IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT DURBAN

Case No: DA6/10

In the matter between:

ETHEKWINI MUNICIPALITY
(HEALTH DEPARTMENT) Appellant

And

INDEPENDENT MUNICIPAL AND ALLIED TRADE
UNION obo I G FOSTER AND 20 OTHERS Respondents

Date of hearing : 23 March 2011

Date of judgment : 28 October 2011

JUDGMENT

JAPPIE JA

[1] On 31 August 2009, the Labour Court granted the following Order:-

> "The respondent is directed to:-
>
> (a) suspend the placement of the second and further applicants against the position in the respondent's new organogram;
>
> (b) reinstate all administrative support to the applicant, including word processing, photocopying, faxing and e-mail facilities;

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> (c) provide reception and office space facilities to the second and further applicants;
>
> (d) ensure that the respondent's managers sign all legal documents, compliance notices and related correspondence which the applicant contend are necessary for the performance of their duties.
>
> (2) The respondent is ordered to pay the costs of this application to include those of senior counsel."

[2] The appellant, eThekwini Municipality (Health Department) was the respondent in the Labour Court. The present respondents, the Independent Municipal and Allied Trade Union on behalf of I. G. Foster and 20 others were the applicants.

Background

[3] Prior to 1995, the area presently under the control of the appellant consisted of 46 different municipalities. In 1995 various municipalities were amalgamated to create seven new councils which were subsequently further amalgamated in 2003 to form the present appellant.

[4] The formation of the appellant created a situation where approximately 18 000 employees who had been in the previous employment of the various municipalities on differing terms and conditions of service now came under the control of a single administration, namely the appellant.

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[5] The amalgamation of the various municipalities created a need for the appellant to embark on a restructuring and placement process to harmonise and integrate services across all the erstwhile municipalities.

[6] In order to achieve the aforestated goal, the appellant on the one hand and the two trade unions, the Independent Municipal and Allied Trade Union (IMATU) and the South African Municipal Workers Union (SAMWU) entered into a collective agreement. The collective agreement was signed on 8 April 2003. The agreement is titled, "Placement Policy" were signed by Dr Michael Sutcliffe on behalf of the appellant, a Mr Samuel Zulu on behalf of IMATU and Mr Thozamile Tyala on behalf of SAMWU.

[7] The second respondent, Mr Ivan Gregory Foster and the other respondents are all employed in the health, safety and social services cluster as environmental health practitioners.

[8] By letter dated 30 March 2007, the second respondent was notified by the appellant that he was to be transferred from his current post and was to be placed in a health unit at, "West 1, West Subdistrict."

[9] The other respondents received similar letters to the effect that they were to be transferred.

[10] The second respondent and the other respondent lodged grievances with the appellant against their new placements and when their grievances were not solved by

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26 August 2008, approached the South African Local Government Bargaining Council “(SALGBC)” to arbitrate the dispute.

[11] The arbitrator took the view that the respondents ought to have utilised the dispute resolution procedure provided for in clause 9 of the “Placement Policy” and ought not to have approached the Bargaining Council. Consequently no arbitration award was made.

[12] The second and further respondent then invoked the procedure as set out in clause 9 of the Placement Policy. On 1 February 2008, the respondents were advised that their grievances were not upheld. The circular advising the respondents contained the following information:-

> “● The Placement Committee had considered the grievance;
> ● The grievance was not supported;
> ● This was a consensus decision amongst the members of the Placement Committee; and, therefore
>
> ● In terms of clause 9.4 of the Placement Policy, the grievant does not have any further recourse to arbitration.”

[13] The appellant then sought to implement the new placements and demanded that the second and further respondents report to their new placements. The respondents then initiated proceedings in the court *a quo*.

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[14] It was common cause before the court *a quo* that in spite of the Placement Committee having reached consensus on the placements of the respondents the second and further respondents were dissatisfied and refused to accept their future placements. The respondents wished to pursue the matter further by referring it to arbitration. The appellant took the view that in terms of clause 9 of the Placement Policy, the respondents had no further right to pursue the dispute by having it referred to arbitration.

