



REPUBLIC OF SOUTH AFRICA

Reportable

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR3020/09

In the matter between:

EKURHULENI METROPOLITAN MUNICIPALITY

Applicant

and

THE SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

First Respondent

PROFESSOR K GOVENDER N.O.

Second Respondent

A J DU PLESSIS AND 2210 OTHERS

Third and Further Respondents

Heard: 06 October 2011

Delivered: 09 November 2011

Summary: Interpretation of a collective agreement and the power of an arbitrator to categorise the municipality.

JUDGMENT

LOUW AJ

[1] The Applicant seeks to review and set aside an arbitration award made by the second respondent under the auspices of The South African Local Government Bargaining Council (SALGBC) case no HQ 050701.

[2] The third to further respondents referred a dispute to the SALGBC concerning the 'interpretation/application of Wage Collective Agreements (WCA'S).'

[3] The outcome which they sought was phrased as 'increase in wages in respect of different grades and in terms of the wage agreements'.

[4] Under paragraph 8 of the referral form creating space for special features/ additional information concerning the dispute, the respondents stated:

'the Applicants want the municipality to interpret/apply wage agreements from 2003 onwards by increasing wages on the basis of the municipality being a grade 6 (formerly 16) or at least a grade 15 municipality.'

[5] Prior to commencing the arbitration process to determine the dispute between the parties, they served and filed Statements of their respective cases.

[6] In summary and only dealing with the salient features of their case, the respondents stated as follows:

'National Wage Negotiations and Collective Agreements

- a. Wages in local government are negotiated annually at national level;
- b. Upon conclusion of the negotiations the wage increase is implemented on the basis of schedules which are drawn reflecting the actual amounts of the increases to be implemented by local government
- c. These schedules which are drawn up distinguish between various municipalities insofar as each municipality may have a different "grading"

- d. The establishment of remuneration according to a grading system has been in existence since 1976.
- e. The grading system was originally created in terms of the Remuneration of Town Clerks Act to determine criteria for the establishment of a wage level for Town Clerks (now Municipal Managers) in the various municipalities according to the size and sophistication of the different municipalities. The reasoning for establishing these grading systems was that Town Clerks and other employees in a specific municipality would have similar levels of responsibility and therefore receive similar remuneration.
- f. The same approach was followed in regard to The Remuneration of Public Office Bearers Act (POBS) insofar as specific criteria was also adopted in regard to the determination of the remuneration of public office bearers to benchmark local authorities is similar size and sophistication.
- g. Although a statutory system similar to the grading system for town clerks and elected officials was never established relative to the remuneration of employees the practice developed that WCA's, which are concluded at national level, would also be applied on a graduated basis in line with the grading of the municipality
- h. Accordingly the "grading system" forms an integral part of the current collective bargaining system (my emphasis)

The Current Dispute between the EMM (applicant in casu) and the employees (the second respondents in casu)

- a. In August 2000, the Minister of Provincial and Local Government issued Notice 803 concerning the grading of Municipal Councils, which were thus graded on a point system based on the rates income and the number of registered voters.
- b. In terms of this Notice, municipal councils were categorised from level 1-16, with level 16 being the highest.
- c. The points system adopted in this Notice utilised the same criteria as had

been applied for grading purposes previously.

- d. On 19 September 2000, the Greater East Rand Metropolitan Council (GERMC), into which the City Council of Greater Benoni (BMC) was incorporated, and predecessor of applicant (EMM), passed a resolution to the effect that the GERMC was a level 13 council as it had 81.24 points.
- e. The GERMC commissioned an investigation into its correct grading as a municipal council in terms of which it was subsequently established that it is in fact a grade 16 council
- f. On 4 December 2000, the Minister of Local Government issued a new Notice in terms of which the salaries and allowance for councillors were to be determined (ROB 2000). This Notice by the relevant Minister once again laid down the same criteria (i.e. rates income and registered voters) but replaced the 1 to 16 levels to 1 to 6.
- g. The GERMC accepted a grading of 6 on 13 December 2000 for purposes of remunerating its elected councillors.
- h. On 3 January 2003, the new formed Respondent (the applicant in *casu*) adopted a resolution to the effect, that for purposes of remunerating its employees, a grade 13 schedule was to be applied, as a result of which, the agreed percentage increases in the WCA of 2003 was implemented by applying those increase on a grade 13 schedule.
- i. The resolution adopted on 3 January 2003 had the effect of misaligning the remuneration of employees and public representatives despite previous arbitration awards and a labour court judgment in regard to BMC.

