



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR38/10

In the matter between:

MINISTER OF LABOUR

Applicant

and

NTSANE ERNEST MATHIBELI

First Respondent

MARTIN SAMBO N.O

Second Respondent

THE GENERAL PUBLIC SERVICE

SECTORAL BARGAINING COUNCIL

Third Respondent

Heard: 24 February 2012

Delivered: 23 October 2012

Summary: Review of an award - the retention, without increased benefits, of an incumbent on a newly upgraded post, does not have, as its consequence, the same substantive outcome as a promotion- dispute is of interest and not of right – award reviewed and set aside.

JUDGMENT

CELE, J

Introduction

- [1] This is an application in terms of section 158 (1) (g) of the Act¹ to review and set aside an arbitration award dated 23 November 2009 in this matter, issued by the second respondent, as an appointed arbitrator of the first respondent.

Factual background

- [2] During December 2007, the applicant embarked on a job evaluation process, wherein all the positions within Legal Services of the applicant were evaluated. At the time, the first respondent was employed as a Senior Legal Administration officer on salary level 10. The job evaluation committee recommended that all Senior Legal Administrative posts (Assistant Manager posts) in Legal Services be upgraded from salary level 10 to salary level 11, and this recommendation was approved by the Director General of the Applicant on 01 September 2008.
- [3] On 31 December 2008, Mr Ramabulana, employed as a Senior Legal Administrative officer on salary level 10 resigned and Mr Latola was appointed to act in his position on 15 January 2009. Mr Latola was employed in Occupational Development of the applicant at salary level 10 before being appointed to act in the post vacated by Mr Ramabulana in legal services. Mr Latola acted at a post which had just been upgraded by the Director General of the applicant on 01 September 2008 from salary level 10 to salary level 11.
- [4] On 23 January 2009, an approval was sought from the applicant to implement the recommendations of the evaluations committee. Such approval was only granted on 24 February 2009. The applicant submitted that the then Acting Chief Financial Officer gave approval which could only be implemented in the next financial year, beginning on 1 April 2009. Also, in January 2009, the applicant advertised the post of Mr Ramabulana at salary level 11 with the salary of R344 052 per annum. Upon seeing the advertisement, the first respondent wrote to the applicant on 12 January 2009 requesting the

¹ The Labour Relations Act Number 66 of 1995.

outcome of the job evaluation. No response was given to him. The Chief Director in Legal Services, Advocate N Pasha advised the staff, including the first respondent, in a meeting held at the Unemployment Insurance Fund that the posts that we occupied in legal services had been upgraded and he provided them with a copy of the approved organisational structure dated 24 February 2009.

- [5] In the meantime, and on 26 March 2009, the applicant received a circular from the Department of Public Service and Administration (DPSA) advising the applicant not to proceed with any job evaluations or grading of any positions occupied by legally qualified personnel. Job evaluation and the implementation of the recommendations of the evaluation committee were consequently abandoned by the applicant. According to the applicant, none of the employees whose positions were evaluated and upgraded were paid and/or benefited from the job evaluations and/or upgrading of positions. The DPSA circular provided that:

'Departments are cautioned that as paragraph 24 and 25 of the Minister of Public Service and Administration's (MPSA) determination dated 29 April 2008, all legal post must with effect from 1 May 2008 be advertised and filled in terms of the OSD. Furthermore since the grading of all posts in the OSD has been centrally determined by the MPSA, departments may not job evaluate or upgrade any legal post.'

- [6] On 31 March 2009, the first respondent wrote another letter to the applicant advising that he was aware that the post that he occupied had been upgraded to salary level 11, requesting payment of his salary to be in accordance with the approved salary level 11. Again, no response was given to his letter by the applicant. On 04 May 2009, he wrote another letter requesting the applicant to pay him a salary in accordance with the approved salary level 11. He was not favoured with any response by the applicant, as a consequence of which on 06 May 2009 he lodged a formal grievance with the applicant. Mr Bongani Yika, a Director in Occupational Development of the applicant, provided the first respondent with a copy the Director General's approval of the recommendations of the job evaluation committee on 11 May 2009

confirming, in the e-mail and in the approval, that the post of Assistant Manager, being the Legal Administration Officer, had been upgraded from salary level 10 to salary level 11 on 01 September 2008.

- [7] On 2 June 2009, the applicant through a letter issued by Mr Bheki Gama, advised the first respondent that the job evaluation was abandoned and that Mr Ramabulana's post was incorrectly advertised on salary level 11 and that it has in the meantime been re-advertised on the correct level. The applicant attached to that letter a copy of the directive from the Department of Public Service and Administration dated 26 March 2009. The attached directive, which was only brought to the first respondent's attention on 02 June 2009 and in response to his grievance, provided that:

'since the grading of all posts in the OSD has been centrally determined by the MPSA departments may not job evaluate or upgrade any legal post.'

