THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR534/2013

In the matter between:

INDEPENDENT MUNICIPAL AND

ALLIED WORKERS UNION **First Applicant**

UASA – THE UNION **Second Applicant**

and

SIBONGILE KHOZA, *N.O.* **Second Respondent**

EKURHULENI METROPOLITAN MUNICIPALITY **Third Respondent**

Heard: **8 June 2015**

Delivered: **6 November 2015**

Summary: Review of an award in respect of an interpretation of a collective agreement (the "Transvaal Agreement"); meaning to be accorded to the definition of "contractual to holder" also known as the CTI (contractual to incumbent) principle.

JUDGMENT

RABKIN-NAICKER J

[1] The applicants seek an order reviewing, setting aside and correcting an arbitration award arising from proceedings in terms of section 24 of the LRA. In the award the second respondent (the arbitrator) dismissed the applicants' claim.

[2] The parties to the dispute agreed that the review of the arbitration award was to be dealt with by way of a stated case. They agree that the subject of the dispute before the second respondent was the interpretation of the Local Government Undertaking Conditions of Employment Agreement: Transvaal concluded in the Industrial Council for the Local Government Undertaking (the Transvaal Agreement). In particular the proper meaning to be given to:

2.1 The definition of 'contractual to holder';

2.2 Clause 6.5 'Demotion';

2.3 Clause 6.5.1.2. 'Reorganisation'; and

2.4 Various collective agreements applicable in the EMM.

[3] This court is required to determine whether:

3.1 The Transvaal Agreement is a collective agreement as contemplated by the LRA;

3.2 Whether the arbitrator, in interpreting and applying the Transvaal Agreement, committed a reviewable irregularity.

Material facts agreed on by the parties

[4] On 3 June 1994 an agreement was concluded between the Municipal Employers' Organisation and the Employers' Organisation of Local Authorities on the one hand and the South African Association of Municipal Employees, on the other.

[5] This agreement, the Transvaal Agreement, was published in Government Gazette No. 16047 dated the 28 October 1994.

[6] Following the coming into operation of the LRA in November 1996, the SALBC was established, replacing the Industrial Council for the Local Government Undertaking. On 2 September 1997, SALGA concluded a collective agreement with IMATU and SAMWU (the Establishment Agreement). Employees in the sector

are predominately represented by IMATU and SAMWU. Some employees are represented by UASA.

[7] The EMM is a member of SALGA, an employers' organisation which represents all municipalities throughout South Africa.

[8] The first respondent (SALGBC) is regulated by a constitution, which provides for collective bargaining levels at national, divisional or local level. Wages, annual increases and job evaluations are reserved for national collective bargaining exclusively.

[9] Prior to the disestablishment of the municipalities that are now part of the EMM, each municipality remunerated their employees on a particular scale, ranging from a grade 9 to a grade 13. On the 21 August 2002, the EMM, IMATU and SAMWU entered into a collective agreement titled the 'Ekurhuleni Metropolitan Municipality Final Collective Agreement on Placement' (the Placement Agreement).

[10] On 30 January 2003, the EMM passed a resolution in respect of a uniform salary scale structure for the EMM. During 2003, the affected members, who occupied various positions in the disestablished municipalities were 'placed' in the organisational structure of the EMM. The letters sent to them in this regard included the following statement:

> *"No interruption in Conditions of Employment or Service shall occur. All employees shall retain their benefits as if their services were not interrupted. All staff of the Ekurhuleni Metropolitan Municipality shall retain all their current Conditions of Employment following placement in the New Structure subject to any other Collective Agreement that may emanate from the Bargaining Council or applicable legislations"*

[11] On 24 May 2004, following the declaration of a dispute by IMATU regarding the implementation of the grade 13 salary levels, the EMM entered into a settlement agreement (later made an order of court). The settlement agreement contained the following clauses:

> *"The Respondent agrees that, irrespective of the classification of a post in terms of the Placement Agreement by the Respondent, the incumbent of a post in the new*

Organisational Structure, shall be remunerated in accordance with the comparable benchmark level as already determined by the Respondent of the Grade 13 Local Authority Bargaining Council Scales:

Provided that should the current salary and benefits of an employee be higher than the bench mark level, that employee shall retain his/her current salary and benefits, regardless of the result of the job evaluation in terms of TASK.