Legal issues that arise from the facts

- a. This dispute involves the interpretation and/or application of the annual wage Collective Agreements entered into and between SALGA, IMATU and SAMWU, in the years from 2003 onwards
- b. The third to further respondents claim that on a correct interpretation of the Wage Agreements, the third to further respondents and all other

employees of the Applicant and not only the councillors of the Applicant should have been remunerated on a grade 16/6 level from 2003.

- c. It is submitted by the third to further respondents that it could never have been the intention of the parties to the WCA that that the remuneration of the second respondent and their other colleagues should be calculated according to a grading system which is inconsistent with the grading applied for purposes of the remuneration of its public office bearers.
- d. The third to further respondents further submitted that insofar as the WCA does not expressly provide for the upgrading of employees' remuneration in accordance with those factors which informed the grading of municipalities for purposes of remunerating its public office bearers, clause 5.6 of the Wage Agreement of 2003 provides that the parties agree to undertake to conclude a collective agreement on the categorisation of a municipality and that an implied term exists that the parties will apply the grading system based on a grading achieved in terms of the exiting POB at the relevant time.
- e. By paying only its councillors on a grade 16 level and its employees on a 'fictional level 13, the Applicant failed to comply with its obligation under the WCA to remunerate all employees according to the correct grading.
- f. In addition to basing its claim against the Applicant on the interpretation of the Wage Agreement, the second respondent submitted that the custom in regard to the implementation of wages in accordance with the grading system has become established *inter alia* by the fact that:
 - i) Applicant has itself given effect previously to the interpretation that the grading system is an integral part of the determination of the implementation of the WCA expressly resolving that it is graded as a grade 13 for purposes of calculating wages.
 - ii) Other local authorities, and specially the previous authorities that amalgamated to form the Applicant, have consistently applied the grading system and the principle of adjusting wage levels to the correct grading

- iii) A previous decision by an arbitrator as well as the labour court has given recognition to the principle that the grading system should be equally applied to employees and public office bearers.
- iv) The second respondent's contention was that a custom and practice has developed in terms of which municipalities across the country (my emphasis) will remunerate all employees and not only its councillors having regard to the particular grade of that municipality, and that this custom or practice has become sufficiently established to be read into the WCA by necessary implication

[7] In essence, thus the third to further respondents based their prayer for the relief they sought as a right they acquired in the WCA dated 5 November 2003 and/or a custom or practice which was sufficiently established in 2003.

[8] In its Statement of Case, and once again in summary and only dealing with the salient features of the their case, the Applicant stated as follows

‘National Wage Negotiations and Collective Agreements

- a) It admitted that wages in local government are negotiated annually at national level. It, however pointed out that such regime existed only since 1998 and the first national agreement was for the year July 1998 to June 1999. No regulation of wages and salaries occurs in any other forum. Constituent municipalities implement the national agreement without variation.
- b) It denied that national collective agreements are accompanied by schedules, as alleged. During the era of the LRA of 1956, some Industrial Councils and some municipalities crafted schedules for themselves but that process has never existed in respect of the SALGBC.
- c) It agreed that the grading system was originally created in terms of the Remuneration of Town Clerks Act to determine criteria for the establishment of a wage level for Town Clerks (now Municipal Managers) in the various

municipalities according to the size and sophistication of the different municipalities. The reasoning for establishing these grading systems was that Town Clerks and other employees in a specific municipality would have similar levels of responsibility and therefore receive similar remuneration.

- d) It admitted that the grading of municipalities was provided for in POBS 2000, but the objectives thereof and criteria thereof are substantively different from the objective of and the criteria stipulated in the RTC.
- e) The Applicant denied a practice developed that WCA's, which are concluded at national level, would also be applied on a graduated basis in line with the grading of the municipality
- f) Insofar as the third and further respondents claimed that the grading system (in line with the grading of a municipality in accordance with the POBS 2000 or its subsequent successors) forms an integral part of the current collective bargaining system, the Applicant pointed out that since 2001, the parties to the SALGBC have been in negotiations about job evaluation and grading. The third to further respondent were and remained bound by decisions taken by their respective bargaining agents to determine salaries in relation to a national job grading system

The Current Dispute between the EMM (Applicant in *casu*) and the employees (the third to further respondents in *casu*)

- a) The Applicant denied that the point system adopted in the G N803 utilised the same criteria as had been applied for grading purposes previously.
- b) The Applicant denied that the GERM C passed a resolution that it was level 13 council (according to the POBS 2000), or that the GERM commissioned an investigation into its correct grading, and stated that the applicant in fact graded itself as a grade 6 municipality by applying the provisions of the POBS 1998 on 13 December 2000.

Legal issues that arise from the facts

- (a) In essence, the applicant admitted that the dispute is about the interpretation

of a collective agreement on terms and conditions of employment in respect of the year 2003/2004 and later years, and that the scope of the dispute was set out in the Request for arbitration.

