REPUBLIC OF SOUTH AFRICA

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JA25/ 2013

In the appeal of:

NTSANE ERNEST MATHIBELI **Appellant**

and

MINISTER OF LABOUR **Respondent**

Heard: **04 June 2014**

Delivered: **25 November 2014**

Summary: Unfair labour practice relating to promotion- Employer upgrading post occupied by employee- Implementation of the upgrading subject to ministerial approval- Upgrading process in error and conflicting with Occupation Specific Dispensation. Commissioner finding that employer committed unfair labour practice and ordering backpay. Labour Court reviewing arbitration award for lack of jurisdiction because dispute referred to arbitration is one of interest- Appeal. Labour Court decision upheld- Different reasoning- dispute referred to arbitration dispute of right related to promotion- evidence showing upgrading not implemented- arbitration award unreasonable- employee's claim dismissed.

Coram: Waglay JP, Tlaletsi DJP and Sutherland AJA

JUDGMENT

SUTHERLAND AJA:

Introduction

[1] This appeal is against the Labour Court's decision reviewing and setting aside the award of an arbitrator which had held that the appellant had been subjected to an unfair labour practice (ULP) in regard to an upgrade of the post he occupied and in respect of which the appropriate relief was to pay the appellant salary for the period September 2008 – August 2009 at the rate higher than what he had received. The Labour Court, on review, decided the matter by finding that the arbitrator had no jurisdiction to hear the matter because the true nature of the dispute was one of interest and not one of right.

[2] The appeal raises two issues; first, whether a factual basis was proven for the higher salary claim, and secondly, whether the claim was a dispute of interest or of right. Ultimately, the crucial question on appeal, no less on review, is whether the arbitrator's award was one to which no reasonable commissioner could come. In my view, the award was one to which no reasonable arbitrator could come. However, I differ from the court *a quo* on the reasoning that supports that outcome.

The facts adduced in evidence and their implications

[3] Despite stout efforts to complicate the matter by delving into irrelevant and tangential issues, the relevant facts are few and true issue is crisp.

[4] The relevant facts on the record, placed before the arbitrator, and found by him, are summarised thus:

4.1. The appellant was employed by the Department of Labour (DoL) as a legal officer. The post he occupied was at grade 10.

4.2. On 1 September 2008, the DoL concluded an exercise which resulted in *recommendations* approved by the Director-General to upgrade several posts. Among the posts so identified was the post occupied by the appellant. It was to be upgraded from grade 10 to 11. A higher salary would be attached to a grade 11 post.

4.3. The *implementation* of the upgrading and the *timing* of their effective date were dependent upon ministerial approval, a decision influenced by budgetary considerations. No evidence existed of a decision by the Minister, ie, the respondent, to approve and implement the recommendations. In an email of 11 May 2009, the Executive Manager, Management Advisory Services, reported in response to a request, that there existed no record of a submission to the Minister, and axiomatically, no decision by the Minister.

4.4. After the upgrading exercise in January 2008, referred to, it was noticed by the Department of the Public Service and Administration (DPSA) that the DoL's upgrading exercise, in respect of professional posts, was apparently in error as the Occupation Specific Dispensation (OSD) policy governed all professional posts from 1 July 2007, and the upgrading exercise carried out in January 2008, was inconsistent with the scheme of the OSD. This was communicated to the DoL in a circular from the DPSA on 26 March 2009. The letter provided schedules of the affected posts and specified the post occupied by the appellant as being among the posts subject to OSD and not permissible to be upgraded otherwise. The letter went on to instruct the DoL to give effect to the translations of the posts to the OSD. A critical passage in the letter is this:

> 'Departments are cautioned that as per paragraphs 24 and 25 of the Minister of The Public Service and Administration's (MPSA) determination dated 29 April 2008, *all legal posts* must with effect from *1 May 2008* be advertised and filled in terms of the provisions 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.'

4.5. The result was that the upgrading of the post occupied by the appellant was “abandoned”, the term used by the respondent. The effect of that would therefore be that the post was not upgraded to grade 11 for want of the necessary approvals.

