under the Stores Operations function the 2010 organogram shows a single T06 position Senior Storeman: Issuing, horizontally linked to Senior Storeman: Storage, of which there are three. These positions reported to a Snr Storekeeper Materials Management T11. There appears to have been no T10 position in this line function.
- [8] It is not disputed that the four employees reported to Zatu; however, as just explained, the 2010 organogram does not include Zatu's prior position. Moreover, there is also only one (and not four) Senior Storeman: Issuing T06 positions. The anomalies were not adequately explained in the evidence but possibly arose during the transition from Patterson to the TASK. Zatu testified that he understood that the anomalies would be addressed during the restructuring process.
- [9] In August 2012, Smit and Wolstenholme filed a grievance complaining about their T06 grade, which did not reflect their role as supervisors to whom other employees at T05 and T06 level were reporting. In February 2013, the

chairperson of the grievance meeting recorded in the outcome report that the anomaly was due to the change from Patterson to TASK and that he could not alter the result of that process many years after the event. However, he noted that the restructuring process to standardise job profiles across Eskom was intended to rectify any anomalies and recommended that the employees wait for the outcome of the process.

- [10] On 30 July 2014, job profiles for new positions in the Group Commercial Division were approved by the line manager, P du Toit, and on 6 August 2014 the chairperson of the JEC, Mr D. Gorrie, confirmed the TASK grades attached to those new positions. An organogram for Nuclear Supply Chain Operations dated 27 February 2015 ("the 2015 organogram"), and signed off by management, reflects the materials management function after restructuring as comprising in part: i) one Materials Management Manager M14; ii) one Senior Warehouse Supervisor T12; ii) four Warehouse Supervisors T10; iii) three Principal Clerks T08; iv) eighteen Snr Storepersons T06; and v) four Storepersons T05. A second organogram for Nuclear Supply Chain Operations dated 18 July 2016 ("the 2016 organogram") is different in some respects from the 2015 organogram but in relation to the materials management function is the same, except, instead of providing for 18 Snr Storepersons T06 and four Storepersons T05, it provides for 22 Snr Storepersons T06.
- [11] The job profile for the new Senior Warehouse Supervisor T12 position records its key performance areas ("KPAs") as *inter alia*: i) the supervision of the stores operations function; ii) administering and monitoring of the warehouse and haulage operational budget; iii) performing warehouse inventory control activities; iv) supervising warehouse staff; and v) identifying and implementing warehousing and haulage improvement opportunities. The most important KPAs of the new Warehouse Supervisor T10 position are: i) supervising and co-ordinating the warehouse activities; ii) controlling and ensuring vehicle load optimisation; iii) controlling safety and good housekeeping activities; and iv) performing administrative activities.

- [12] The migration policy envisaged and provided for various possibilities in relation to the placement of employees. We deal only with the possibilities that are relevant to this appeal.
- [13] In terms of paragraph 3.2.4 of the migration policy, if a position was not affected by the transformation (grading, job content, location and number of incumbents remained the same) the appointment of the incumbent employee in such positions would be confirmed in writing. If a position was relinked through a change in reporting relationship but otherwise unaffected, the employee would likewise be appointed in the position and, if applicable, given notice of the new reporting relationship.
- [14] If a position's job profile changed, and the change in the content of the job profile was less than 30 per cent, and the JEC confirmed that the TASK grade was unaltered, the employee would be appointed in the position with no change. However, if the position's job profile changed, and the change in the content of the job profile was more than 30 per cent, then there were four possible outcomes: i) if the TASK grade was the same, the employee would be appointed in the position with no change; ii) if the TASK grade was lower, the employee would be offered an alternative position on the previous TASK grade, failing which the employee would be appointed in the position on the personal to holder principle; or iii) if the TASK grade was higher, the employee would be appointed in the position if he or she met the requirements (in various ways); iv) if the TASK grade was higher but the employee did not meet the requirements within a reasonable time, including by way of an individual performance plan or recognition of prior learning, the employee would not be appointed and would be reasonably accommodated.
- [15] Furthermore, if positions which were the same had different grades, they would be equalised by creating a standardised new job profile. If a position no longer existed, Eskom would reasonably accommodate the incumbent in the placement plan. And finally, if a new position was created that did not exist immediately prior to the organisational change, the responsible line manager would identify and consult with suitable employees within the department and

appoint them in writing (failing which an increasingly widening search would be conducted).

