REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable

Case Number: D295/11

In the matter between:

IMATU	**First Applicant**
R. CROUCH & 4 OTHERS	**Second to Sixth Applicants**
and	
ETHEKWINI MUNICIPALITY	**First Respondent**
SOUTH AFRICAN LOCAL BARGAINING COUNCIL (SALGBC)	**Second Respondent**
NHLANHLA MATHE N.O.	**Third Respondent**

Heard: **30 May 2013**

Delivered: **12 September 2013.**

Summary: **Review of award – collective agreement interpreted by commissioner - A collective agreement entered into by the employer and its employees, or their chosen representatives has the effect of curbing this common law right, but only to the extent as is outlined in the collective agreement. As a corollary, the employer retains its common law based rights that are not waved expressly or by necessary implication in any collective agreement. Award not reviewable.**

JUDGMENT

CELE, J

Introduction

[1] The third respondent's decision dated 20 February 2011 which confirmed the first respondent's decision to rescind the placement of the employees published in the placement circular dated 19 February 2007 is sought to be reviewed and set aside in terms of section 158 (1) (g) of the Act[1]. The first respondent, hereafter referred to as the respondent, opposed the review application.

Factual Background

[2] The second to further applicants, hereafter referred to simply as applicants were in the employ of the respondent holding various positions described as:

- Crouch – Chief Conservationist;
- Stewart – Natural Areas Officer;
- Liebenberg – Conservation Supervisor;
- Coskey - Conservation Supervisor;
- Zuma - Conservation Supervisor.

[3] An amalgamation of various municipalities to form the respondent took place in terms of a collective agreement called the Placement Policy which agreement had been entered into in April 2003 between the first applicant, the respondent and the South African Municipal Workers Union,("the SAMWU"). A placement committee was formed constituted of 8 members, 4 of which were respondent's representatives and the other four were union representatives, According to the provisions of the collective agreement, two of the four union representatives' seats were allocated to each of the two recognised trade unions. The Placement Committee was in charge of placement of staff into the

[1] The Labour Relations Act Number 66 of 1995 (as amended).

newly created organogram of the respondent.

[4] Decisions are taken by way of consensus seeking process between the respondent, being the employer and organised labour components, taking into account the provisions of the agreement. In circumstances where consensus cannot be reached between the employer and organised labour in respect of a particular placement, Clause 3.3.2 breaks the deadlock by providing that where the parties cannot reach consensus, the employer ("council") proposal will be published. Clause 8 provides that employees will be notified by personalised letters of any post into which the Committee has confirmed their placement. It is common cause that all the applicants received these personalised letters on 19 February 2007.

[5] Clause 9 sets out the collectively agreed process for disputes or objections to placements. In terms of this clause, employees or trade unions acting on their behalf have the right to lodge grievances against their placement, within ten days of publication of the committee's decision. If no grievance has been lodged within 10 days, the placement is deemed to be final.

[6] In terms of the placement circular dated 19 February 2007, the applicants were placed onto the respondent's new organisational structure on 9 January 2007. But it was not by consensus and in terms of the provisions of Clause 3, the employer proposal, as represented by Deputy Head Mr Christo Swart, was published as follows:

1. Crouch – Conservator;
2. Stewart – Conservator;
3. Liebenberg – Conservation Officer;
4. Coskey - Conservation Officer;
5. Zuma - Conservation Officer.

[7] According to the respondent, the applicants' placements made in terms of the placement circular dated 19 February 2007 were done in error. It was said

that the Conservator position was intended to be a new, strategic post that would be responsible for five zones. Messrs Butler and Crouch were tasked with the drafting of the description for the Conservator post. They used the donor job description, of chief conservationist. The positions were then close-matched to Messrs Crouch and Stewart. Job descriptions could only be finalised with the approval of Messrs Swart and Mkhwanazi. It was their evidence at the arbitration proceedings that they had not approved the final job description. Human Resources (HR) staff was responsible for managing the placement process and advising management. HR were not authorised to change the classification of the role.

[8] When according to the respondent the error was discovered, the matter was investigated and the staff was consulted. At a meeting of the placement committee held on 7 July 2009, the employer, represented by Mr Swart motivated for the rescission of the applicant's placements, a decision taken two and a half years earlier in terms of clause 3.3.2. The organized labour component of the placement committee did not support the rescission proposed by the employer. SAMWU recorded that they abstained from the discussion of the employer proposal and IMATU indicated that they would take the matter further. Regardless, the views of the organized labour component of the placement committee, Mr Swart as employer representative recorded that he moved forward with the employer proposal and that the employer was rescinding the applicant's placements as per "Management prerogative".