(b) The Applicant also stated that there is no practice as alleged.

(c) It further more simply denied any legal basis for the acquiring of a right stipulated by the third to further respondents.

[9] Premised on both Statements of Case filed with the SALGBC, and the oral and documentary evidence submitted to the arbitrator, the arbitrator issued an award in terms of which he ordered the Applicant to remunerate its employees on a basis that the Applicant 'must be deemed to be grade 15 municipality as from the date in 2003 when it implemented the "grade 13" salary scales', including an order to make these payments retrospectively to 2003.

[10] Considering the legal issues that arise from the facts as set out by the first respondent in paragraph (a), under the same heading, it should have been clear that as far as they were concerned the dispute involves the interpretation and/or application of the annual WA's in the years from 2003 onwards, and more particularly the WA dated 5 November 2003.

[11] In essence therefore, the second respondent was required to interpret the provisions as contained in paragraph 5.6 of the WA dated 5 November 2003.

[12] Perhaps it is opposite to, at this stage, sketch succinctly the historical context relevant to the issues as they arose on the pleadings alluded to above, and in some instances quoting from the founding affidavit of the Applicant.

[13] Prior to 1994, local government in South Africa was managed chiefly, as a provincial affair. The employees in local government were subject to the Labour Relations Act of 1956. Collective bargaining took place within Industrial Councils that were set up on a regional basis. Some large Cities, like Johannesburg and Pretoria had a dedicated Industrial Council. Smaller towns were members of regional industrial councils, like the industrial council for the Local Government undertaking: Transvaal. The towns on the East Rand which later in 2000 were amalgamated to

form the Applicant were members of this Industrial Council.

[14] One legislative intervention in local government was the Remuneration of Town Clerks Act, 115 of 1984 (RTCA) Its purpose was to regulate the remuneration of the Town Clerks, the forerunner of the present Municipal Manager. The RTCA applied to every municipality, and provided for a grading system for local authorities which is then used to determine, *inter alia*, the remuneration of town clerks. In terms of the RTCA, local authorities were classified into groups, and graded on a scale of 1 to 15 on the basis of a formula determined by thirteen factors 'i.e. the certified revenue of the authority, the number of erven, the number of electricity meters and sewerage connections, roads, housing, water and sewerage purification fire tenders and ambulances and the number of trading licences issue and library books'. The level of grading of the remuneration of Town Clerk was determined by the Board on Remuneration and services Benefits for town clerks established in terms of the RTCA. As no official may be paid more than the town clerk, the grading also determined the remuneration of all other posts in the local authority linked to the grading systems, and therefore referred to as the "'inkage' practice. The RTCA was repealed in 1996.

[15] When the RTCA was repealed, the State ceased to set salary limits for the town clerk/CEO of the municipality. It is trite that the Municipal Systems Act, 32 of 2000 (Systems Act) commenced on 1 March 2001. The Systems Act made it abundantly clear that the municipality now set the remuneration for municipal managers, and they were accordingly outside the purview of collective bargaining. The remuneration rate of the municipal manager was no longer a factor in determining the scope of collective bargaining for other employees of a municipality which now takes place nationally in the SALGBC.

[16] The evidence of the witnesses before the first respondent, and according to the award issued by the second respondent was the following. During the existence of the RTCA salary scales were provided for each grade of municipality premised on the thirteen factors as set out in terms of the RCTA. These schedules were initially devised by the Industrial Councils and later by the Bargaining Councils. In the past there had been 16 categories or grades of municipalities. These grades were subsequently reduced to 6 in December 2000 for purposes of remunerating public

office bearers. When the Applicant came into being there were nine different councils all of which were graded on different levels. Some of these component municipalities changed its grading over a period of time. According to one witness's recollection Springs changed from a grade 11 to 12. Benoni changed to a grade 13 (which together with Boksburg were incidentally the highest grade among all of the eventual components which formed the Applicant).

[17] One witness testified that the percentage increase agreed on in the Industrial Council would be applied to a specific salary scale applicable to the particular grade of the municipality; thus still speaking of the system under the RTCA. The same witness testified that none of the Wage Agreements that followed the coming into existence of the Applicant made any reference to abolishing the scales issued by the Industrial Council. There was no deviation from this established system especially considering the reference to two specific documents relating to the salary scales provided by the Bargaining Council (referring to salary scales drawn up by the Industrial Council) for a grade 11 municipality during the period 1 July 2001 to 30 June 2002. The witness could not recall when the Bargaining Council stopped issuing the scales, but was clear that the municipalities never deviated from implementing the existing scales. According to the second respondent's findings the latter evidence was never contradicted

[18] Another witness called before the first respondent testified that he prepared salary scales for the bargaining council for the old Transvaal and subsequently for the Bargaining council for Gauteng from about 1987 to 2002/3.