- [16] On 11 December 2014, the senior manager Nuclear Commercial, Mr. B Culligan, addressed and signed a letter to Zatu notifying him of his appointment in the new position of Senior Warehouse Supervisor T12, and attaching the new job profile. The relevant part of the letter reads:

'The consultation discussion held with you on 01 September 2014 refers.

It is confirmed that Eskom is currently in a transition in order to implement its business plan. In terms of the principles that govern the migration of employees during the transition, Eskom has given the undertaking that no loss of employment will occur during this process.

You are hereby informed that the job profile for the position in which you have been appointed has changed. Such change is more than 30% and a new profile was submitted to the Job Evaluation Committee for grading. The Job Evaluation Committee has confirmed that grading at TASK Grade **T12**. This grade is higher than the grade the position was previously graded at. The new designation of the position is **SENIOR WAREHOUSE SUPERVISOR**.

Please find attached a copy of the new job profile.

It is confirmed that after consultation with you it was determined that you:

.....

Do Not meet the minimum requirements established by the new job profile and that you have the necessary skills, knowledge and experience to perform the job outputs....

In order for Eskom to honour its undertaking your appointment in this position is confirmed.

You do not have to apply for the position....'

- [17] Zatu accepted the offer by countersigning the letter on the same day. The evidence indicates that although delivered to and signed by Zatu, this letter, and others like it, was never "officially issued" or confirmed. The letters were

not actioned allegedly because management at Eskom head office was uncomfortable with the upgrades. Thus, Eskom claims that the letter was issued prematurely.

- [18] The letter to Zatu, however, is consistent with the 2015 organogram depicting the Nuclear Supply Chain Operations organisational structure and signed by Culligan. As discussed, the 2015 organogram depicts the warehousing line function reporting to the Materials Management Manager in the organogram as being comprised of a Senior Warehouse Supervisor T12, Warehouse Supervisors T10; Principal Clerks T08; Senior Storepersons T06; and Storepersons T05. The positions of "Supervisor Tech Technical Serv" and "Senior Supervisor: Issuing" previously held by Zatu and the other employees respectively are not reflected on the organogram and thus no longer exist.
- [19] The 2015 organogram contains the names of the employees reflected against the new designated positions. Zatu's name is recorded (consistent with the offer he received on 11 December 2014) under the Senior Warehouse Supervisor T12 position; while the other employees are placed in the four positions of Warehouse Supervisor T10. Thirteen other employees are designated in the Senior Storeperson T06 position reporting to the employees. By contrast, the 2016 organogram does not reflect the names of the employees but records the positions as vacant.
- [20] Zatu testified that the 2015 organogram was agreed to by organised labour in the business consultative forum. The names of the employees were inserted later. The employees deny that the organogram was a "wish list", which had not been approved. Coetzee testified that the 2015 organogram had been implemented to a large extent. Be that as it may, the new positions were graded by the National Grading Committee, since the record shows that all the jobs were evaluated and graded.
- [21] Zatu testified that both prior to and after the restructuring he performed the tasks of a Senior Warehouse Supervisor T12 as reflected in the new job profile, despite then being designated "Supervisor Tech Technical Serv' T10, a position which, as mentioned, did not in fact exist on the 2010 organogram.

Coetzee, Lambert, Smit and Wolstenholme all reported to Zatu. At the arbitration, Eskom did not dispute that Zatu carried out grade T12 functions. However, it was put to him during cross-examination that he had performed these tasks in an acting capacity. Zatu conceded as much but added that he continued to carry out the functions, despite the fact that Eskom had stopped paying him an acting allowance, and that he had been asked to do so because his job profile and grading would be corrected through the migration process.