[9] The applicants who had been placed as Conservation Officers (Messrs Liebenberg, Coskey and Zuma) were returned to the posts of Park Nursery Supervisors. This was on 7 January 2009 when the respondent purportedly exercised its management prerogative to restructure its department and rescind the placements. The applicants were aggrieved and they referred a dispute for arbitration, in terms of the collective agreement. The third respondent was appointed to arbitrate the dispute.

[10] The crisp issue which the commissioner had to determine was whether the respondent was in the circumstances entitled to rescind the placements. It

was common cause that there was no provision in the collective agreement that made provision for rescission of a placement decision by the committee. Nor is there any provision for the placement committee to change its decision, save in circumstances where an employee has lodged a dispute in terms of Clause 9.

[11] An argument was advanced before the commissioner that the decision taken by the respondent was permitted in order to correct a wrong. It was agreed in the pre-arbitration minute that in addition to considering the provisions of the collective agreement, the commissioner was to further apply his mind to whether the first respondent could rely on any other law in the circumstances of this case entitling the first respondent to rescind a placement decision once such placement has been made.

[12] The commissioner found that the Placement Policy did not prevent management from exercising its authority. The commissioner found that the first respondent was entitled to exercise its discretion and rescind the placements made in error.

[13] The commissioner made the finding that the justification or authority for the first respondent's action of rescinding the placement did not reside in the collective agreement but was derived as follows:

> 'This authority (to correct the error by rescinding) is located within the province of managerial discretion of the employer to manage the municipality. In line with that discretion the employer has the right to restructure its operation'.

Grounds for review

[14] In support of the review application the applicants contended that:

1. The commissioner's reasoning was defective and wrong in law. It is not disputed that an employer ordinarily has a discretion to manage and restructure its organization as it pleases, subject to the applicable legal framework. However, the respondent in this case made a decision to enter into a collective agreement that expressly governs the manner in

which decisions regarding placement of employees onto the new agreed organizational structure would be taken.

2. Decisions are taken by a committee set up specifically for this purpose. The collective agreement by its very nature limits the general right of the employer. The employer has given up, by agreement, the sole discretion to take decisions on the placement of employees.

3. It is only in a deadlock situation where the members of the committee have attempted to reach consensus, but have been unable to do so, where the proposal put forward by the employer assumes greater weight. The employer proposal is published as a placement committee decision, giving rise to the rights set out in Clause 9.

4. In the absence of a grievance by the employee or his union on his behalf, the agreement dictates that the placement is deemed final. At this stage, the placement committee becomes *functus officio*.

5. What the employer has done in the circumstances of this case is *ultra vires* the collective agreement. Neither the placement committee, nor the employer component thereof, has recourse to revisit, or change a decision of the committee. Had there been such an intention between the parties, provision would have been made in the collective agreement.

6. In addition to the legal consequences flowing from the provisions of the collective agreement, it is submitted that the committee or any component thereof would certainly be estopped by virtue of the passage of time from rescinding its decision. It is not disputed that two and a half years elapsed from the date of placement to the date the employer rescinded the committee decision to place.

7. In his consideration of the first respondent's actions in light of the provisions of the agreement, the commissioner erred in his reasoning. He failed to apply his mind to the express provisions of the collective agreement and he failed to appreciate the fact that the rights of the

employer had been limited by virtue of the provisions of the agreement. He further failed to appreciate the purpose behind clause 3.3.2 and he read into the agreement rights that were never contemplated by the parties.

8. The limited scope of the "management prerogative"[2] was misunderstood by the commissioner and the legal principles applicable to collective agreements and the legal status of collective agreements was not properly considered and/or ignored.

9. It is submitted that the review must succeed on this ground alone as the Commissioner clearly committed an error of law and made a finding that no reasonable commissioner would have come to having properly applied their mind to the spirit and specific provisions of the collective agreement.

Opposition to the review application

[15] The respondent submitted that the applicants have failed to establish any factual or legal basis on which this Court can review and set aside the commissioner's award. The contention was that the applicants have failed to show any misconduct on the part of the commissioner in relation to his duty as a commissioner. It was not shown that the commissioner neither applied his mind to the matter nor committed any gross irregularity in the conduct of the proceedings. The applicants are said to have failed to demonstrate that the commissioner's award is not justifiable in relation to the reasons provided for it, given the evidence properly available to the commissioner and that the decision he reached was one which a reasonable decision-maker could not reach in the circumstances.