4.6. However, to muddy the waters, the DoL on 15 January 2009, appointed Mr S S Latola to act in a vacant legal post, equivalent to the post occupied by the appellant, and paid him at grade 11 rates. At about the same time, a request for additional legal staffing dated 29 January 2009, was submitted by the Director –General to the Minister and ultimately approved on 24 February 2009. In this submission, reference was made to the posts grading levels, and in respect of the posts equivalent to that occupied by the appellant, they are described as being at grade 11. The Minister approved this submission, which act fell foul of the OSD prescripts. This advertised post was never permanently filled.

4.7. Lastly, it was common cause, that Clause C.6 of Part V of the Public Service regulations makes it clear that the current incumbent of a post that is indeed upgraded, does not automatically acquire any right to remain in the upgraded post. These regulations provide for the Minister to select whether to advertise the posts and invite applications in a competitive process, or make a decision to “continue to employ” the incumbent in the higher graded post if certain conditions are met. There was no evidence that the Minister made a selection.

[5] However, the arbitrator was, ostensibly, more impressed by certain other facts, namely the DoL’s bungling of the upgrading exercise, the impression created by the exercise on the employees who might enjoy a prospect of benefiting from the exercise, especially the wrong advertising of a vacant post as grade 11, which encouraged belief that the upgrading must have indeed been implemented, and the failure of the DoL to alert the employees that the upgrading had been abandoned at the recommendation stage. The arbitrator might also have added the fact that the DoL ignored several written requests

from the appellant about the issue, showing thereby a contemptuous attitude towards its own employee.

[6] In search of the rationale for the decision of the arbitrator to hold that as a result of these facts and circumstances a ULP had been committed and that upon that foundation he could justify an order for back pay salary at the grade 11 rate, the sole clue is this statement in the award:

> 'It is clear then that the [DoL] *negligently conducted* a job evaluation exercise, upgraded posts, advertised the posts and failed to inform its employees despite being asked. The [DoL] further *neglected to inform* its employees of the DPSA circular [ie the circular referred to above.] It was only able to conceptualise this in June 2009. *I find this to be unfair.* The respondent cannot embark on processes with such serious implications and later, *due to its negligence,* not take responsibility for its actions or prejudice its employees as a result.
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> From these circumstances, detailed above, [the DoL] has committed an ULP as set out in S186(2) (a) of the LRA.'
> (*emphasis supplied*)

[7] The cited passage is premised on the arbitrator's justified disapproval, or perhaps his understandable disgust, with the blunders of the implicated officials in the DoL. However, these factual findings and his opinion about the bad treatment of the appellant's requests for information, have no logical connection with the outcome that he reached. The arbitrator did not find that the proposed upgrades were, in fact, implemented. Upon that premise, no rights existed that could be violated, and no prejudice could be caused to any employee, notwithstanding whatever disappointments had been engendered. The conduct the arbitrator condemned as an ULP was the bungling of the illicit job evaluation exercise and erroneous allusions to an upgrading that had not been implemented, which, even if the conduct could be construed as a ULP did not cause a loss of income by any employee.

[8] Furthermore, no finding was made that the failure to retain the appellant in a putatively upgraded post constituted an ULP, nor could it be, because on the facts found by the arbitrator in regard to the provisions of the regulations,

there could be no legitimate expectation of automatic retention in an upgraded post by the appellant.

[9] The outcome that an ULP had been committed on the basis the arbitrator thought it had been committed cannot logically be connected to the notion that paying the appellant a back-salary at the grade 11 rate was appropriate. Thus, because it is not justified by its premises it is irrational. Accordingly, the award was unreasonable and must be set aside.

The jurisdictional controversy

[10] I turn to address the controversy about jurisdiction, which was the basis for the Labour Court's decision for dismissing the claim of the appellant.

[11] The arbitrator had dismissed a preliminary point about jurisdiction based on the contention that the dispute was one of interest not right. The Labour Court, revisiting that issue, upheld it. In paragraph [24] –[25] of the judgment, the Labour Court held:

> '[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.
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> [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.'

[12] The rationale of the Labour Court's finding that the dispute is one of interest is that the regulations do not afford any right to achieve a back-door promotion to a person who is the incumbent of an upgraded post. The absence of a back -door promotion is a correct finding.

[13] However, in my view, this is not a sufficient foundation to conclude that this particular dispute referred by this appellant was properly construed as an interest dispute. An examination of exactly what was referred is necessary.