[19] The second respondent, and premised on the evidence alluded to, reached the following conclusions as set out hereunder in paragraphs [21] to [39].

[20] There are no statutory provisions in the Systems Act preventing a municipality from re-grading itself. The evidence showed that the components parts of the Applicant, including itself, re-graded itself in 2003 to grade 13 and subsequently grade 15 in 2008. The practice under the RTCA thus continued long after the repeal of the RTCA.

[21] The POBS provides a framework for the determination of the salaries and allowances for elected political functionaries. Neither the POBS nor any other

regulation regulates the practices pertaining to the remuneration of employees of a municipality. Since every trade union and employer's organisation has been afforded the right to engage in collective bargaining premised on the LRA and section 23(5) of the Constitution, it is evident that the salaries of employees be determined through collective bargaining in the SALGBC. The repeal of the RTCA and the continued collective bargaining process at the SALGBC is not incompatible with the custom that once a percentage increase was agreed upon at the SALGBC or previous Bargaining Councils it was to be applied uniformly to municipalities of the same grade.

[22] No evidence was led to indicate that the custom of applying the existing scales did not continue. The uncontested evidence was that re-grading occurred and salaries accordingly adjusted. Mr Rudman, the first witness for the first respondent, confirmed that he is aware of the WA of 28 June 2002. Rudman stated that although there were 'issues about how to determine the categorisation of municipalities, there was no deviation from the principle that the category of a municipality determined the salary scale to be paid to its employees'.

[23] Referring to two specific documents, one a letter from the Gauteng provincial Government to the Boksburg transitional council (now forming part of the Applicant) indicated that a statutory mechanism for re-grading had ceased to exist with the repeal of the RTCA. The letter stated that legislation for a new remuneration system for local government was to be passed, and that it was agreed at MINMEC (a committee comprising the minister and members of the executive councils) that no local government would be re-graded in the interim. According to the second respondent this particular letter, including a circular issued to all local governments and recommending that a moratorium be placed on salary increases pending the transformation of municipalities, were merely couched in the form of request or recommendations, and, presumably, not an indication that the 'linkage' practice ceased to exist. This conclusion by the second respondent was also premised on his reference to different sphere of government in its distinctive, interdependent and interrelated status.

[24] Despite these request and recommendation from the Provincial Government to local authorities, the municipalities continued to re-grade itself. In the absence of

applicable national or provincial legislation municipalities were within their powers to re-grade. One of the constants in this process was the fact that municipalities continued to re-grade and then pay their staff in accordance with the higher salary scale applicable after the re-grading exercise. The repeal of the RTCA did not therefore have the effect of legally interrupting the custom that similarly graded municipalities must be remunerated on the same salary scales .

[25] The fact that salary scales continued to be issued up and until 2002, indicates that the custom continued after the demise of the RCTA, and during the period when bargaining occurred in the SALGBC.

[26] The evidence of the Applicant's only witness accepted that when the Applicant re-graded in 2008, it adopted the salary scales applicable to a grade 15-municipality. As no new salary scales were issued by the Bargaining Council after 2003, these salary scales must have been in existence prior to that and continued to be used.

[27] In his analysis of the WA of 2003, the second respondent, first of all referred to the evidence given by Mr Rudman that prior to the adoption of the grade-13 to be implemented by the Applicant, each council remunerated its employees in accordance with salary scales issued by the Bargaining Council. The Bargaining council would issue different scales for each grade of municipality. The percentage increase agreed upon would then simply be applied to the relevant salary scale. According to him, no evidence was led to indicate the contrary.

[28] The second respondent concluded that the drafters of the WA clearly premise clause 5 on the understanding that the salary scales in respect of the various grades of municipalities will be used to determine the exact increase that each employee would receive. Subject to improving the pay packages of the lowest paid employees the differential between various grades was preserved. This is explicit recognition that employees at similarly 'situated' municipalities must be similarly remunerated. The existence of the grading itself is recognition that municipalities have vastly different responsibilities, duties and obligations. Clause 5 of the WA is premised on and incorporated the custom referred to.

[29] If a municipality had unfettered discretion to grade up and down irrespective

of objective criteria, it would have considerable latitude and discretion to determine the wages to be paid to its employees. This clearly could not have been the intention of the WA's. Thus, when a municipality is re-graded the new grade has to correlate to and proportionate with the responsibilities, duties and obligations of that municipality. This obligation is also implicit in the WA's.

