THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO: JR741/16

In the matter between:

EMFULENI LOCAL MUNICIPALITY **Applicant**

and

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL **First Respondent**

M N S DAWSON *N.O* **Second Respondent**

SAMWU OBO T I MOKOENA & OTHERS **Third Respondent**

Heard: 7 November 2019

Judgment delivered: 11 November 2019

JUDGMENT

VAN NIEKERK J

[1] This is an application to review and set aside an arbitration award issued by the second respondent (the arbitrator). The arbitrator issued the following award:

> 1. The action by the respondent by promoting only those members who are in the LUM section and not promoting the traffic officers was procedurally unfair, since the LUM employees and the traffic officers were all law enforcement officers.
> 2. The respondent is hereby ordered to place the traffic officers on the same level as the LUM employees with effect from 1 July 2012.
> 3. The respondent is hereby ordered to place the traffic officers on that level on or before 15 April 2012 and if they fail to do so the matter should be brought before me for the proper assessment.
> 4. The respondent is hereby ordered to pay the costs occasioned by this arbitration.

[2] The arbitrator subsequently issued a second award in terms of which he ordered the applicant to pay the respondents (the employees) a sum in excess of R 36 million in back pay. The applicant seeks also to review and set aside that award.

[3] The material facts are not in dispute. The applicant is a municipality. It comprises various departments, clusters and divisions. The employees who are the subject of this dispute were employed by the applicant (and remain in its employ) as traffic officers in the public safety and community development cluster. The employees are all graded at job level 9, as law enforcement officers, in terms of their contracts of employment and in accordance with the occupational structure relevant to their division.

[4] In November 2014, the employees lodged a grievance in which they contended that the applicant had committed an unfair labour practice in that they were engaged at job level 9, while law enforcement officers in the land use management cluster (referred to in the award as 'LUMs') were appointed at job level 6, a higher grade. LUMs perform duties related to the use of land and building in the applicant's jurisdiction. The dispute was ultimately referred to the first respondent, the bargaining council, for arbitration.

[5] In his award, the arbitrator recorded that the issue for decision was whether the promotion of the LUMs to level 6 while the traffic officers who are also law enforcement officers remain at level 9 was fair. The award is devoid of any analysis of the evidence and any reasoning that serves to indicate the basis of the award. The arbitrator simply concluded that he was satisfied that the applicant had failed to prove on a balance of probabilities that by promoting the LUMs to level 6 and leaving the traffic officers at level 9 it acted fairly. It warrants mention that the arbitrator had ruled that the applicant bore the onus of proving that its conduct was not unfair. (This is the subject of a separate ground for review, which in view of the conclusion to which I have come is not necessary for me to consider.) The only discernible basis for the arbitrator's conclusion appears to be the premise that the applicant had failed to produce any evidence to explain why the LUM employees had been placed on level 6.

[6] The applicant contends that the award is reviewable because the arbitrator erred in classifying the dispute as one relating to promotion. In short, the applicant's primary submission is that since no-one was promoted (and no-one demoted), the dispute between the parties should not have been framed in the terms that the arbitrator chose to frame it. The arbitrator thus misconceived the nature of the enquiry.

[7] The test to be applied is one that recognises and reinforces the distinction between a review and an appeal. This court is entitled to intervene if and only if the arbitrator's decision is one that falls outside of a band of decisions to which a reasonable decision-maker could come on the available material. In *Head of*

Department of Education v Mofokeng & others [2015] 1 BLLR 50 (LAC), the LAC said the following:

> [30] The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, the Supreme Court of Appeal ("the SCA") in *Herholdt v Nedbank Ltd* and this court in *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and others* have held that before such an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome…
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> [32] …Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc. must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived inquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her.
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> [33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order would point to at least a *prima facie* unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether

> a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, if an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.