[14] The dispute referred for conciliation was described as the issue of "promotion". When the dispute was referred to arbitration, the issue was described thus:

> 'The Department of Labour has upgraded the post that I am [at present] occupying from SR level 10 to SR level 11 but is refusing to pay me my salary of R….. in accordance with SR 11.'

[15] The arbitrator mentioned in the award that he understood the issue to be whether an ULP in terms S186(2)(a) had been committed; ie:

> '…any unfair act or omission that arises between an employer and an employee involving ….unfair conduct by the employer relating to the promotion… of an employee…'

[16] Albeit the label of a "promotion" was used in the referral to conciliation, the refinement in the referral to arbitration (cited above), in my view, more usefully defines the issue. Two claims are made by the appellant.

16.1. First, the appellant's referred dispute alleged a fact: ie, that he was *already occupying* a grade 11 post. Unless that allegation of fact was proven, the appellant had no claim to more pay. This factual allegation was not a claim of entitlement to be promoted to a grade 11 post, which would indeed be an interest issue, but rather, an allegation that he was, as a fact, in a grade 11 post. If he failed on that alleged fact, as he plainly did, the claim had to fail too.

16.2. Secondly, even if he had proven that the upgrade of the post had been implemented, the common cause fact that he was not, under the regulations, entitled to retain it destroyed his second claim that by virtue of occupying a grade 11 post he was entitled to the higher pay. This latter claim is not necessarily an interest claim but rather a claim

which turned on the application and interpretation of the Public Service Regulations.

16.3. In argument, the appellant who appeared in person, was at pains to point out that the core of his complaint was that he was underpaid and that notwithstanding anything said before, he did not assert a right to a promotion.

[17] The unravelling of the facts to discern the true dispute in a matter concerning money claims in relation to job upgrades was addressed by Freund AJ in *National Commissioner of the SA Police Service v Potterill N O and Others* (2003) 24 ILJ 1984 (LC) at [11] – [20] as follows:

> '[11] The dispute was referred by the employees for arbitration on the basis that the employer was alleged to have committed an unfair labour practice. It is clear that this was intended to be a reference to an unfair labour practice as contemplated in item 2(1) of schedule 7 to the LRA and, in particular, item 2(1)*(b)*.
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> [12] Mr Oosthuizen did not dispute that if, properly analysed, the dispute was a dispute about an alleged unfair labour practice in terms of item 2(1), the arbitrator had jurisdiction to arbitrate the dispute. He contended, however, that the dispute was in fact an 'interests dispute' concerning a demand or claim for an increase in salary and not a 'rights I dispute' concerning a failure to promote or any of the other instances of residual unfair labour practices set out in item 2(1). He contended that the arbitrator accordingly had no jurisdiction to entertain the dispute, exceeded her powers and acted ultra vires.
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> [13] The relevant part of item 2 provides as follows:
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> '(1) For the purposes of this item, an unfair labour practice means any unfair act or omission that arises between an employer and an employee involving - . . .
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> *(b)* the unfair conduct of the employer *relating to the promotion*, demotion or training of an employee or relating to the provision of benefits *to an employee*. ' (Emphasis added.)

[14] Mr *Oosthuizen* submitted that the nature of the dispute which was referred to the arbitrator had to be determined by reference to the document in terms of which the dispute was referred to the bargaining council and by the substance of the dispute as it appears to this court. He submitted that, in the referral documents, the employees made no mention of the term 'promotion' and did not indicate that promotion was the desired outcome; they merely claimed an increase in salary. He submitted that a claim for salary is an 'interest dispute' and that the dispute, properly analysed, did not pertain to an alleged unfair labour practice. More particularly, whether or not the employer had acted unfairly, its conduct was not conduct 'relating to the promotion' of the employees.

[15] In my view there is no merit in this point. The substance of the dispute pertained to the employees' complaint that their posts had been regraded but, despite the fact that they had continued to be employed in the same posts and despite the requirements of regulation 24, their salaries had not been increased. In my view this is a complaint about alleged unfair conduct 'relating to the promotion' of the employees.

[16] In my view regulation 24 requires one to draw a distinction between a decision to regrade 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 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* (9 ed), namely:

'V.tr.1 (often foll. by to) advance or raise (a person) to a higher office, rank, etc (was promoted to captain).'