[30] Similarly, a re-grading in terms of POBS could only occur if the prescribed point allocated for the number of registered voters and in respect of rates income has been obtained. These two criteria are used to measure the responsibilities, duties and obligations of the municipality. The second respondent was satisfied that once a decision is made to re-grade a municipality then, in terms of the custom, the WA and applicable law, the choice of grade must bear a direct correlation between the responsibilities, duties and obligations of that municipality. There is nothing in the WA and neither have I been referred to any binding collective agreement that prohibits municipalities from re-grading.

[31] Clause 5.6 of the WA commits the parties to finalise a collective agreement on categorisation of municipalities within a period of three months. All the parties recognised that it is necessary to have agreement on categorisation of municipalities.

[32] On 3 January 2003, the Applicant approved a proposal to adopt a grade 13 as the basis of calculating remuneration. The explanation that appears from the resolution selecting grade 13 is that 'prior to disestablishment, the majority of the SDC's were a grade 13 local authority and the employees remunerated at this level.' This explanation, the second respondent found appears to support the speculation of Rudman as to why the Applicant opted for grade 13. Rudman's speculation that as a result that certain component municipalities were graded at 13, the remuneration of employees could not be reduced. Thus in order to achieve a uniform salary structure and not to reduce the remuneration of any employee within the Applicant, the Applicant adopted grade 13.

[33] The second respondent remarked that the Applicant did not place any evidence before him to show that the adoption of the grade 13 regime followed an assessment, appraisal and application of objective criteria relating to responsibilities,

duties and obligations which would justify that decision. Following Rudman's opinion and another witness's understanding of current negotiations, all Metropolitan Councils would be in category 8, a category attracting the highest salary scale. In the same breath, he concluded that 'this evidence' was not disputed. Wolfaardt also testified that to the 'best of his knowledge' the other Metropolitan Councils such as Pretoria (sic), Johannesburg, Cape Town and Durban are all remunerated at grade 15.

[34] With reference to the strike in 2008, and the adoption of a resolution to pay remuneration on grade 15, this is an explicit recognition by the Applicant that it is a grade 15 municipality, and that it should remunerate its employees accordingly.

[35] As a result of it being common cause that the Applicant resolved to grade itself as a municipality deemed to be a grade 6 in terms of the then POBS, and the Applicant's counsel's argument that the criteria and grading in terms of the POBS applied exclusively to public office bearers and that the criteria were vastly different from those used in the RTCA to grade municipalities, the second respondent was of the view that these differences were more apparent than real. The second respondent then embarked upon stating, which was clearly his opinion, as to what the yardsticks should be to determine the nature, extent and scope of the obligations, responsibilities and duties of municipalities.

[36] He continued to state that for purposes of his award, the resolution taken on 13 December 2000 by the Applicant is evidence of the Applicant re-grading itself as being in the top category of municipalities in the assessment of its responsibilities, duties and obligations. The second respondent was further of the view that no reason, logic or principle existed for a municipality to grade in the top rank for purposes of the POBS and in a much lower category for the purpose of remunerating its employees.

[37] According to the second respondent, no evidence was led to show any significant change in the responsibilities, duties and obligations of the Applicant in 2003 as compared to 2008.

[38] In conclusion, the second respondent was satisfied that there was an established trade custom and usage in the local government sector to be graded in

accordance with their responsibilities, duties and obligations, and that the grade of the municipality determined the salary scales to be used to remunerate its employees. He was satisfied that the trade usage or custom survived the repeal of the RTCA and continued under the present dispensation. When a municipality elects to re-grade, it has to ensure that the new grade directly correlates with its responsibilities, duties and obligations. The WA was premised on the continued existence of these customs. The decision of the Applicant to grade itself as a grade 13 is in violation of the WA read with applicable and binding trade custom and usage. The first respondents' rights in this matter thus accrue directly from the WA dated 5 November 2003.

[39] In terms of the Wage Agreement (WA) dated 28 June 2002, the parties to this agreement (i.e. SALGA and IMATU) entered into what was essentially a multi-term wage increase for the 2002 to 2005 financial years. Importantly, this agreement also set out two further aspects namely, that the parties also agreed on the 'categorisation' of municipalities in principle to which effect they hereby undertake to finalise a collective agreement on categorisation of municipalities within a period of three months starting from 1 July 2002.

[40] In terms of the WA dated 5 November 2003, the parties to this agreement (i.e. SALGA, IMATU and SAMWU) entered into yet another collective agreement for the period 19 July 2002 up to and including 30 June 2005. The object of this agreement was set out as:

To make provision for the rate of pay and for matters incidental thereto for all employees and employers who fall into the registered scope of the council (i.e. the SALGBC)

This agreement was once again essentially a multi-term wage increase for the 2002 to 2004 financial years. This agreement also set out two further aspects namely, that the parties also agreed on the 'categorisation' of municipalities in principle to which effect they hereby undertake to finalise a collective agreement on categorisation of municipalities within a period of three months from the date of signature of the agreement (i.e. 5 November 2003), thus ostensibly lengthening the period agreed upon with IMATU from 1 October 2002 to 4 February 2003 (the unnumbered clause in the WA dated 28 June 2002 on page 2 thereof, and paragraph 5.6 of the WA

dated 5 November 2003).