[8] Of some significance to the present proceedings is the referral form. On the face of the referral form, the dispute referred to the bargaining council is one in which the employees are aggrieved at their job grades and in which they seek to have that grade revised to level 6. The referral form makes no mention of any dispute concerning promotion The first inkling of any dispute about promotion is apparent from the record. It would appear that the pre-arbitration minute recorded one of the issues in dispute as whether the conduct of the respondent in appointing and/or promoting and/or affording benefits to law enforcement officers at job level 6 in the division while the applicants were kept the job level 9 is unfair in general, and more specifically for reasons that are recorded in the minute, including the absence of any rational justification for the differentiation, and the consequent prejudice caused to the employees by the income differential. Specifically placed in dispute was also whether there should be any job evaluation process before any upgrading of the employee to a higher job level. The arbitrator enquired of the applicant's representative whether she agreed with the understanding that in 2012, the LUMs were promoted to level 6. The response was that 'It was not a promotion as such'. The arbitrator replied 'Well, let us call it a demotion then since six is before nine. But do you agree that that happened? ' The applicant's representative again stated that it was not a promotion 'as such'. The arbitrator is later recorded as saying 'Therefore I rule that the onus is on the department to prove to me that by not promoting these people… or you do not seem to like the word "promoting", moving them from nine, level 9/10 to level 6 is just for them and not an unfair labour practice on

them. I will rule that the onus is on the respondent to resume or kick off the evidence…'. The employees' representative, in his opening address, made reference to the differentiation between the LUMs and the employees, and the unfairness on the part of the applicant 'by not giving them the same'.

[9] It would appear then that without the dispute having been articulated by the employees as one concerning an unfair labour practice in regard to the employer's conduct in relation to promotion, and without hearing any evidence and in the face of a clear objection by the applicant's representative, the arbitrator simply decided that the matter was one that concerned promotion, and proceeded to hear evidence and make a decision on that basis.

[10] Counsel for the respondents submitted that the true nature of the dispute was one that concerned demotion, and that the arbitrator correctly categorised the dispute in those terms. The duties of an arbitrator in this regard were set out by the LAC in *Health & Other Services Personnel Trade Union of SA on behalf of Tshambi v Department of Health, Kwazulu-Natal* [2016] 7 BLLR 649 (LAC):

> "[16] An arbitrator is required to determine the true dispute between the parties. To that end, it is necessary to establish the relevant facts and construe the category of dispute correctly. An arbitrator must make an objective finding about what is the dispute to be determined. This court in *Wardlaw* … addressed directly the question of whether the employee's characterisation of a dispute should enjoy deference and rejected that approach. Distinguishing the formalistic school of thought from the substantive school of thought, this court held that the latter should prevail. As a result, in *Wardlaw*, an arbitrator was held to have incorrectly assumed jurisdiction over a dispute that was about an automatically unfair dismissal, a category of dispute reserved for adjudication by the Labour Court. The Constitutional Court disposed of this issue in *Commercial Workers Union of SA v Tao Ying Industries & others*:
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> > 'A commissioner must, as the LRA requires, "deal with the substantial merits of the dispute". This can only be done by ascertaining the real dispute between the parties. In deciding what the real dispute between the parties is, a commissioner is not necessarily bound by what the legal representatives say the dispute is. The

> labels that parties attach to a dispute cannot change its underlying nature. A commissioner is required to take all the facts into consideration including the description of the nature of the dispute, the outcome requested by the union and the evidence presented during the arbitration. What must be borne in mind is that there is no provision for pleadings in the arbitration process which helps to define disputes in civil litigation. Indeed, the material that a commissioner will have prior to a hearing will consist of standard forms which record the nature of the dispute and the desired outcome. The informal nature of the arbitration process permits a commissioner to determine what the real dispute between the parties is on a consideration of all the facts. The dispute between the parties may only emerge once all the evidence is in.'

That approach has been reaffirmed by this court in National Union of Metalworkers of SA on behalf of *Sinuko v Powertech Transformers (DPM) & others* (2014) 35 *ILJ* 954 (LAC) at paras 16-21 per Coppin JA."