- [22] Coetzee testified that despite being classified as a “Senior Storeperson: Issuing” T06 before the restructuring and as a Senior Storeperson T06 thereafter, he performed the tasks set out in the Warehouse Supervisor T10 job profile. He testified that other employees graded T06, T08 and T10 report to him, which would not be the case if he was, in fact, a Senior Storeperson T06.
- [23] On 12 March 2015, Zatu received an e-mail from a human resources official under the heading: “Intimation for Position Change” which stated: “The Employee ...has been moved to New Organisation Unit (49131814) with effect from (01.09.2014).”
- [24] Mr. Lionel Henn, Business Partner at the Koeberg Operation Unit, testified that the 2015 organogram was ultimately not approved at national level. However, the evidence of Zatu and Coetzee concerning their job outputs was not meaningfully challenged. Although it was put to them that Eskom would refute their testimony concerning their actual duties, Henn and the other Eskom witnesses gave no cogent evidence in that regard.
- [25] Henn suggested that the employees’ positions had not gone for grading and that the T06 positions remained unchanged. However, Ms. Beaulah Sishuba, the Remuneration and Benefits manager, confirmed that all positions had in fact been evaluated and graded by the JEC. She explained:

‘The migration as I have confirmed now first of all is for migration that applies to everybody and the process was that all the jobs there was taken for grading and I think what happened it is also loosely referred to as evaluation.

Job Evaluation and Grading Committee people use those words interchangeably so it went for evaluation through the Grading Committee and I think what else what also comes through is if a job did not move up or down then people perceive it as if it has not been graded but the job has in essence been graded by the Grading Committee, it has been evaluated, all the jobs have gone, they have been presented, looked at and then evaluated. So all the jobs have been evaluated.'

- [26] On 21 May 2015, the employees received letters notifying them that their positions were not affected by the transformation, and that all their terms and conditions of employment remained unchanged. The letter to Zatu described his position as "Warehouse Supervisor" and his grade as T10 and the letters to the other employees describes their positions as "Snr Storeperson" and their grade as T06. The relevant part of the letters read:

'It is confirmed that Eskom is currently in a transition in order to implement its business plan. In terms of the principles that govern the migration of employees during the transition, Eskom has given the undertaking that no loss of employment will occur during this process.

In order for Eskom to honour that undertaking you are hereby informed the job contents, designation and grading of your current position have remained unchanged.

You do not have to re-apply for your position since it is not affected by the transformation.

All your Eskom staff benefits, terms and conditions of employment, and remuneration remain unchanged.'

- [27] The content of the letters is not entirely accurate. Even if it were accepted that the job contents and grading of the employees' positions remained the same, their designations had changed. Moreover, as there are no job descriptions for the employees' previous positions ("Supervisor Tech Technical Serv" and "Senior Supervisor: Issuing") on record, it is not possible to determine definitively whether the job contents and grading of those positions were the same as that of the job profiles for the Warehouse Supervisor and Snr Storeperson positions to which the employees were appointed by the letter of

21 May 2015. In this regard, it must be kept in mind that the evidence of the employees that their job contents aligned with the KPAs for Senior Warehouse Supervisor and Warehouse Supervisor was not controverted.

[28] On 8 June 2015, each of the employees appealed to the relevant Employee Care Group (“ECG”). Paragraph 3.5 of the migration policy established ECGs comprising representatives of line management, HR/IR management and organised labour at local, divisional and national level, which would monitor the implementation of the migration principles and rules; monitor and facilitate placement of employees; deal with and finalise appeals from bargaining unit employees; and monitor and facilitate reasonable accommodation of those who were unplaced. In terms of paragraph 3.5.1 of the migration policy, one of the objectives of the ECG’s was to “deal with and finalise appeals” from bargaining unit employees. Thus, an employee who was dissatisfied concerning his or her placement could lodge an appeal with the ECG. Appendix B to the migration policy diagrammatically depicts the appeal process. It provides that dissatisfied employees were entitled to lodge an appeal within 14 days of being informed of a placement decision to the chairperson of the responsible ECG which would consider the appeal and “make a final decision”. If the employee remained dissatisfied about the outcome of an appeal, in terms of Appendix C of the migration policy, he or she could declare a dispute with Eskom.

[29] In his appeal, Zatu stated that since his appointment he had been performing the duties of the Senior Warehouse Supervisor T12 and still supervised the stores operation function. He asked to be appointed to the position as per the migration principles. He also alleged that he had been treated unfairly because “I was told that I will be upgraded to the current grading because the work that I am performing”. The other employees in their appeals stated that they were performing the duties of Warehouse Supervisor and wanted to be upgraded to T10 “as per the migration principles”.

[30] The ECG considered the appeals on 14 July 2015. Smit and Wolstenholme were the only employees present, but they put forward the case for all of the employees other than Zatu. The relevant part of the minutes read:

‘Appellants gave background on the case:

The appellants are T06 operating at T10 level (Snr Supervisors). Their job went for grading and came back as T10. They believe that they should be upgraded to T10 based on their job outputs and that their jobs were graded at T10.