In the event of a post being evaluated lower than the benchmark level, the incumbent of that post shall retain the benefit of the higher salary attached to such post: Provided that the future annual salary adjustments shall be withheld until the incumbent's salary equals the salary scale of the TASK job evaluation.

The effective date for implementation of this agreement shall be 1 April 2004."

[12] The resolution emanating from the EEM's corporate affairs committee in relation to the settlement agreement read as follows:

"RESOLVED:

1. That the contents of the report regarding the contractual to incumbent status of employees BE NOTED.
2. That employees offered a lower position RETAIN their salaries and benefits as contractual to incumbent as defined in the Conditions of Service.
3. That employees placed in lower positions RETAIN their salaries as contractual to incumbent as defined in the Conditions of Service.
4. That the possibility to migrate the employees not on the Ekurhuleni scale to the nearest higher notch BE INVESTIGATED and that a further report BE SUBMITTED with the full financial and other implications by end January 2006."

[13] On 18 June 2008, the EMM concluded an agreement with SAMWU in terms of which it was agreed that a Grade 15 salary scale would be implemented with effect from 1 September 2008 (the Grade 15 Agreement). The EMM passed a resolution in respect of this on 26 June 2008.

[14] On 30 October 2008, the EMM issued letters to the affected members which were headed: "*Directive: Implementation of EMM salary scales: September 2008: contractual-to incumbent (CTI) levels*". The letters recorded the affected members'

current remuneration; the top notch of CTI level and the top notch of EMM Scale and stated:

> "Please note that the salary scale of the CTI level that you are currently being remunerated on is still higher than the salary scale of the position that you are currently occupying.
>
> In view of the above please be informed that you will retain your better remuneration contractual-to-incumbent since you will not benefit to be placed on the EMM salary scale."

[15] Both of the applicants referred disputes to the SALGBC in terms of section 24, which disputes were consolidated. The IMATU referral reads that the issue in dispute is: *"Despite being aware of and even confirming the status of applicants as contractual to holder in terms of the conditions of employment collective agreement, the respondent disregarded that latter and unilaterally subjected the applicants to the principal (sic) of personal to holder at the time of adopting Grade 15 status."*

[16] The referral by UASA describes the issues in dispute as: *"The interpretation and Application of various collective agreement regarding the implementation of the Grade 13 and Grade 15 salary scales for employees who are contractual to holder."*

[17] In her award, the arbitrator records her brief and findings as follows:

> "To determine whether the respondent failed to interpret and apply various collective agreements regarding the implementation of Grades 13 and 15 salary scales for employees who are 'contractual to holder.' In her analysis of the evidence and argument before her, the Arbitrator found as follows:
>
> "My brief is thus to determine whether the respondent has indeed incorrectly interpreted and applied the CTI principle and the grade 13 and grade 15 salary scales thus excluding the applicants by not placing them on the previous levels they held in addition to them retaining the salaries that they were earning on their previous defunct positions.

The determination of the same requires me to look at the CTI definition as espoused/ contained in the Transvaal Conditions of Service agreement, as well as the relevant provisions of the settlements agreements that resulted into the implementation of both the grade 13 and grade 15, CTI is defined as follows:

> **"Contractual to holder"** with regard to-
>
> (a) Salary/ salary scale-
>
> Means that the employee retains the salary / salary scale pertaining to the post before its downgrading abolition and retains all adjustments and regradings so that the incumbent will never be in a less favourable position vis-à-vis other posts which were previously evaluated on a par with the post, in other words as if the post was never downgraded

Whereas the Implementation of The Grade 13 Salary Scales dispute Settlement agreement of the 24th May 2004 provides thus:

