REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case No: P 80/13

In the matter between:

Malusi Gotshana and Fifty Five Others

Whose names appear on Annexure "A" **Applicant**

and

MEC Department of Rural Development

and Agrarian Reform (Eastern Cape) **First Respondent**

Department of Rural Development

and Agrarian Reform (Eastern Cape) **Second Respondent**

Heard: **29 May 2013**

Delivered: **16 July 2013**

Summary: An interdict pending the finalisation of an unfair labour dispute at the bargaining council should not be granted when the requirements for an interdict have not been established.

JUDGMENT

LALLIE, J

[1] The applicants filed this urgent application for an order in the following terms:

> 'Para 2:That a Rule Nisi be issued with the return date to be determined by the Registrar of the above Honourable Court when the respondents shall advance reasons and show cause, if any why the following order should not be made final.
>
> > Paragraph 2.1:Interdicting and restraining the respondents from the unilaterally demoting the applicants and/or otherwise adversely affecting their status/rank/level/notch and/or salary grade and/or remuneration pending the final determination in an appropriate forum of an unfair labour practice dispute that has been referred by the applicants to the General Public Service Sectorial Bargaining Council, alternatively, pending the implementation of a fair and proper procedure in which respondents disclose all relevant information and documentation to applicants and affected employees and permit the applicants and affected employees to each be heard and make full representations prior to Respondents taking any decision to demote them retrospective to 2009;

An Order directing the respondents to restore the status quo ante 29th November 2012 with respect to applicants' status/rank/level/notch and/or salary grade and/or remuneration and/or deductions pending the final determination in an appropriate forum of an unfair labour practice dispute that has been referred by the applicants to the General Public Service Sectorial Bargaining Council, alternatively, pending the implementation of a fair and proper procedure in which respondents disclose all relevant information and documentation to applicants and affected employees and permit the applicants and affected employees to each be heard and make full representations prior to respondents taking any decision to demote them retrospective to 2009;

That the respondents be ordered to pay the costs of this application.

Further and/or alternatively relief,

The relief set out in paragraph 2.1 and 2.2 above will have immediate effect pending the return date and/or the final determination of the dispute between applicants and respondents.'

[2] When this matter was argued on 28 February 2013, Counsel for the respondents, after raising a few issues, sought an opportunity to deliver answering papers. The basis for his request was that although the applicants set the matter down for 28 February 2013 they required the respondents to deliver their notice of opposition and answering affidavit on or before 8 March 2013. The respondents were afforded the opportunity they required. The applicants were similarly granted an opportunity to file replying papers. The matter was postponed to 13 March 2013 when it was further postponed for further affidavits to be filed. It was finally argued on 29 May 2013.

<u>Background</u>

[3] The applicants are employees of the Department of Rural Development and Agrarian Reform of the Eastern Cape Province (the Department). Between 20 December 2012 and 21 January 2013,each applicant received an envelope containing two notices from the Department. They were signed by the Superintendent General on 29 November 2012. The notices are similar but reference to the first applicant's notices will suffice. The notices will be referred to as the first and second notices. The first notice reads as follows:

<u>Notification of irregular promotion: yourself</u>

1. As you are aware, during 2009 you were granted a notch promotion to level <u>N/A</u>

2. In implanting (1) above, you were paid an amount of <u>R 24746.16</u> as salary back-pay, and promoted from R <u>N/A</u> to <u>R N/A</u> , and from level <u>N/A</u>

to level N/A retrospectively to 01 May 1994. You were then translated from N/A to N/A retrospectively to 01 May 1994.

3. Following a departmental audit of all rank/leg or notch promotions awarded and implemented during 2009, the Department determined that your promotion was irregular and unlawfully in that your file does not evidence that the substantive and/or procedural requirements for such promotion to level N/A were complied with.

4. The Department, in compliance with HROPT EXCO Resolution (Annexure A) as communicated by the Director General on 20 April 2011 is herewith conducting its preparatory word as per the memorandum dated 12 May 2011 (Annexure B), circulated to all staff through the offices of the then Acting General Manager: Corporate Services.