- [8] The first respondent was not satisfied with the response from the applicant and he declared an unfair labour practice dispute. The second respondent was appointed to arbitrate the dispute between applicant and the first respondent. He had to consider, *inter alia*, what happens to the incumbent if a post is upgraded, that is, whether the incumbent is automatically elevated to that higher level. In this respect, the witness called by the first respondent, Mr Latola expressed himself thus:

'it would not make sense to separate the post from the person as that person is functioning in that post. The Department would need to answer. How the Department will deal with the upgrading is up to them. His opinion is that the two cannot be separated.'

- [9] Mr Gama testifying for the applicant on the same issue said that:

'In terms of the Public Service Regulation, Chapter 1 paragraph C.6 and C.7 (Bundle C page 21), if an executing authority increases the salary of the post as provided under regulation V C.5, (s) he may continue to employ the incumbent employee in the higher graded post without advertising the post if the listed conditions are met. This means the executing authority has discretion. This requirement could not be stuck to due to a collective

agreement that led to OSD... with reference to Bundle C page 21 paragraph C.8, the fact that SR 10 does not appear does not make it mandatory that it must exist. The executing authority had the discretion to transfer the Applicant somewhere else'.

[10] On 20 November 2009 he issued the assailed award with the chief findings that:

'The onus to prove the fact on which an allegation of an unfair labour practice falls on the applicant. In this case the Applicant indicated through documents and oral testimony that his post was upgraded as a result of the job evaluation from salary level 10 to salary level 11 with effect from the 1st of September 2008... From the facts presented before me, what is clear is that there was a job evaluation exercise which led to the upgrading of posts from salary level 10 to salary level 11 in the Legal Services Section of the Respondent. The Applicant was in that section at salary level 10.

The Applicant led evidence that indicated that with effect from the 1st of September 2008 the post at the Legal Services were graded at the salary level 11 and level 12. Although the Respondent disputes that the Applicant was from that time functioning at level 11, there was no evidence submitted to prove the Applicant was functioning at level 10 or to dispute that level 10 ceased to exist as from 1st September 2008. The applicant proved this through an approved memorandum by the Director General, the Persal Printout, the approved organogram document of the Section and the advertised post of a former colleague Mr Ramabulana. The Respondent did not dispute that evidence and the fact that the Applicant continued to function in the Legal Services. The Applicant therefore contends that his post has been upgraded. On the balance of probability I am of the view that the applicant's post was upgraded or the Applicant has been functioning in the upgraded post from 1st of September 2008.

The next question is what happens to the incumbent if a post is upgraded. In response to whether if a person's post is upgraded, it is automatic for one to be elevated, the Applicant's witness Mr Latola testified...

By implication, from the above prescripts, once a post is upgraded it does not automatically mean the incumbent is promoted. There are conditions to be

met. I agree with the Respondent's contention that the Applicant cannot claim this is a right. However, it is also clear from the above prescripts that once the post is upgraded, the Respondent has three options namely, to transfer the incumbent somewhere else, or to advertised the post or continue to employ the incumbent in the higher graded post. From evidence presented before me, the Applicant was not transferred and neither was the post advertised. Whether he met the conditions or not is clear that the Applicant continued to function in a higher grade from 1st September 2008.

...If it was I would agree with the Applicant that an employee benefited from the Job evaluation. However, my view is that in all fairness, even if no employee benefited, the Respondent has benefited in utilising or employing the Applicant in a higher graded post but paying him a lower salary.

Job Evaluation was abandon as a result of the OSD circular from the DPSA which stated in paragraph 4, page 40 of Bundle A that *"Departments are cautioned that as paragraph 24 and 25 of the Minister of Public Service and Administration's (MPSA) determination dated 29 April 2008, all legal post must with effect from 1 May 2008 be advertised and filled in terms of the OSD. Furthermore since the grading of all posts in the OSD has been centrally determined by the MPSA, departments may not job evaluate or upgrade any legal post."*