[15] Before the *court a quo,* the respondents sought to suspend the placement and further respondents and to reinstate all administrative support for the respondents pending the determination at the arbitration contemplated in the Placement Policy. Clause 9 of the Placement Policy reads as follows:-

> "9. <u>DISPUTE/OBJECTION PROCESS</u>
>
> 9.1 Employees or trade unions acting on behalf of employees, have the right to lodge grievances against their placement and must identify the post and specify the post I.D. number into which they believed they should have been placed in terms of this policy. It must be noted that should an employee lodge a grievance against his/her placement, the affected placements will be suspended and will be subject to the grievance process as set out hereunder.
>
> 9.2 Any such grievance must be lodged within 10 working days of the Placements Committee's publication. Placement against which no

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grievances have been lodged within the 10 working days period will be deemed to be final.

9.3 Should a grievance be lodged arising out of the placement of any employee/s, a
meeting shall be convened within 5 working days between the employees, management and the Staff Placement Committee. All relevant information requested will be made available.

9.4 Should the parties reach agreement; the proposed placements will be implemented.

9.5 Should the parties disagree and should the matter not be resolved within a period of 10 working days as to whether the proposed placement is reasonable, and should the grievant wish to pursue the matter further, the grievant shall be required to refer the matter to arbitration in terms of the agreed procedures within 7 working days from the date of the last meeting.

9.6 The terms of reference of the arbitrator will be to determine whether the placement against which a grievance has been lodged is reasonable or unreasonable taking into account the provision of this Placement Policy.

9.7 Should the arbitrator rule that the placement proposal is reasonable, the employee/s concerned shall be obliged to accept the placement.

9.8 Should the arbitrator rule that the placement proposal is unreasonable he/she will be

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entitled to make a determination having heard representations from the following parties:-

- the aggrieved employee and his/her Union representative
- the employer representative
- the employee who has been placed into the post in dispute (if post not vacant) and his/her Union representative."

Before the Labour Court

[16] The argument advanced by the respondents before the court *a quo* was to the effect that the appellant had failed to distinguish between the role of the trade union representatives on the Staff Placement Committee and their separate and distinct role as representative of the aggrieved employees. Clause 9.3 of the Placement Policy contemplated a meeting between:-

(a) the Staff Placement Committee (comprising members of the appellant and the two trade unions);

(b) management, representing the appellant; and

(c) the grievant employee and/or it's union representative.

[17] Clause 9.4 and 9.5 contemplate an agreement (or lack thereof) between the parties at the meeting and not simply consensus between the constituent members of the Placement Committee. It was submitted that the word "parties" in clause 9.4 refer to all those present at the meeting contemplated in clause 9.3. Although the Placement Committee had reached consensus, this was not acceptable to the employees. That being so, it was submitted that the provisions of clause 9.5 became applicable as "the

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parties disagree" and the employees therefore had a right to refer the matter to arbitration. Consequently, the respondents were entitled to an interdict suspending further placement pending the outcome of arbitration proceedings.

[18] The court *a quo* accepted this argument as advanced on behalf of the respondents and concluded,

> "29. Clause 9.2 – 9.5 a couched in the form of a step by step procedure to be followed depending on whether the "parties" reach and agreement or not. In terms of Clause 9.8, the arbitrator is to make a determination having heard representations from the "parties" which include the aggrieved employee and his/her union representative. Therefore, "parties" include the union.
>
> 30. The terms of the Placement Policy therefore contemplated there being two sets of parties. There are parties that took part in the creation and adoption of the policy and there are parties to a grievance resolution of which is made dependant on the terms of the policy. To give to the parties that meaning which the respondent describes would certainly lead to an enological result of the referring union having to recu~~e~~se itself from the staff placement committee because of its ~~r~~vested interest in the grievance. The result is that the staff placement committee might not even be able to sit. Similarly, a representative of the respondent in the staff placement committee might have to recu~~e~~se themselves."

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[19] The effect of the court *a quo's* judgment was that the placements were not final and still the subject of an arbitration process and that it was, therefore premature, for the appellant to have placed the respondents in the new structures.

[20] The appellant applied for and was granted leave to appeal to this Court against the whole of the judgment of the Labour Court delivered on 31 August 2009.

On appeal

[21] The appellant has submitted that the primary issue is the proper interpretation to be given to the word "parties" as it is appears in paragraph 9.4 of the Placement Policy.

[22] It was argued that the Placement Policy is a collective agreement which was signed by the municipal manager and representatives of IMATU and SAMWU. The Placement Policy sets out the various mechanisms by which the restructuring of job positions in a reorganised eThekwini Municipality was to be achieved. In terms of clause 3 of the Placement Policy, a Placement Committee was created consisting of representatives of management of the appellant and representatives of the two trade unions. The committee comprised of eight members and four employer representatives and four labour representatives made up of two representatives from each of the recognised trade unions. It was the task of the Placement Committee to consider and endeavor to reach consensus regarding the placement of existing employees into posts in the new structures. As clause 9.4 states, "should the parties reach agreement, the proposed placements will be implemented."