Evaluation

[16] The Constitutional Court decision in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [3] provides an approach to reviewing decisions

[3] 2008(2) SA 24 (CC).

of the Commission for Conciliation, Mediation and Arbitration (CCMA) and similarly to decisions of bargaining councils in arbitration proceedings. The Court held that the appropriate standard of review is one of reasonableness. The question to ask is whether the decision reached by a commissioner or arbitrator is one that a reasonable decision-maker could not reach. Paragraph 109 of the judgment contains an important warning as the Court said:

> 'Review for reasonableness, as explained by Professor Hoexter, does threaten the distinction between review and appeal. The Labour Court in reviewing the awards of commissioners inevitably deals with the merits of the matter. This does tend to blur the distinction between appeal and review. She points out that it does so in the limited sense that it necessarily entails scrutiny of the merits of administrative decisions. She states that the danger lies, not in careful scrutiny, but in "judicial overzealousness in setting aside administrative decisions that do not coincide with the judge's own opinions'. This Court in Bato Star recognised that danger. A judge's task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution'.

[17] In summary, it was submitted by the applicants that the review application ought to succeed on the ground that the commissioner committed an error of law and made a finding that no reasonable commissioner would have come to, having properly applied their mind to the spirit and specific provisions of the collective agreement. The commissioner was said to have erred by failing to apply his mind to the express provisions of the collective agreement and thus to appreciate the fact that the rights of the employer had been limited by virtue of the provisions of the agreement. This was in reference to the commissioner having found that the Placement Policy did not prevent management from exercising its authority and therefore that the first respondent was entitled to exercise its discretion and rescind the placements made in error.

[18] It is trite that the employer has a common law right to arrange the working environment of its employees in conformity with what it considers appropriate and expedient so as to achieve maximum production in its workplace. The employer is however obliged to provide employees with reasonably safe and

healthy working conditions. The scope of this duty extends to providing proper machinery and relevant equipment, properly trained and competent supervisory staff and a safe system of working.[4] A collective agreement entered into by the employer and its employees, or their chosen representatives has the effect of curbing this common law right, but only to the extent as is outlined in the collective agreement. As a corollary, the employer retains its common law based rights that are not waved expressly or by necessary implication in any collective agreement.

[19] In the present matter the parties agreed on a Placement Policy which agreement had been entered into in April 2003, in terms of which a Placement Committee was formed to be in charge of placement of staff into the newly created organogram of the respondent. In circumstances where consensus cannot be reached between the employer and organised labour in respect of a particular placement, Clause 3.3.2 breaks the deadlock by providing that where the parties cannot reach consensus, the proposal of council as the employer, will be published. Clause 8 provides that employees will be notified by personalised letters of any post into which the Committee has confirmed their placement. Therefore, where the parties cannot reach consensus, the employer's discretionary powers, ordinarily waved through a collective agreement, resurface.

[20] The commissioner had to determine whether the first respondent was entitled to exercise its discretion and rescind the placements which it considered to have been made in error. He found that the Placement Policy did not prevent management from exercising its authority. The commissioner made the finding that the justification or authority for the first respondent's action of rescinding the placement did not reside in the collective agreement but was derived or located within the province of managerial discretion of the employer to manage the municipality. He found that in line with that discretion the employer had the right to restructure its operation.

[21] In reaching the decision he came to, the commissioner has not been shown by the applicants to have strayed from utilizing the evidence adduced or to

[4] See *Wilsons and Clyde Coal Co Ltd v English* [1937] 3 ALL ER, 628.

have applied his mind to any irrelevant considerations. On the contrary, and as submitted by the respondent, he appears to have:

1. properly considered and evaluated the evidence presented to him during the arbitration proceedings;

2. applied his mind to the facts and evidence before him;

3. made findings and reached a determination that is justifiable in relation to the reasons given for it;

4. properly and correctly came to the conclusion that the first respondent acted within its managerial discretion to rescind the incorrect placements;

5. made a well balanced, coherent and logically reasoned award; and

reached a decision which a "reasonable decision-maker" could reach in the circumstances.

[22] The applicants have made bold but unsubstantiated allegations that the commissioner failed to apply his mind to the express provisions of the collective agreement; that he failed to appreciate the fact that the rights of the employer had been limited by virtue of the provisions of the agreement,and that he failed to appreciate the purpose behind clause 3.3.2 and he read into the agreement rights that were never contemplated by the parties.

[23] In my view, this application failed to demonstrate any circumstances under which the award in this case stands to be reviewed and set aside.

[24] Accordingly, the following order will issue:

1. The review application is dismissed.

2. No costs order is made.

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Cele, J

Judge of the Labour Court of South Africa.