What I grapple to understand, is not the argument of the respondent, but the timing at which it was brought to the Applicant. The Applicant wrote several letters to the Respondent from January 2009 until may 2009 requesting results of the Job Evaluation and that he be paid according to his upgraded post but was not given a response. The First response he got was in June 2009 after he lodged an official grievance with the Respondent. The response was informing him that Job Evaluation was abandoned as a result of the OSD circular from the DPSA. The circular is dated the 3rd of March 2009 and speaks of a determination made in April 2008. The Applicant was only informed in June 2009. The Respondent then further says it did not have authority to approve the upgraded post on the 1st September 2008 and wrongly advertised the SR11 post in the Legal Services in January 2009. It is clear that the Respondent negligently conducted a Job Evaluation exercise, upgraded post, advertised the post and failed to inform its employee despite being asked. The Respondent further neglected to inform its employees of the

DPSA circular. It was only able to conceptualise this in June 2009. I find this to be unfair. The respondent cannot embark on processes with such furious implications and later, due to its negligence not take responsibility for its actions or prejudice its employees as a result.

From the circumstances detailed above, the respondent has committed an unfair labour practice as set out in section 186(2) (a) of the Labour Relations Act 66 of 1995 ('the LRA').

Grounds for review

[11] The submission by the applicant is that the conclusion reached by the second respondent was not a conclusion a reasonable arbitrator in his position could have reached, having regard to the evidence and the material presented to him. The applicant submitted that the second respondent's finding that the third respondent had jurisdiction to adjudicate a dispute was unreasonable. The contention was that a dispute relating to upgrading did not amount to a promotional issue but rather to a mutual interest issue and therefore that the third respondent lacked the necessary jurisdiction to arbitrate disputes of interests.

[12] Further, it was contended that the second respondent committed a gross irregularity and/or misdirected himself and/or exceeded his powers:

1. in the findings he made which included that:

- The dispute between the first respondent and the applicant was one of unfair labour practice;
- The first respondent proved on a balance of probability that the applicant committed an unfair labour practice;
- The first respondent had been functioning in an upgraded post since 1 September 2008;
- When a post is upgraded the applicant has three options, namely to advertise the post or to transfer the incumbent or to continue to employ the incumbent in a higher graded post;
- The post in which Mr Latola acted was an upgraded post and that an employee benefited from the job evaluation;

- Though no employee benefited from the job evaluation, the applicant benefited in utilising or employing the first respondent in a higher graded post but paying him a lower salary, thus conveniently disregarding the applicant's evidence that once a post is upgraded, the incumbent is not automatically elevated to a higher salary level;
- The applicant negligently conducted a job evaluation exercise, upgraded posts, advertised posts and failed to inform its employees despite being asked;
- The applicant neglected to inform its employees of the DPSA circular.

2. In that he:

- Conveniently failed and/or neglected and / or omitted to mention that the first respondent was not yet assessed or had not received a satisfactory rating in his most recent performance assessment and was not automatically entitled to be elevated to the higher salary;
- Read the approval of an organogram to be the same as an approval for the implementation of the recommendations of the evaluations committee;
- Backdated the applicant's approval for the implementation of the recommendations of the evaluations committee to 1 September 2008;
- Elevated the first respondent to a higher salary level, contrary to the regulations;
- He directed the applicant to pay the first respondent an amount of R93 300 75, being the difference between salary level 10 and salary range level 11 with effect from 1 September 2008 until 31 May 2009.

Opposing grounds

- [13] The first respondent submitted inter alia that the grounds under which an arbitration award could be reviewed and set aside are found in section 145(2)(a) of the Act and that those were the only grounds under which an arbitration award made in terms of the Labour Relations Act could be reviewed and set aside. He contended that the applicant had not established grounds of review as contemplated in section 145(2)(a) of the Act and that the applicant could not rely on any other grounds in common law or under section 33 of the constitution because the conduct of arbitrations under the Act did not constitute administrative action.
- [14] He said that to upset the award, the applicant was required to show that there were gross irregularities in the conduct of the proceedings which prevented a fair trial of the issues, to show that the second respondent had exceeded his powers or obligations imposed on him by the Act, and to establish facts which amounted to misconduct on the part of the second respondent. The submission was that the applicant had not established any of those grounds of review and that, in any event, the conclusion reached by the second respondent was the conclusion that a reasonable arbitrator could have reached given the weight of the evidence that the first respondent presented before him.
- [15] In respect of the classification of the issue, the first respondent submitted that the third respondent had the necessary jurisdiction to adjudicate the dispute between himself and the applicant in that upgrading did amount to promotion as contemplated in section 186(2) of the Act.