> "The Respondent agrees that irrespective of the classification of a post in terms of the Placement Agreement By the Respondent, the incumbent of a post in the new Organisational Structure, shall be remunerated in accordance with the comparable benchmark level as already determined by the respondent of the Grade 13 Local Authority Bargaining Council Scales:
>
> Provided that should the salary and benefits of an employee be higher than the benchmark level, that employee shall retain his / her current salary and benefits, regardless of the result of the job evaluation in terms of "TASK."
>
> In the event of a post being evaluated lower than the benchmark level, the incumbent of that post shall retain the benefit of the higher salary attached to such post:
>
> Provided that the future annual salary adjustment shall be withheld until the incumbent's salary equals the salary scale of the TASK job evaluation."

Clause 1.4 of the settlement agreement entered into between the respondent and SAMWU on the 18th June 2008 provides as follow:

> "1.4 That the parties agree to use the Grade 15 salary scales and will further be guided by category "A" municipalities from the SALGBC;"

The CTI definition as captured above refers to a position that has either been abolished or downgraded by the job evaluation. This in simple terms or plain English refers to a position that is no longer in existence in the structure of the respondent.

Whilst the regradings in the said definition refers to the newly created positions at the time of placement when their previous positions were abolished, meaning that the employees were placed in new defined levels no longer the same as the previously held positions.

Thus retention entails that employees retain/ keep their previous salary scale together with its benefits and adjustments as if the said positions were still in existence. Such retentions has nothing to do with the levels of the defunct or abolished positions as the same is now only represented by the salaries which the employees earned in the previous abolished positions.

The retained salaries also have nothing to do with the grades of the defunct municipalities as the applicants would have this forum to believe. The simple fact that the applicant did not disapprove is that their salaries are still higher than those of the positions that they occupy. Thus to claim that these scales represent the grades of the previous defunct municipality when it is not their case that the two grades did not result in them earning lower salaries is an afterthought which does not assist their case.

To seek to be placed on the abolished levels in the downgraded positions in which they are placed amounts to creating new levels which in turn would amount to them receiving new salary scales which they never earned before. This would exactly mean what the respondent is arguing creation of a new right to a higher or increased remuneration.

I think the respondent's witness put it succinctly when he stated that the principle of CTI is not to put any employee in a better position than the one he / she was previously in but is about the employees not being in a worse off position. He further stated that retention is about one keeping that which they had and not about progression as the applicant's argument seem to be that they should have progressed or obtained that which they don't have in terms of the CTI principle.

The same principle of retention is resonated even in the grade 13 and 15 settlement agreement that were entered into by IMATU and SAMWU respectively with the

respondent. Nowhere is indicated in the said agreements that the implementation of the two grades would change the applicant's levels, the two actually place emphasis on the issue of retention of higher salaries and benefits should the employee be placed in a post that has been evaluated lower than the benchmark level.

It is thus my finding in the light of the above that the applicant's claim should be dismissed on the basis that the respondent has correctly interpreted and applied the CTI principle to their position."

Evaluation

[18] Mr Hulley for the EMM raised an *in limine* point in this court to the effect that the Bargaining Council does not have jurisdiction to hear the dispute on the basis that the Transvaal Agreement was a collective agreement under the old LRA, and as such elapsed on 31 December 1997. Mr Myburgh for the applicants referred the court to **EMM v IMATU & Others** (case no. JR2535/10) in which the Labour Court per Hardie AJ dealt with a similar challenge. In that matter the court concluded that the Transvaal Agreement "is a valid collective agreement and that the commissioner had the jurisdiction to determine the dispute on the interpretation/application of clause 15.6.1 of the Transvaal agreement."[1]

[19] Hardie AJ found as follows:

"[13] In terms of Government Notice no.R 1828 published in Government Gazette No. 16047 on 28 October 1994, the then Minister of Labour the Right Honorable Tito Mboweni, in terms of section 48 (1) (a) of the Labour Relation s Act 28 of 1956 declared that the provisions of the Transvaal agreement shall be binding for the period ending 31 December 1997. On 2 September 1997, the Second Respondent was established in term of an Establishment Agreement, it was agreed that all existing collective agreements (whether concluded in a Bargaining Council or any other Bargaining forum, including the National Labour Relations Forum) shall, to the extend that they are not in conflict with the constitution, be deemed to be of full force and effect until amended or repealed by the Second Respondent.