5. Very important**:** You are entitled to make written representation before 2013-01-31. This is to be submitted to the office of your relevant Deputy Director General. Failure to respond by this date will mean that the Department's decision is final and binding:

[4] The notices are materially different from each other. By way of example the first applicant's first notice reflects that he received a salary back-pay of R24746.16 while the second provides that it was R874 735.44. According to the first, the level and salary he was promoted from retrospectively to 1 March 1994 is written N/A. The portion provided for his translation from and to, retrospectively to 1 May 1992 is also written N/A. The second states the level to which he was granted a notch promotion. It also shows the level and the salaries from and to which he was promoted. The annexures referred to in both notices were not enclosed. Notwithstanding that the notices informed the applicants that the demotion and deductions would be from 1 February 2013 the Department unilaterally implemented the demotion a month earlier, 30 days before the 31 January 2013, the date by which they were required to have made representation.

[5] As the applicants seek interim relief they are required to prove a *prima facie* right, apprehension of irreparable harm, balance of convenience,

no other satisfactory remedy and I also have a discretion to exercise in deciding whether the relief should be granted.

[6] The applicants submitted that they have a clear right. In determining whether the right exists, it is necessary to trace the history of this dispute which began in the formation of the province of the Eastern Cape as it exists today. Shortly before the 1994 democratic elections the independent homelands which were created by the former South African Government were abolished. Two of them the former Transkei, and the former Ciskei were integrated into the former Cape Province to form the present Province of the Eastern Cape. All the civil servant of the integrated area became employees of the government of the Eastern Cape Province.

[7] Shortly before the integration a lot of irregular promotions were affected in the public service of the former Transkei and Ciskei. Consequently, at the time of the integration many civil servants of the former Transkei and Ciskei had inflated salaries. The President of the Republic of South Africa invoked the provisions of section 236 (6) of the interim Constitution and appointed the Browdey Commission to determine the lawfulness of the promotions. After Browdey's resignation on 30 November 1995, he was succeeded by Judge White on 25 March 1996 and the commission was referred to as the White Commission. The White Commission declared 16650 promotions irregular and set them aside, necessitating civil servants who had been over paid as a result of irregular promotions to refund the government. It ceased to operate in November 1998. In a letter dated 18 August 1998 the Department of Public Service and Administration informed all Heads of Departments/Provincial Administration Offices of Provincial Services Commission that the *Audi alteram parten* rule applied in the application of Section 38 of the Public Service Act of 1994.

[8] In July 1999, the National Treasury issued a circular stating the method in which wrongly granted remuneration was to be recovered from employees. Some employees repaid the remuneration they received unlawfully. On 4 October 2006, the Executive Council of the Eastern

Cape Province (the EXCO) took a resolution to write off the balance of R73 174 000.00 owed by 2558 employees in the 9 Departments pursuant to the finding of the White Commission. It directed employees with genuine and justifiable cases of promotion and pay progression to submit their claims to their respective heads of departments for thorough scrutiny where after responses would be communicated to such employees in writing within a period of 3 months. It also required heads of departments to inform, in writing employees whose claims had been rejected, of the course open to them.

[9] In 1997, the government of the Eastern Cape Province assembled the Human Resources Operation Project Team (the HROPT) to put together the different pay roll systems. The HROPT also made findings on promotions. The Department later established the Departmental Task Team (the DTT) comprising of representatives of the employer and trade unions to identify individual cases and assess the work of the HROPT. The DTT was disbanded in 2009 and the Department appointed Grant Thornton, an independent firm of auditors to audit its employees' files. It issued a report, which reflected that some employees were promoted and granted salary increases irregularity while others were granted promotions and salary increases due to them.

[10] On or about 1 November 2010, the Office of the Premier of the Eastern Cape issued a document to all Heads of Department in relation to the implementation of the EXCO resolution regarding the HROPT audit. The Heads of Department were advised among others that in the recovery of the alleged debts from employees they must "include effective communication with the affected employees to advise them of the over/under payments that the department intends to recover such overpayments" and that the employer is not entiltled to effect a unilateral process. The document also makes it clear that if the employees concerned do not consent to the deduction the employer should institute legal proceedings.

[11] In the main the applicants seek to assert their right not to be demoted or have their remuneration or status unilaterally reduced pending the

finalisation of their unfair labour practice dispute, alternatively pending the respondents affording them the opportunity to be heard before the respondents take any decision to demote them retrospectively to 2009. In addition, they seek to have the status quo at the 29 November 2012 regarding their remuneration and status restored pending the finalisation of their unfair labour practice dispute, alternatively not to be demoted retrospectively to 2009 before the respondents afford them an opportunity to be heard.