The desired outcome with the appeal is that management and HR upgrades them to T10.

Response from Management and HR:

Management confirmed that the employees are operating at T10 level. In 2007 they logged an appeal and their jobs went for grading and came back at T10 level. Management supported that they should be upgraded to T10 because they play pivotal role in the department and they perform their duties very well and it's only fair that they are appointed as T10.

HR confirmed that the employees logged a grievance in 2007 and the outcome of the grievance was that they wait for the transformation process. When their jobs were graded at T10, remuneration and benefits (Sishuba) rejected that they be moved to T10 because on SAP they were occupying T06 positions.

Questions and Answers:

After a lengthy deliberation on the matter Koeberg Management and HR agreed with the ECG that the employees' job titles/designations were incorrect on SAP and that they cannot use the ECG platform to rectify that though in commercial environment Snr Supervisors are graded at 10 and correct processes need to be followed to rectify their job titles/designations.

ECG Response and Recommendations:

ECG advised Management and HR to rectify the employees' designations on SAP and automatically they will be upgraded at T10 because their grades will be correct.'

- [31] On 31 July 2015, Culligan carried out the ECG's decision by completing Approval of Employee Change GA2 forms for a "position change" and

“designation” for each of the employees, directing that Zatu be designated as Senior Warehouse Supervisor and the other employees as Warehouse Supervisors. These forms were submitted to HR Shared Services (“HRSSU”), which requested a signature from Remuneration and Benefits. The GA2 forms were then submitted to the Remuneration and Benefits Manager, Sishuba, on 11 August 2015, advising her that the appeals had been upheld by the ECG and requesting her to sign off on them.

- [32] Sishuba was unwilling to approve the position changes. On 3 September 2015, Henn addressed an e-mail titled “Warehouse Employees” to the relevant managers. It read:

‘You would recall that the ECG recommended that we should “rectify the employees’ designation on SAP”. We did the paperwork and sent it to HRSSU, but they requested that Remuneration and Benefits (R&B) signed it off because of the change in grading. Subsequently it was sent to them.

After my engagement with Beulah at R&B she informed me that she is not comfortable signing these grade changes. The requirement from HRSSU to have paperwork signed by R&B did not yield success and therefore these changes cannot happen.’

- [33] Other employees at Koeberg fared somewhat better than the employees. The evidence in this regard focused on three other Storemen: Van Wyk, Scullard and Louw. Louw and Scullard occupied T06 positions designated “Senior Storeman: Receiving” and Van Wyk occupied a T05 position designated “Storeman: Inventory Control”.

- [34] On 14 April 2015, a specialised subcommittee of the JEC, the Safety, Health, Environment and Quality Committee, confirmed the grading of the posts Assistant Officer Quality Assurance at T10 which were included in both the 2015 and 2016 organograms.

- [35] On 21 May 2015, Louw and Scullard received letters describing their new positions as ‘Snr Storeperson’ T06 and, as with the employees in this appeal, stating that their positions were not affected by the transformation. Van Wyk received a letter upgrading him from Storeman Inventory Control T05 to

Senior Storeperson T06. Van Wyk, Scullard and Louw submitted appeals to the ECG on 8 June 2015 on the basis that “the current/actual work output are not recognised as being performed”.

- [36] On 10 August 2015, the ECG met to consider the appeals of Van Wyk, Scullard and Louw. The minutes of the meeting bear striking resemblance to the minutes of the meeting that considered the employees’ appeal. The relevant part of the minutes read:

‘Koeberg Power Station – Job Title: Assistance Officers Quality – Material Management

Appellants gave background on the case:

The appellants are T05 (storeman) and T06 (Snr Storeman) operating at a T10 level (assistant officers quality). Their job went for grading long time ago in the space of Commercial and the outcome of the grading was T10. They believe that they should be upgraded to T10 as per the grading outcome.

They indicated that they have been doing the job for years. Further indicated that they lodged a grievance in 2012 and the issue was not resolved.

The desired outcome in the appeal is that management and HR upgrade them to T10.

Response from Management and HR

Management confirmed that the employees are operating at T10 level. In 2007 they logged an appeal and their jobs went for grading and came back at T10 level. Management supported that they should be upgraded to T10 because they play pivotal role in the department and they perform their duties very well and it’s only fair that they are appointed as T10 (assistant officers quality).