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[23] The appellant has argued that the word "parties" can only mean parties to the Placement Policy. That is to say, if consensus is reached by the representatives of management and the trade unions on the Placement Committee, who are the "parties" to the Placement Policy then the proposed placements will be implemented. It was submitted that the word "parties" do not include the individual employee that filed the grievance. It was contended that the respondent's argument that the word "parties" in clause 9.4 includes the grievant employee as well as his trade union representative is both illogical and contrary to the principale of collective bargaining. Thus, the interpretation contended for by the respondents and as found by the court *a quo* would defeat the very purpose of the collective agreement.

[24] The appellant contended that, provided the representatives of management and the trade unions on the Placement Committee agreed that the proposed placement of the employer was reasonable, the placement would be implemented and the employee would not have recourse to arbitration.

[25] It seems to me that the court *a quo's* conclusion that the word "parties" in clause 9.4 include the grievant employee and all the unions was largely influenced by what is contained in clause 9.8. The relevant clause reads as follows:-

> "9.8 Should the arbitrator rule that the placement proposal is unreasonable, he/she will be entitled to make a determination having heard representations from the following parties:
>
> (i) the aggrieved employee and his/her union representatives;

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> (ii) the employer representative; and
>
> (iii) the employee who had been placed into the post in dispute (if post not vacant) and his/her union representative."

It is clear from the said clause that those who are considered, "parties" are expressly enumerated. This does not appear in clause 9.4. Clause 9.8 refer to proceedings before an arbitrator. In my view there is no basis to rely on clause 9.8 to interpret clause 9.4.

[26] It seems to me that the court *a quo* in coming to its conclusion, did not take into account the all important principale of collective bargaining. One of the purposes of the Labour Relations Act, No. 66 of 1995 is to promote orderly collective bargaining. It is common cause that the Placement Policy is a product of collective bargaining and is a collective agreement.

[27] In *North East Cape Forests v S A Agricultural Plantation and Allied Workers Union and Others,*[1] the Labour Appeal Court pointed out that:-

> "a collective agreement in terms of the Act is not an ordinary contract and the context within in which a collective agreement operates under the Act is vastly different from that of an ordinary commercial contract."

It seems to me that a collective agreement must be interpreted in such a manner as to ensure effective and sound industrial relations. Section 23 of the LRA not only binds the parties to a collective agreement but members of a trade union as well, if such a

[1] 1997 (18) ILJ 971 (LAC).

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trade union is a party to the collective agreement. Thus, when parties to a collective agreement, reach agreement on an issue, not only are the parties themselves bound, but each individual member of a recognised trade union is bound as well.

[28] In the present matter it is common cause that the grievant employee is represented on the Placement Committee by a trade union representative. That trade union representative must have the authority to bind its employee members to decisions reached by the Placement Committee. To hold otherwise would place individual employees at odds and in conflict with its trade union representative on the Placement Committee. This, in my view would create an intolerable situation and not conducive to a sound and orderly workplace environment.

[29] It seems to me that to allow an individual grievant employee, who is dissatisfied with a decision of the Placement Committee where it had reached consensus, to take the dispute to arbitration would create a situation where there would be a multiplicity of arbitrations for each grievant employee and will cause an undue delay in the finalisation of placements. This appears to have been overlooked by the court *a quo*.

[30] Moreover, to give meaning to the word "parties" in clause 9.4 has to include the grievant employee would be inconsistent with the general meaning of the word "parties" wherever else it may appear in the Placement Policy.

[31] In my view, the court *a quo* ought to have held that the meaning of the word "parties" in 9.4 of the Placement Policy to include only the members of the Placement Committee as such. This meaning would be in accordance with the principle of

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collective bargaining and would be consistent with the interpretation of that word where ever else it appears in the Placement Policy. The court *a quo* therefore, ought not to have granted the respondents the relief they sought.

[32] In the result:-

(1) The appeal is upheld.

(2) The Order of the Court *a quo* is set aside and replaced with the following:

"The application is dismissed."

(3) It is ordered that each party will pay its own costs of the appeal.

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JAPPIE JA

Mlambo JP and Molemela AJA concur in the judgment of Jappie JA.

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Appearances

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Counsel for the respondent	:	
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