[11] But it does not follow that an arbitrator is free to determine the nature of the dispute without proper recourse to the relevant documentation (including the referral form) and the evidence. Any determination of the nature of the dispute (and thus jurisdiction) must necessarily be the subject of reflection and a rational decision-making process. Section 186 (2) (a) of the LRA defines an unfair labour practice as an act or omission that arises between an employer and employee involving unfair conduct by the employer relating to promotion. In the present instance, the arbitrator concluded, at the stage of the opening address by the municipality's representative, that the dispute was one that concerned an unfair labour practice in relation to promotion. This conclusion amounts to no more than an assumption on his part, without regard to any evidence. Even if the arbitrator had been inclined to postpone his conclusion until all the evidence was in, he would have had regard to the fact that no-one was promoted, at least not in the sense that this court had defined that term. In *Mashegoane v University of the North* [1998] 1 BLLR 73 (LC), a dispute that concerned the refusal by the senate of the university to appoint a lecturer to the position of dean of the faculty, where the court considered that the appointment to the post of dean would be one that would considerably elevate the employee's status and encompass a greater

degree of responsibility. On this basis, the court held that the dispute properly concerned a promotion. In the present instance, the employees do not seek appointment to another post, and certainly not one that confers greater responsibility or status. They seek to remain in the same jobs, with the same responsibilities, but to be graded at a higher level, with the financial rewards that grading at a higher level will bring. In *Polokwane Local Municipality v SALGBC & others* [2008] 8 BLLR 783 (LC), Molahlehi J regarded a dispute where an employee sought to have her post upgraded as a dispute of interest. In the absence of any right to be appointed to the higher position or to have the post upgraded, the dispute was not arbitrable (at paragraph 26).

[12] In the present instance, there is no evidence that the adjustment of the employees' job grades to grade 6 would result in any greater responsibility, authority or status. Indeed, the employee's case is that they are entitled to be engaged in job grade 6 because they perform the same work as those of their colleagues in that grade, and that they enjoy the same status as law enforcement officers. There is thus no dispute about promotion.

[13] The evidence overwhelmingly suggests that the true dispute between the parties is one that relates to job grading; specifically, a contention by the employees that their posts should be graded at a higher level. The employees have established no right, whether by way of collective agreement, regulatory measure and the like, to have their jobs graded at level 6. The employees' dispute is thus not arbitrable under the unfair labour practice definition - see *Polokwane Local Municipality* (*supra*)). The employees may have a claim under the Employment Equity Act on the basis of equal pay for the same or similar work, or work of equal value. But that is not the claim that they referred to arbitration. Alternatively, the applicants may have the election to press their demand by resorting to the exercise of the right to strike. But this is not a matter that I need decide.

[14] In summary, the arbitrator committed a reviewable irregularity by assuming that the dispute before him was one of an unfair labour practice relating to promotion.

He misconceived the nature of the enquiry and his award is reviewable on that basis.

[15] In the light of the conclusion to which I have come, it is not necessary for me to consider the applicant's further grounds for review.

[16] In so far as costs are concerned, the court has a broad discretion in terms of s 162 to make orders for costs according to the requirements of the law and fairness. Both parties submitted that costs ought properly to follow the result I see no reason to disagree with that submission and there is no evidence before me to indicate otherwise.

I make the following order:

1. The arbitration awards issued by the second respondent on 15 March 2016 and 10 August 2016 under case number GPD 061501 are reviewed and set aside.
2. The award issued on 15 March 2016 is substituted by the following:

   'The referral is dismissed'.
3. The South African Municipal Workers Union is to pay the costs of the application.

André van Niekerk
Judge

REPRESENTATION

For the applicant: Adv. J Nalane, instructed by KNT Attorneys

For the respondent: Adv. F Baloyi, instructed by Maenatja Attorneys