[41] It is common cause that this last mentioned agreement, insofar as it related to the so-called categorisation issue, including a similar agreement in the WA dated 28 June 2002 was not concluded as at 30 January 2003.

[42] The WA dated 5 November 2003, however, also included terms and conditions insofar as it concerned the possibility that the parties may not be in agreement as to the interpretation and application of this agreement. These particular terms and conditions included an obligation on the General-Secretary or Regional Secretary to investigate any such dispute and attempt resolve it by issuing a directive. In the event of the dispute about the interpretation of the WA of 5 November 2003 not being resolved, such a dispute should eventually be arbitrated upon. This is exactly what ultimately led to the award issued by the second respondent under case number HQ 050701.

[43] It is of critical importance that the strike issue resolved in June 2008 needs to canvassed and considered. During, and what was described by the second respondent as 'a somewhat bruising strike', the Applicant and SAMWU (not the unions as alleged) entered into an agreement on 18 June 2008 (SA). The SA made it abundantly clear that the primary purpose of the SA was to end the strike (my emphasis). Some of the salient points in the SA were the following:

'There is agreement that on the principle that Ekurhuleni cannot fall below municipalities of a similar size in handling the matter of grading

That the parties agree to use Grade 15 salary scales and will further be guided by category "A" municipalities form the SALGBC.

That the implementation on the demand for payment from the date of the appointment of employees be done with effect from 31 July 2008.

This agreement constitutes the entire agreement between the parties and the parties further agree that any amendments thereto shall be reduced to writing and must be signed by both parties. The agreement is effective from date of signature.'

[44] The Applicant attacks the award on basically two different grounds. The first ground of the challenge is that the second respondent misconceived the questions to

be answered, and as a result rendered an award that was unreasonable.

[45] In order for misconception of the issues to constitute a ground for review, it must be material in that such misconception or misdirection must have prevented a fair trial of the issues. I am of the view that whilst it may be so that the second respondent 'muddled his way through the issues' he ultimately identified the correct issues to be determined, namely whether there was a tacit term in the WA that municipalities remunerate its employees based on a grading system which is directly linked to the magnitude of its responsibilities, duties and obligations in respect of its service delivery obligations. He found that there was based on an established trade and custom. Whether such a custom or trade usage survived the repeal of the RTCA is, in my view, for purposes of my eventual consideration whether the award was reasonable of no significance.

[46] Even If such a custom or trade usage was established and applied within the Applicant and its component parts, which is in reality the only fact that was proven by the evidence, then the following question arises. If the custom was allegedly still in use from 2000 to 2003, then why did the first respondent not pursue similar rights for this particular period?

[47] The second ground of the attack is premised on a submission that the award rendered was at odds with the evidence adduced, both oral and documentary. That is to say, the Applicant challenged the second respondent's finding that there was a tacit term contained in the relevant WA that a similar grading system as that applied in respect of Public Officials also applied to the remuneration of employees, was not a finding that a reasonable decision maker could have reached.

[48] In my view, the second respondent did not at any stage consider the import of clause 5.6 of the WA of 5 November 2003 coupled with the evidence of Mr Nciza and had as a consequence failed to weigh up the evidence in a balanced manner and disregarded this relevant and important evidence before him. See *Vodacom (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (JR1412/05 dated 11 November 2010)

[49] The Applicant submitted that the second respondent wholly misunderstood the implications of the collective bargaining process and the strike that occurred on

the issue of re-grading that led to a collective agreement in June 2008, thinking it corroborated the existence of the claimed right, when in truth its effect was to prove the exact opposite. In consequence, so it was argued the award cannot stand. Once again the alleged 're-grading' in June 2008 is of no relevance for purposes of either deciding whether the parties negotiated a collective agreement from 5 November 2003 up to and until 30 July 2008.

[50] As referred to above, it was common cause that the parties had agreed as part of the WA that they would reach agreement sometime in the future as to how municipalities would be categorised for the purpose of remunerating employees. This tends to indicate that the parties had abandoned the old custom and practice in terms of simply adopting the grading applicable based on the principles either emanating from the RTCA or the POBS. As such, it cannot be the case that the previous custom and trade formed a tacit term of the WA. The second respondent did not understand the import of clause 5,6 of the WA of 5 November 2003. This being the case, the second respondent's finding in this regard is not one which a reasonable decision maker could have reached in the circumstances.