<u>Prima facie right</u>

[12] The applicants submitted that they have a clear right to have their unlawful demotions reversed. Their case is that the issue in this matter is not whether each applicant was receiving an inflated salary but whether the respondents are entitled to demote the applicants retrospectively to 1999/2000 levels based upon allegations of false en masse promotions in 2009. They claim that *prima facie,* an employee is entitled to enjoy the status and rank accorded to him or her over many years by his or her employer. The entitlement is a clear right. Part of the clear right is the right to make representations and be heard before the decision to demote them was put into effect. It is clear from the notice of motion and the manner in which the applicants defined their right that it is a combination of a substantive right, which is their right not to be demoted from the status and levels of remuneration the respondents demoted them from and a procedural right to be heard before the decision to demote them was implemented.

[13] A demotion must be justifiable and on substantive grounds. In this regard see *Mathese vs Acting Provincial Commissioner, Correctional Services and others*[1]*. It must also be procedurally fair. In this regard see Hock v Mustek Electronics (Pty) Ltd.*[2] *In MEC for Education v Gradewell*[3] it was

[1] (2000) 22 ICL 1653 (LC)

[2] (2000) 21 ILJ 365 (LC)

[3] [2012] 8 BLLR 747 (LAC)

held that an interdict should not be granted when the requirements for an interdict have not been established.

[14] In their attempt to prove their substantive right the applicants disputed that their promotion was irregular or unlawful. They also denied being part of the 2009 masse promotion.

[15] The applicants submitted that they were subjected to the moratorium declared by the Office of the Premier of the Eastern Cape (the Premier) in respect of any appointments, promotions, salary increases and translation of rank. The escalation of the applicants' ranks and remuneration took the same pattern as that of the first applicant. The respondents' persal records regarding the first applicant's employment with the second respondent from 1 July 1996 to 1 July 2009 reflect that on 1 July 1996, his rank and salary was that of an Administration Officer on Level 6, the level upon which he had entered the Department of Agriculture, Eastern Cape in 1994 and which he had formely held in the Department of Agriculture, Ciskei. On 1 July 1999, after the moratorium imposed by the Premier in 1994 had been lifted he received a translation in rank which translated his Ciskei rank, level and length of service to the Department of Agriculture Eastern Cape. On 1 May 2000, he was promoted to level 8 which was the Level which he continued to occupy from 1 May 2000 until 1 January 2013 when he was demoted to level 6.

[16] The respondents' case is that, the DTT went beyond the scope of the 2006 EXCO resolution and violated the Public Service Regulations. It recommended that irregular promotions reversed by the Browde Commission be regularised to allow employees to progress through their ranks and recommended rank promotion up to salary level 8. The DTT recommendations violated the prescripts applicable to rank and notch promotions. The Head of Department issued a statement to all staff members and organised labour on 20 March 2009 that payments would be effected as from 15 April 2009.

[17] The statement served as a mandate to proceed with the processing of the *en masse* payments based on the findings of the Departmental Task

Team. In the process the Department was unable to implement the HROPT payments as per the finding of Grant Thornton Auditors. The findings of the DTT were not approved by Head of the Department.

[18] The respondents submitted that Provincial Government has made a decision to reverse the grant of unlawful salary increases and has appointed independent auditors who have confirmed that the applicants are in receipt of unlawful salary increase. The decision has not been set aside. This submission is not supported by the letters notifying the applicants of the reduction in their remuneration which reflects the reason as irregular promotion. The reasons proffered by the respondents for the reversal of the payments are inconsistent. One reason is reversal or irregular promotions and other is reversal of over payments.

[19] The respondent's basis for demoting the applicants was that they were amongst its employees who were promoted *en masse* in 2009. The respondents allege that they demoted the applicants in the process of reversing unlawfully granted salary increases. They however failed to prove that the applicants received such increases. Further the notices the applicants received reflect that they were irregularly promoted. The respondents cannot claim to have substantive reason for demanding the applicants when they could not identify the reason for the demotion. They even withdrew the other reason they sought to rely on when it proved to be false. On their own vision the respondents did not disclose a substantive reason for the demotions.

[20] I have considered the respondents' argument that the applicants cannot use the procedural defect of the demotion to found a substantive right. The arguments by the respondents and the authority they sought to rely on in defence of the their failure to follow a fair procedure cannot sanitize the reality that the Department demoted the applicants without giving them an opportunity to be heard. The applicants have proved their substantive right by proving that the respondent had no valid and lawful reason to demote them. I therefore conclude that the applicants have proved the existence of clear substantive right which was violated by the respondent.