[17] A bulletin issued by the South African Police Service on 28 March 2002 which sought to explain the meaning and effect of regulation 24 stated:

> 'There is, however, no obligation on the National Commissioner to *upgrade the post* and *promote the incumbent*. Instead, he may, . . .' (Emphasis added.)

In my view the author of this document was quite correct in distinguishing between the decision to 'upgrade the post' and the decision to 'promote the incumbent'.

> [18] The employees' complaint that regulation 24(6) had not been applied with regard to their posts and their request that their salaries be increased to the salary level of directors must, in my view, be construed as a complaint that they were entitled to be, but had not been, promoted. By alleging that their employer was guilty of an unfair labour practice they impliedly alleged unfair conduct on its part 'relating to' its failure to promote them. Having regard to the substance of the dispute as the parties understood it I am satisfied that this was a dispute about alleged unfair conduct relating to promotion.
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> [19] Mr *Oosthuizen* argued that the employees' failure to state expressly in the referral forms that the relief that they sought was promotion established that the dispute referred to arbitration was not a dispute concerning promotion. I B cannot agree with this. In my view a distinction needs to be drawn between the nature of the dispute underlying the remedy sought and the remedy itself. The remedy sought does not necessarily give a clear indication as to the real nature of the underlying dispute. As to a similar conclusion reached in a different context, see *Ceramic* C *Industries Ltd t/a Betta Sanitaryware & another v NCBAWU & others* (1997) 18 ILJ 671 (LAC); [1997] 6 BLLR 697 (LAC) at 703E-J.
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> [20] I do not accept the argument that the dispute was a 'dispute of interests' which, for this reason, fell beyond the jurisdiction of the arbitrator. The employees' case was that they were the victims of an unfair labour practice and that, as a matter of law, they were entitled to salary increases. This was a 'dispute of rights'. The fact that the remedy sought was an increase in salary does not change the character of the dispute. A claim for a higher salary as a matter of right is not an 'interests dispute'."

[18] In my view, this dictum correctly captures the controversy and elucidates the implications and is therefore adopted by this Court.

[19] Accordingly, the view I take is that a right issue was indeed referred by the appellant, ie a claim based on being paid the wrong amount. Nevertheless, despite the arbitrator having jurisdiction, the claim was meritless, both on the facts and in the law, by reference to the regulations.

[20] The question of whether the true claim intended by the appellant was not one that ought to have been brought as a civil claim in terms of section 77(3) of the Basic Conditions of section Employment Act 75 of 1997 was not raised in

the arbitration or during the review proceedings. The claim bears characteristics which strongly suggest that this is what the appellant had in mind. Nevertheless, it is unnecessary for this Court to pronounce on that matter.

[21] The upshot is that:

21.1. There is no merit in the claims of the appellant, having regard to the facts adduced in evidence: he was not an incumbent of a grade 11 post.

21.2. The award was unreasonable because the evidence demonstrated the meritless of the claims, and the rationale for finding otherwise was not rationally connected to the evidence.

21.3. The award should be set aside in its entirety.

21.4. The appropriate outcome should have been the outright dismissal of the dispute.

[22] A matter that bears emphasis, and which is common cause, is that the appellant was repeatedly ignored by the management of the DoL in regard to his requests and later demands for action over his grievance. This was aggravated by the effect of the DoL's other conduct about the upgrading of posts, which encouraged, in the absence of proper information, a wholly wrong but nevertheless, sincerely held view by an employee. (It is an unhappy occurrence that such treatment can occur, in of all places, the DoL, where it would be reasonable to suppose that an enhanced sensitivity to sound industrial relations ought to be part of the DoL's culture, and indeed, of all Departments of State).

[23] The parties no longer are in an employment relationship. But for the fact that the appellant conducted his own case and incurred no legal costs, it would have been appropriate for the court to have considered a costs order adverse to the respondent.

The order

[24] In the result, I make the following order:

(i) The appeal is dismissed with no order as to costs.

(ii) The setting aside of the award by the Labour Court is confirmed.

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Sutherland AJA

I agree

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Waglay JP

I agree

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Tlaletsi DJP

APPEARANCES:

FOR THE APPELLANT: In Person

FOR THE RESPONDENT: Adv D Mtsweni

Instructed by the State Attorney, Pretoria