[51] I may add that a further question also needs to be considered namely: whether the second respondent's finding that the resolution taken by the Applicant on 30 January 2003 constituted a re-grading of itself for purposes of remunerating its employees was within the scope of his powers. Even if it did somehow constitute a re-grading as decided upon in the WA of 28 June 2008, which it did not, was it within the powers of the second respondent to find that the Applicant must be categorised according to a certain grade in order for the Applicant to remunerate its employees accordingly?

[52] There can be no doubt that the only obligation placed on the Applicant was to enter into negotiations with IMATU and SAMWU so as to agree on the 'categorisation' of municipalities and an undertaking to finalise a collective agreement on categorisation of municipalities within a period of three months starting from 1 July 2002, but in reality extended to 4 February 2003. As I have stated before, this undertaking was not adhered to. The non-adherence to this undertaking did not give the second respondent the power to step into the shoes of the parties and categorise the Applicant himself. However, that is exactly what the second

respondent did. He based his categorisation on, *inter alia*, on his opinion as to how and on what basis a municipality should grade itself for purposes of remunerating its employees, on his conclusion that the Applicant allegedly confirmed its grading to be allegedly admitting as much on 19 June 2008, when this admission was clearly intended in June 2008 for purposes of ending the strike action by SAMWU, and only to the extent that such an admission shall operate as from 31 July 2008.

[53] I fully agree with counsel for the Applicant that the second respondent wholly misunderstood the implications of the collective bargaining process and the strike that occurred on the issue of re-grading that led to a collective agreement in June 2008, thinking it corroborated the existence of the claimed right, when in truth its effect was to prove the exact opposite.

[54] The second respondent in concluding that the Applicant should in 2003 be deemed as a grade 15 municipality alluded to equity factors quite irrelevant to the rights issued before him. This is borne out by his observation that:

‘I can see no reason and logic or in principle for a municipality to be graded in the top rank for purposes of remunerating the political office bearers and in a much lower category for the purposes of remunerating its employees.’

[55] This was manifestly not the question he was asked to decide. As correctly pointed out by counsel for the Applicant that even if assuming the validity of the observation (in my view actually an important part of the reasons for his ultimate order in deciding on the categorisation of the applicant), it introduced an equity norm into an inquiry as to what might justify a difference. In this regard, I may also add my own observation, without obviously constituting this as a reason for my eventual order, that there may be very cogent reason why there should be a difference. In instances where municipalities were formed by various component municipalities differing in size, it must be borne in mind that political office bearers immediately assume responsibilities for the entire area whereas the typist or security guard still only accept responsibility in the Nigel or Brakpan area of the amalgamated municipality

[56] The second respondent analysed the WA of 5 November 2003 in a lengthy three pages of the award. His analysis of the agreement cannot be faulted. He,

however, and with reference to the all-important clause 5.6, merely stated as follows:

‘Clause 5.6 commits the parties to finalise a collective agreement on categorisation of municipalities within a period of three months.’

The second respondent continued his exposition of Mr Nciza’s (the only witness for the applicant) evidence as follows:

‘All the parties recognise to have agreement on categorisation of municipalities. Mr Nciza described one of the main goals in the earlier negotiations process as paying the same salary for the same job. He later indicated that the present dispute between the parties regarding categorisation centred on the factors to be taken into account of the municipalities. At no stage did he indicate that municipalities would not be able to re-grade in the future. I understand his evidence to mean that once agreement is reached on the criteria for re-grading, employees in similar graded municipalities will be similarly remunerated in terms of the process agreed upon .’

[57] Not even the second respondent’s further reference to Mr Nciza’s evidence that the Applicant would always be placed in the top category, coupled with the second respondent’s assertion that Mr Nciza is an ‘integral part of one of the teams negotiating a new categorisation regime’ did nothing to alert him to the clear and unambiguous provisions contained in clause 5.6 of the WA of 3 November 2003.’

[58] In *Commercial Workers Union of SA v Tao Ying Metal Industries and Others*,¹ the court found the role of the reviewing court to be limited to deciding the issues raised by the party seeking the review. It may not raise issues not raised by the party seeking the review. A party seeking review was bound by the grounds contained in the review application. A litigant might not on appeal raise a new ground of review. These principles were subject to the qualification that where a point of law was apparent on the papers, but the common approach of the parties proceeded on a wrong perception of the law, the court was obliged, *mero motu*, to raise the point of law and to require the parties to deal with it. Accordingly, the court found that the SCA was entitled *mero motu* to raise the issue of the commissioner's jurisdiction and to require argument thereon.