Evaluation

- [16] To the extent relevant in this matter section 186 (2) of the Act reads:

'Unfair labour practice means any unfair act or omission that arises between an employer and an employee involving–

- (a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals or a

reason relating to probation) or training of an employee or relating to the provision of benefits to an employee”

- [17] In his closing submissions the first respondent, who appeared in person, referred me to various court decisions, for which I thank him. In *Mahango v MEC, Department of Roads and Transport, Limpopo Province and Another*,² the court considered the implications of upgrading a post and held:

‘In my view, the events leading to the upgrading of the post, and the subsequent downgrading thereof, fall inside the ambit of an "unfair labour practice" as defined. Even if this was not a "promotion" or "demotion" on any interpretation, the events still, in my opinion, "relate to the provision of benefits to an employee" as included by the definition prescribed in section 186(2)(a) of the Labour Relations Act ("the LRA").’

- [18] Also, in *National Commissioner of the South African Police Service v SA Police Union and Others*³ court similarly considered the effect of re-grading a post and said:

‘Expatriating on his submission, Mr Lüderitz argued that chapter V of the regulations related neither to appointments nor promotions. Accordingly, so the submission went, 'the achievement of a representative service' as also the other guiding principles such as 'employment equity', 'fairness' and 'affirmative action' find no application in the filling of a higher graded post. I cannot agree. The retention, with increased benefits, of an incumbent on a newly upgraded post, has as its consequence the same substantive outcome as a promotion.’

- [19] Then in *National Commissioner of the SA Police Service v Potterill NO and Others*,⁴ court held:

‘In my view, regulation 24 requires one to draw a distinction between a decision to re-grade a post and a decision to allow the incumbent employee in the regraded post to continue to occupy that post. Where the incumbent employee is permitted to continue to occupy the regraded post and is

² [2009] JOL 23293 (GNJ) at para 34.

³ (2004) 25 ILJ 203 (T) at para 20.

⁴ (2003) 24 ILJ 1984 (LC) at para 16.

afforded the appropriate higher salary, the employee is, in my view, "promoted". In my view such a situation falls within the first meaning given for the word "promote" in the Concise Oxford Dictionary 9th ed, namely: "Advance or raise (a person) to a higher office, rank, etc".'

[20] What is clear from the decisions referred to above is that the retention, with increased benefits, of an incumbent on a newly upgraded post, has as its consequence the same substantive outcome as a promotion. Put differently, where the incumbent employee is permitted to continue to occupy the re-graded post and is afforded the appropriate higher salary, the employee is promoted.

[21] It must follow necessarily then, that the retention, without increased benefits, of an incumbent on a newly upgraded post, does not have, as its consequence, the same substantive outcome as a promotion. Where, therefore, the incumbent employee is permitted to continue to occupy the re-graded post and is not afforded the appropriate higher salary, the employee is not promoted. The re-grading of a post may bring with it new essential requirements for the population of that post, which the current incumbent may not be possessed of. There is therefore a need to draw a distinction between a decision to re-grade a post and a decision to allow the incumbent employee in the re-graded post to continue to occupy that post.

[22] Clause C.5 of Part V of the Public Service Regulations provides that:

'An executing authority may increase the salary of a post to a higher salary range in order to accord with the job weight, if;

- (a) the job weight as measured by the job evaluation system indicates that the post was graded incorrectly; and
- (b) the department's budget and medium-term expenditure framework provide sufficient funds".

[23] While clause C.6 of the Regulations provides that;

'if an executing authority increases the salary of a post under regulation V C.5, She or He may continue to employ the incumbent employee in the higher-graded post without advertising the post if the incumbent:

- (a) already performs the duties of the post;
- (b) he received a satisfactory rating in her or his most recent performance assessment; and
- (c) starts employment at the minimum notch of the higher salary range.'

[24] The Public Service Regulations contain conditions that are a precursor to the population of a re-graded post. By the mere re-grading of a post therefore, the incumbent of that post does not acquire a right to be promoted to the newly created status level of the post. A dispute arising between the employer and the employees, in its work place, would accordingly not be one of right but one of interest, for which the employees might be entitled to strike.

[25] The second respondent therefore lacked authority to issue the award as the third respondent had no jurisdiction to be seized with this matter for arbitration purposes. In any event, the third respondent did not even lead any evidence to show that he met all the set requirements for the population of the upgraded post. The DPSA circular added yet another complication for the third respondent, which consideration is no longer of any consequence, due to the findings already made.

[26] Accordingly the following order will issue:

- (a) the arbitration award dated 23 November 2009 issued by the second respondent in this matter is reviewed and set aside, for lack of jurisdiction;
- (b) No costs order is made.

CELE J

JUDGE OF THE LABOUR COURT

LABOUR COURT

APPEARANCES:

For the applicant:

Mr Mtsweni

Instructed by: The State Attorneys, Pretoria

For the third respondent: In person.

LABOUR COURT