HR gave background that the storeman position was the only job that was available when we moved from Patterson grade to Task grading. Subsequently they then operated at a higher level. When they wanted to rectify that, the organisation told them there was no grading committee sitting at that time, they should wait for the Migration and Transformation process for

standardization and equalisation of the jobs. Local HR at Koeberg indicated that they support the upgrade of T10 as their outputs are more by 30% as per the migration principles.....

Question and Answers

.....

The response from Rem & Benefit said in terms of impact analysis there is a job in the new structures such as senior storeperson: so they need to migrate them to such a job. Fundamentally the output of senior storeperson is different from what they are performing currently.

ECG Recommendation:

The decision of the ECG committee agreed to the upgrade of T10 positions.'

- [37] The decision of the ECG of August 2015 was implemented and Van Wyk, Scullard and Louw were subsequently promoted to T10 Assistant Quality Officers.
- [38] The employees contend that the inconsistent treatment of the two groups of similarly situated employees at Koeberg was unfair.

The CCMA proceedings

- [39] The employees referred unfair labour practice disputes to the third respondent ("the CCMA") on 19 October 2015, as contemplated in Appendix C of the migration policy. Two disputes were referred: one for Zatu and another for the other employees. In the LRA Forms 7.11 NUM described the dispute as an unfair labour practice dispute and requested that the employees be upgraded. It summarised the facts as follows:

'The company refuses to upgrade our members as per the migration principles. Please note that our members are already performing work at a higher grade.'

- [40] Conciliation was not successful. On 9 and 10 November 2015, the CCMA issued certificates of outcome recording that the disputes concerning an

alleged unfair labour practice related to promotion, demotion, probation, training or benefits remained unresolved. The dispute was referred to arbitration on 11 November 2015. The issues in dispute were described as follows:

‘Promotion was not effected after the transformation process as guided by the migration principles document.’

The relief sought was “the company must promote our members”.

[41] The arbitration was conducted between April and July 2016. The commissioner handed down his award on 6 August 2016. He formulated the issue for determination to be whether Eskom “committed an unfair labour practice in respect of the applicants’ claims for post reclassifications”. He concluded later in the award that the dispute was “one concerning upgrading of posts” and that such disputes could be categorised as an unfair labour practice dispute in terms of section 186(2)(a) of the Labour Relations Act¹ (“the LRA”), being one allegedly involving unfair conduct “relating to the provision of benefits to an employee” in that should the job be upgraded, the employees will receive better benefits, being an advantage or privilege to which an employee is entitled as a right or granted in terms of a policy or practice subject to the employer’s discretion.²

[42] Although the referral to arbitration intimated that the dispute related to promotions, the commissioner was satisfied that the documentation overall made it clear that the employees were seeking “upgrading to the levels at which they claim to be operating”. The commissioner’s reasoning is succinct, but it is clear that he regarded the failure by Eskom to accept that the job profiles of the positions occupied by the employees had changed to a higher grade together with the non-implementation of the recommendation of the ECG to be an unfair labour practice. He was fortified in his decision by his view that the employees had not been treated in the same manner as Van Wyk *et al*, who similarly had job descriptions that did not reflect the duties and

¹ Act 66 of 1995

² *Thiso v Moodley NO* [2015] 5 BLLR 543 (LC); and *Apollo Tyres South Africa (Pty) Ltd v CCMA* [2013] 5 BLLR (LAC) at para 50

responsibilities actually being undertaken. Yet Eskom complied only with the recommendation of the ECG directing that the positions of Van Wyk *et al* be upgraded or that their designations be changed to result in the correct grading.

[43] The commissioner concluded as follows:

‘[Eskom] committed an unfair labour practice when it failed to treat Applicants in the same way that it treated Van Wyk *et al*. The treatment was arbitrary and without rational explanation in relation to how the others had been treated. It is clear from the documentary evidence (ECG minutes) that Applicants are carrying out the duties described in the T10 and T12 job descriptions and that the ECG should have placed them into those positions as it did with van Wyk and his colleagues.’