[59] The Applicant did not explicitly raise the jurisdiction of the second respondent

¹ (2008) 29 ILJ 2461 (CC).

to embark on an exercise 'to categorise' the applicant with effect from 1 July 2003. However in their papers and in oral argument, the Applicant raised the issue of the second respondent's powers, when the applicant argued that the second respondent misunderstood the implications of the collective bargaining process and strike that occurred on the issue of re-grading that led to a collective agreement in June 2008, and that the grading of a municipality for purposes of remunerating its employees is a matter that has to be collectively bargained in the SALGBC. It was submitted on behalf of the third and further respondents that: 'this dispute arose because the parties could not agree on what the grade of the municipality should be for the purposes of remunerating its employees'. No evidence was tendered by the third and further respondents, and nowhere was it argued on their behalf that the WA of 5 November 2003 made provision that should the parties not agree on 'the categorisation' of a municipality (in *casu* the Applicant) that such a categorisation was now left to the SALGBC.

[60] In *Tao Ying Metal Industry (Pty) Ltd v Poee NO and Others*,², the court stated as follow:

'The authority of an arbitrator is confined to resolving the dispute that has been submitted for resolution and an award that falls outside that authority will be invalid. As pointed out by Mustill and Boyd in the context of commercial arbitration (but the principle is equally applicable to labour arbitrations):

"If [an arbitrator] awards on issues which have not been left to him for decision, he commits misconduct and may also be acting in excess of jurisdiction".' [Footnote omitted]

[61] See also *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others*³ where the court, stated as follows:

'The CCMA [SALGBC] is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court. In *Benicon Earthworks & Mining Services (Edms) Bpk v Jacobs NO & others* (1994) 15 ILJ 801 (LAC) at 804C-D, the old Labour Appeal Court considered the position in relation to the Industrial Court established in terms of the predecessor to the current Act. The court held

² [2007] 7 BLLR 583 (SCA) at para 5.

³ (2008) 29 ILJ 2218 (LAC) at para 40.

that the validity of the proceedings before the Industrial Court is not dependent upon any finding which the Industrial Court may make with regard to jurisdictional facts but upon their objective existence. The court further held that any conclusion to which the Industrial Court arrived on the issue has no legal significance. This means that, in the context of this case, the CCMA [SALGBC] may not grant itself jurisdiction which it does not have. Nor may it deprive itself of jurisdiction by making a wrong finding that it lacks jurisdiction which it actually has. There is, however, nothing wrong with the CCMA enquiring whether it has jurisdiction in a particular matter provided it is understood that it does so for purposes of convenience and not because its decision on such an issue is binding in law on the parties. In Benicon's case the court said at 804C-D: C

“In practice, however, an Industrial Court would be short-sighted if it made no such enquiry before embarking upon its task. Just as it would be foolhardy to embark upon proceedings which are bound to be fruitless, so too would it be fainthearted to abort the proceedings because of a jurisdictional challenge which is clearly without merit.”

In my view the same approach is applicable to the CCMA [SALGBC]’ [My emphasis]

[62] In the present case, the second respondent issued an order in terms of which he ordered the applicant to remunerate its employees on a basis that the Applicant ‘must be deemed to be grade 15 municipality as from the date in 2003 when it implemented the “grade 13 salary scales”’, including an order to make these payments retrospectively to 2003. Whilst it is so that the third and further respondents claimed for a correct interpretation of the WA of 5 November 2003; that it could never have been the intention of the parties to the WA of 5 November 2003 that employees should not be paid other than on a grading system; and that an implied term exists that the parties will apply the grading achieved in terms of the existing POBS at the relevant time, the important fact of the matter remains that it was specifically left to the parties to negotiate on the issue of categorisation of the Applicant and all other municipalities. At the time of entering into the WA of 5 November 2003, all parties to the agreement would have been well aware of the POBS, and could simply have inserted what the third and further respondents alleged to be ‘an implied term’ as a specific stated term.

[63] In my view, the second respondent took it upon himself to determine the categorisation of the Applicant. The second respondent’s failure to apply his mind to

the validity of the clear and unambiguous language of the WA of 5 November 2003 and assuming a responsibility contrary to what had been entrusted to him constitute misconduct to such an extent that his award cannot stand. The second respondent simply did not have the jurisdiction to categorise the Applicant.

[64] In view of the on-going relationship between the parties, and the failure of the applicant to have concluded a collective agreement 'on the categorisation of the municipality', I am of the view that no order should be made with regard to the costs of this review

For the foregoing reasons, the following order is made:

1. The award is set aside.
2. No order is made with regard to the costs of this review.

LOUW AJ

APPEARANCES:

APPLICANT:	Advocate R Sutherland SC with advocate Robert Liphosa instructed by Du Plessis De Heus & van Wyk, Benoni
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THIRD AND FURTHER

RESPONDENTS	Edward Nathan Sonnebergs Inc, Sandtom, attorney F Malan appearing
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