[1] At paragraph 16

[14] The Transvaal Agreement was never amended or repealed by the Second Respondent, and in a circular dated 9 January 1998 (circular 1 of 1998) the Second Respondent restated the situation that all existing collective agreements remained in force in terms of clause 3.5. of the Establishment Agreement notwithstanding that certain collective agreement of the Old Industrial Council, such as the Transvaal Agreement., had expired or were due to do so in the near future.

[15] The Applicant attempted to persuade me that the Transvaal Agreement was not a collective agreement as contemplated by the Act, and that as a result, the Commissioner had no jurisdiction to entertain the dispute in terms of section 24 of the Act. Various arguments were advanced in this regards. The first one is that Notice R1828 is not a collective agreement as contemplated in terms of section 213 of the Act, the Transvaal clearly preceded the Act and is therefore not a collective agreement in terms if that Act, and the Transvaal Agreement expired on 31 December 1997.

[16] I am not persuaded by these arguments. The Transvaal Agreement is on all fours with the definition of a collective agreement as articulated in section 213 of the Act. Notice R1828 was merely extending its operation, and in the absence of a challenge to its jurisdiction to do so, I must accept that the parties to the Second Respondent had the ability to incorporate clause 3.5. in its Establishment Agreement. I therefore find that the Commissioner had the jurisdiction to determine the dispute on the interpretation/ application of clause 15.6.1 of the Transvaal Agreement."

[20] With respect, I see no basis to depart from the cogent reasoning set out above, and the point in *limine* stands to be dismissed.

[21] One of the grounds on which an employee may be demoted in terms of the Transvaal Agreement is when there is 'reorganisation'. The Transvaal Agreement defines reorganisation as follows:

"6.5.1.2 **Reorganisation**

6.5.2.1 If an employee's post is declared redundant and is abolished due to a reorganisation of the council's service and such employee is demoted by the council, the employee shall retain his post level that applied

prior to such demotion as personal to holder or contractual to holder, as the case may be."

[22] In as far as the review is concerned, the applicants' approach can be summarised as follows:

22.1 When the Municipality "regraded" to grade 13 and grade 15, it ought to have applied that re-grading to the post levels occupied by employees prior to the disestablishment of the previous municipalities;

22.2 They were entitled, in terms of the concept "contractual to holder" in the Transvaal Agreement, to have their post levels adjusted upwards in accordance with the upward adjustment of the grading of third respondent.

22.3 In not coming to this conclusion the second respondent committed a reviewable error of law.

[23] It was submitted by Mr Myburgh on behalf of the applicants as follows:

23.1 In terms of clause 3.5 of the establishment agreement (i.e. the agreement establishing the SALBGC) read with circular 1 of 1998, the Transvaal Agreement remained operative until amended or repealed by the SALGBC, which did not occur.

23.2 The resolution passed by the EMM corporate affairs committee on 28 November 2005 (this further to the settlement of the grade 13 grading dispute) specifically provides for the operation of the CTI principle.

23.3 The letters issued to the affected employees by the EMM on 30 October 2008 (this after the EMM upgraded to grade 15) again specifically refer to CTI levels.

23.4 The creation of the EMM constituted a reorganisation as envisaged in clause 6.5.1.2. of the Transvaal Agreement. The services provided by the disestablished municipalities were reorganised into the EMM.

23.5 After re-organisation the CTI principle endured and by its action the EMM accepted that the CTI principle applies in relation to its regrading. This is

reflected in its resolution of 28 November 2005 and the letters of 39 October 2008.