[44] The commissioner accordingly ordered Eskom to upgrade the employees to the T12 and T10 positions with effect from 1 September 2014, and to pay them the difference in their salaries. The order in effect graded the employees T12 and T10 respectively. NUM has subsequently contended that the order should be construed not as a promotion but as merely one directing the re-grading of the positions in fact occupied by the employees.

The Labour Court

[45] On review, the Labour Court held as follows regarding the categorisation of the dispute:

‘The union referred an unfair labour practice relating to promotion. Its case was that its members had been upgraded to levels T10 and T12 respectively and that they were entitled to be paid accordingly. That is a rights dispute over which the CCMA did have jurisdiction in terms of s 186(2)(a) of the LRA....The fact that the arbitrator in this case decided instead that he had jurisdiction because it was an unfair labour practice relating to ‘benefits’, rather than relating to promotion, is, in my view, a bit of a red herring. Even if he was mistaken in that view, he still had jurisdiction to decide an unfair labour practice dispute in terms of s 186(2)(a). Whether his award can be sustained on the merits is a different question.’

[46] In finding that the award was unreasonable, the Labour Court accepted a number of factual propositions, some of which are open to doubt. First, it found that there was no evidence to support the ECG's finding that the employees were carrying out the duties described in the higher T10 and T12 job descriptions. Second, it held that the commissioner ignored the evidence that the ECG did not have final authority to decide the matter. The ECG, in its view, could only make a recommendation and the final authority rested with Sishuba, the Remuneration and Benefits Manager, at national level after an ECG made its recommendation at divisional or local level. Third, it accepted the evidence of Sishuba that the decision to place employees at a higher level had to be done through recruitment and selection and not through the migration process. The ECG had no authority to promote. Fourth, the commissioner ignored the employer's evidence that the migration principles were inapplicable in this process, because the jobs of the employees remained unchanged. In this regard, the learned judge accepted the evidence of Henn who said during his testimony that "in terms of the migration principles the job has not gone for grading and has come out at the higher grade". Fifth, the letter of 11 December 2014 to Zatu upgrading his position was unauthorised and should not have been issued. Sixth, no evidence was produced to show actual job evaluations resulting in the upgrading of the employees' jobs.

[47] The Labour Court finally took issue with the tenet of the commissioner's finding that the employees were treated differently to Van Wyk *et al* despite the documentary evidence that the employees like Van Wyk *et al* were carrying out duties of a higher grade than that required by the job descriptions of the posts they occupied. The Labour Court held that the problem with this finding is that there was no documentary evidence that the employees were in fact carrying out the duties described in the T10 and T12 job descriptions. Furthermore, it held that the evidence showed that "the output of the positions held by Van Wyk *et al* was significantly different to the outputs" of the employees.

- [48] In the result, the Labour Court concluded that the commissioner “came to a conclusion that is disconnected from the evidence that was before him and the outcome was unreasonable” and that the claim of an unfair labour practice was unsustainable. It accordingly set the commissioner’s award aside and declared that Eskom had not committed an unfair labour practice.

The submissions on appeal

- [49] Eskom aligns with the reasoning and findings of the Labour Court. It persists with its defence that the recommendation in relation to the employees was unauthorised and overridden by Sishuba who had the ultimate authority to promote and authorise their salary increases and in any event had fair and rational reasons for not implementing the ECG recommendation. It reiterated that the migration policy required grading to be done by the National Grading Committee and suggested that it was not. In the result, the 2015 organogram reflecting that the employees were promoted into higher re-graded positions was not authorised. Moreover, where an upgrade has financial implications such was subject to the approval of the Remuneration and Benefits Manager. Hence, the letter to Mr Zatu had to be authorised by Sishuba and Zatu conceded that the letter was not authorised or binding.
- [50] In summary, Eskom submits that grading had to be approved by the National Grading Committee; remuneration increases as a result of grading needed the approval of the Remuneration and Benefits Manager; and a change would be finalised when an employee received an authorised HRSSU letter. There is no evidence that the employees were contractually appointed into higher positions by a person in authority. All of their jobs came back from the job evaluation process as unaffected, meaning that the grade remained the same or unchanged.
- [51] NUM submits that the Labour Court erred in a number of respects. It contends that Eskom’s failure to upgrade the employees amounted to an unfair labour practice simply because the employees were performing duties which were not accurately accounted for in the job descriptions of the positions that they occupied. The transformation process was designed to address such

anomalies and initially rectified them but then Eskom for insubstantial reasons did not implement the corrective action. Eskom's conduct was unfair because it failed to grade the employees properly and fairly. Eskom's internal organisational requirements and procedures, including who was authorised to grant or to refuse the upgrades, and the proper procedure to follow in upgrading them, NUM argues, are of no consequence.