[21] The respondents submitted that before the demotions were effected the applicants were given an opportunity to make representation which opportunity they took up. The weakness of this submission is that it is common cause that the respondents did not provide the applicants with the documents in terms of which they intended deducting their remuneration. Although the documents are referred to in the notices they were not attached. The omission made it difficult for the applicants to exercise their right to make presentations. Further, the deductions were made a month before the date on which the presentation were due. The inescapable conclusion is that the applicants' representations were not considered before the decision to reduce their remuneration was implemented. The demotions were therefore procedurally unfair.

[22] The applicants seek to protect a substantive right not to be demoted pending the outcome of their unfair labour practice dispute and to have the status quo ante 29 November 2012 restored pending the finalisation of their unfair labour practice dispute. They seek to assert their procedural right to be heard in the alternative.

[23] When the excess is removed, I have employees before me who have been demoted. The two notices they were given shortly before their demotion contain contradictory reasons for their demotion. The evidence tendered as reasons for their demotions is inconsistent with the contents of the notices. The documents in terms of which they were demoted were not attached to the notices contrary to the content of the notices. The respondents purported to afford them the right to be heard before making the final decision to demote them but went ahead with the demotions before the presentations were due and without considering them. The respondents failed to prove that the applicants were part of the en *masse* promotion. The applicants had a substantive right not to be unilaterally demoted without a valid reason and a procedural right not to be demoted before making presentations. The applicants proved that the respondents demoted them without valid reason and before granting them an opportunity to make representations thus providing the existence of their right.

Irreparable harm

[24] One of the grounds on which the respondents challenged the urgency of this application is the absence of irreparable harm. The applicants submitted that the respondents' conduct has an extremely detrimental and prejudicial effect on them and their livelihood as their salaries have been reduced. The first applicant submitted that he had to remove his child from university, cancel funeral and life insurance policies and is unable to provide for his dependents. The respondents submitted that harm suffered by the applicant is not irreparable as if they are successful in proving their unfair demotion, the GPSSBC will grant an award for the compensation they are entitle to. The respondent further submitted that financial hardship cannot found urgency.

[25] Not every harm entitles an applicant to have his or her application heard urgently. Irreparable and serious financial loss or prejudice arising from the conduct of the respondents does not constitute irreparable harm which can found urgency. It is trite that financial prejudice does not give rise to urgency. In this regard see *Hultzer v Standard Bank of SA (Pty) Ltd*[4] *and Caledon Street Restaurant CC and Monica D' Aviera* a judgement of the South Eastern Cape Local Division under case number 2656/97.

[26] I have considered the financial position the applicants find themselves in as a result of the respondents' conduct. The only irreparable harm they have advanced is financial prejudice. The first applicant has even submitted that he could write over 100 pages expressing the irreparable financial hardship and ruin caused by the demotion. No other form of irreparable harm was provided by the applicants. They further furnished no valid reason for this court to depart from the general rule that financial prejudice cannot found urgency. In the circumstances I must find that the

[4] (1999) 20 ICL 1806

harm suffered by the applicants is not the kind of irreparable harm that can found urgency.

No other remedy

[27] The respondents argued that the applicants are not without alternative effective remedy in that the GPSSBC will issue an award for the payment of all the money unfairly deducted from them and compensate them for any procedural unfairness they have suffered should they prove their case. An award for damages is generally considered an alternative adequate. Like an award of the bargaining council while not immediately available it is accepted as adequate. In this regard see *Calden Street Restaurant CC (supra).*

The applicants did not establish the apprehension of irreparable harm and the absence of effective alternative remedy. As it was held in *MEC for Education v Gradwell* (supra) an interdict should not be granted when its requirements have been established. In the circumstances the application cannot succeed.

<u>Costs</u>

[28] Amongst the factors I need to consider in deciding whether a costs order should be granted in terms of section 162 of the LRA is the conduct of the parties in proceeding with or defending the matter before court. The applicants did not act unreasonably in bringing this application. A costs order against them will therefore not be appropriate.

[29] In the circumstances the following order is made:

29.1 The application is removed from the roll for lack of urgency.

29.2 No order is made as to costs.

Lallie, J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv. Wylde

Instructed by Chris Unwin Attorneys.

For the first Respondents**:** Adv. Pretorius SC and Adv. Mbenenge SC

Instructed by State Attorney.