[24] The crisp issue for determination in this matter is the meaning to be accorded to the definition of *"contractual to holder"* (which is known in practice as 'contractual to incumbent' – CTI) in the Transvaal Agreement. The definition reads:

> "**contractual to holder**" with regard to
>
> *(a) salary/salary scale-*
>
> *means that the employee retains the salary/salary scale pertaining to the post before its down-grading/abolition and retains all adjustments and regradings so that the incumbent will never be in a less favourable position vis-à-vis other posts which were previously evaluated on a par with the post, in other words as if the post was never downgraded;*
>
> *(b) other benefits –*
>
> *Means that the employee retains all better benefits that he is entitled to in terms of the contract until his services are discontinued with the council or until such other time, depending on the conditions of his appointment or on the stipulation of the contractual agreement"*

[25] For the applicants, it was submitted that a proper reading of the above definition means that the affected employees were entitled to:

25.1 retain their original post level that applied prior to their demotion and the salary scale pertaining to their original post level; and

25.2 all re-gradings relating to their original post level (i.e. as if their posts were never abolished/down graded) and;

25.3 thus the EMM'S conduct constituted a breach of the CTI principle, in that the affected employees were entitled to the benefits of the regradings of the salary scales (in terms of the collective agreements entered into by the applicants) in relation to their original post levels.

[26] I cannot agree. The use of the word "*retains*" in the CTI definition must be accorded due attention. To 'retain' means to "keep in place hold fixed"[2]. The word is used in the definition in respect to both the salary level and adjustments/regradings. Further, the definition provides that the incumbent will never be in a less favourable position *vis* a *vis* other posts which were previously evaluated on a par with the relevant posts (now downgraded or abolished). The interpretation of the definition to mean an entitlement to enjoy future regradings of salary levels of posts on a reorganised establishment (which in the result would mean that the incumbents would be in a more favourable position than those posts previously evaluated on a par with their former posts) cannot be correct.

[27] I take note of the statement by Comrie AJA in **Pretorius v Rustenburg Local Municipality & Others**[3] in which the court referred to the definitions in the Transvaal Agreement as follows:

> "The terms 'contractual to the holder' and 'personal to the holder' are defined. They appear at least to mean that the employee will not suffer a reduction in salary or other benefits, which could happen in the case of a demotion on other grounds."[4]

[28] The above interpretation is in line with an understanding of the CTI definition which is premised on a notion of retention of salary and benefits by specific employees. The principle protects individual holders of posts affected by reorganisation. It does not protect the post which has been demoted/abolished. The present state of the law as regards interpretation has been set out by Wallis JA in **Natal Joint Municipal Pension Fund v Endumeni Municipality** 2012 (4) SA 593 (SCA) as follows:

> "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to

[2] New Shorter Oxford Dictionary, Clarendon Press 1993
[3] (2008) 29 ILJ 1113 (LAC)
[4] At paragraph 34 per Comrie AJA

> the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[29] In my judgment, over and above the use of the word *retain* in the CTI definition, the interpretation contended for by the applicants would lead to insensible results. An employee who has a CTI salary scale and benefits as defined in the Transvaal Agreement was, prior to the reorganisation of the municipal structure, in a post that has been down-graded or abolished. Let us take the abolished post scenario as an example. The notion that a post that is no longer in existence on the establishment of a Municipality can be beneficiary of new salary scales attached to posts on the fixed establishment, in terms of collective agreements entered into after that reorganisation, is not sensible or business like. That post no longer exists as a financed post on a municipal establishment, it being budgeted for on a 'contractual-to-holder' basis. When the incumbent leaves the service of the municipality, the expenditure on that holder will cease.

[30] In view of the above, I do not think that the Arbitrator made an error of law in her award in finding that the EMM correctly interpreted and applied the CTI principle. I therefore make the following order:

Order:

1. The application to review the award under case number GPD 031019/060922 is dismissed.

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H. Rabkin-Naicker J

Judge of the Labour Court of South Africa

Appearances:

For the Applicants:	Anton Myburgh S.C. and Marlene Jennings
Instructed by:	Savage, Jooste and Adams
For the Third Respondents:	G. Hulley S.C.
Instructed by:	TZ Attorneys