- [52] Moreover, NUM submits further, the Labour Court erred in finding that there was no evidence that the employees are performing the work described in the T10 and T12 job profiles or that their jobs were evaluated and graded. It maintains that there is uncontroverted evidence to that effect. It persists also in its submission that the situation of the employees was identical to that of the *Van Wyk et al*, showing that upgrades were indeed capable of being effected in the manner claimed by the employees. Hence, it asserts that the decision of the commissioner was rationally based on the evidence and was one that a reasonable decision-maker could reach.

Evaluation

- [53] Neither the commissioner nor the Labour Court discussed the approach that Eskom ought to have taken to the employees in terms of the migration policy. The Labour Court took the view that because the employees' job profiles remained unchanged the migration policy did not apply. That, strictly speaking, is not correct. As confirmed by Sishuba during her testimony, and in accordance with paragraph 2.1 of the migration policy, the policy applied to all Eskom Bargaining Unit employees and all jobs were evaluated. However, in terms of paragraph 3.2.4 of the migration policy, if a position was not affected by the transformation (where the grading and job content remained the same) the incumbents would be appointed into such positions. Eskom maintains that is what happened here.
- [54] Closer scrutiny of the evidence and the migration policy shows that Eskom's position is not sustainable.
- [55] Firstly, the Labour Court erred in holding that there was no evidence to show that the employees performed the work described in the Senior Warehouse

Supervisor T12 and Warehouse Supervisor T10 job profiles. Both Coetzee and Zatu testified that those job profiles described their respective duties prior to the restructuring and that evidence stands uncontroverted. When cross-examining Zatu, Eskom's legal representative did not challenge the fact that he was performing work at a T12 level but merely suggested that, as he was no longer paid an acting allowance to do so, he was doing it of his own accord.

- [56] Coetzee's evidence that he, Smit, Lambert and Wolstenholme were performing the work of Warehouse Supervisor is supported by the minutes of the ECG of 14 July 2015 recording that management confirmed that the employees were operating at T10 level.
- [57] The evidence of the employees is corroborated in some measure by the 2015 organogram signed off by Culligan, the Senior Manager at Nuclear Commercial and Henn the HR Manager. While the 2015 organogram may not have given rise to any rights or legitimate expectations, it may be inferred from it that management at Koeberg accepted that the employees performed the work set out in the new Senior Warehouse Supervisor T12 and Warehouse Supervisor T10 job profiles. This is confirmed further in the case of Zatu by the letter to him from Culligan dated 11 December 2014.
- [58] Eskom failed to call any other witnesses who knew or testified directly about what tasks the employees actually performed.
- [59] The Labour Court also erred when it held that no evidence was produced to show an actual job evaluation resulting in the upgrading of the applicants' jobs. The job profiles for Senior Warehouse Supervisor and Warehouse Supervisor were evaluated and graded by the JEC on 6 August 2014. Zatu testified that the job profile Senior Warehouse Supervisor T12 described his actual duties, and accordingly his true position. Coetzee likewise confirmed that the job profile Warehouse Supervisor T10 described his actual duties. The minutes of the ECG of 14 July 2015 record that the jobs of the employees other than Zatu went for grading and came back at T10 level. Again, the 2015 organogram signed off by Henn, the HR manager and Culligan in February

2015, showing all five employees in the T12 and T10 positions, is an indication of management's understanding of the description and contents of the jobs performed by the employees.

- [60] The fact that the positions occupied by the employees under the old structure, Senior Storeman: Issuing T06 and Supervisor Tech Technical Serv T10, no longer exist after the restructuring, is perhaps a matter of some importance. In such circumstances, it cannot be said that the employees' positions were unaffected and that they thus fell under paragraph 3.2.4 of the migration policy. Although it is difficult, in the absence of any evidence regarding the old job profiles, to determine if the job contents of the employees' new positions changed significantly. At the very least the job designations changed; and the functions currently performed by the employees are those in the job profiles of newly designated similar positions with higher grades.
- [61] Although we have received no submissions on the matter, the situation of the employees was perhaps covered by paragraphs 3.2.5.8 and 3.3.1 of the migration policy which *inter alia* provide that Eskom must reasonably accommodate the incumbent of a position which no longer exists. This requires the responsible departmental manager, after considering all the available placement options, to engage with such employees and to decide in accordance with the normal selection process and criteria whether to appoint them to any available positions. Alternatively, the Senior Warehouse Supervisor and Warehouse Supervisor positions could be seen as new positions and the employees should have been placed in those positions in terms of paragraph 3.2.5.9 of the migration policy, which permits the responsible line manager at an early stage (even before a formal placement plan exists) to consider placing in that position an employee who is employed in the department who needs reasonable accommodation. It is not clear whether management at Koeberg followed this approach before populating the 2015 organogram with the names of the employees. However, for reasons that follow, it is not necessary to determine this appeal on the basis of whether the prescriptions of the migration policy were correctly followed –

even though they appear *prima facie* not to have been, which in itself points to unfairness.

- [62] The uncontroverted evidence is that the employees continue to perform the work described in the Senior Warehouse Supervisor and Warehouse Supervisor job profiles. They were placed however in new positions that do not accord with the job contents of their actual jobs. But even before the migration process, the employees were in positions which did not reflect the work that they did. They were given assurances by management that during, and as a consequence of the migration process, new job profiles reflecting their actual job contents would be drawn up. These new job profiles were approved by the line manager on 30 July 2014 and were sent to the JEC for grading which graded them at grades T10 and T12 respectively.
- [63] The question before the commissioner was whether the employer's conduct was unfair and amounts to an unfair labour practice. The employees do not rely on a representation giving rise to a legitimate expectation or a contractual right to a certain outcome of the migration policy. Their case is simply that the employer's conduct in failing to place them on the correct grades, in accordance with the recommendation or decision of the ECG, was unfair. In the circumstances, the questions of authority and the applicability of the migration process are of limited relevance. Eskom's focus in justifying its conduct on the basis of issues of authority fails to address the fairness of its conduct in not properly rewarding the employees for their work.
- [64] The reasons given for reversing the initial upgrades by the departmental managers and for failing to follow the recommendation of ECG were insubstantial in light of the implementation of the decision of the ECG in the case of van Wyk *et al.* The fact remained that the Senior Warehouse Supervisor and Warehouse Supervisor positions were profiled and graded in July and August 2014, and that these job profiles correctly reflected the work done by the employees. We were informed from the bar that the T12 and T10 positions still remain vacant. Consequently, the employees are unfairly denied the benefit of being allocated a grade commensurate with the work they actually do.

- [65] In the premises, the commissioner's decision that Eskom committed an unfair labour practice was rationally based on the evidence. His determination of the dispute by ordering the employees to be promoted or for their positions to be upgraded was reasonable. The Labour Court, therefore, erred in setting the award aside.
- [66] Eskom filed a cross-appeal against the finding of the Labour Court that the dispute involved an unfair labour practice related to a promotion. The cross-appeal was not pursued with any vigour in argument. Suffice it to say that the unfair conduct of Eskom related to the provision of benefits to the employees. The failure to properly grade an employee is related to the provision of benefits for the simple reasons that benefits (including status, remuneration, eligibility for promotion etc.) are normally determined by grade. As Ms Harvey, on behalf of NUM, correctly submitted, an employee who complains that his or her job is wrongly graded does not seek promotion to a new, higher or different job. Any re-grade of the job to coincide with the actual work done does not change the job contents. A re-grade does not promote an employee into a new position it merely recognises the correct value to be attached to what the employee, in fact, is already doing. A promotion gives an employee a different or revised task. A dispute about an unfair incorrect grading is thus an unfair labour practice dispute relating to the provision of benefits over which the CCMA will normally have jurisdiction. There is accordingly no merit in the cross-appeal.
- [67] In the result, the following orders are made:
- 67.1 The appeal is upheld and the order of the Labour Court is set aside and substituted with the following order:
- "The application for review is dismissed".
- 67.2 The cross appeal is dismissed.
- 67.3 The first respondent is ordered to pay the costs of the appeal and the cross appeal.

JR Murphy

Acting Judge of Appeal

I agree

D Davis

Judge of Appeal

I agree

F Kathree-Setiloane

Acting Judge of Appeal

APPEARANCES:

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LABOUR APPEAL COURT