



THE LABOUR COURT OF SOUTH AFRICA

JOHANNESBURG

Reportable

Case no: JR 951/16

TSAKANI ISABEL TSHIFHANGO

First Applicant

ELIZABETH KUKI MAKHONDO

Second Applicant

and

**THE MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES**

First Respondent

**THE DIRECTOR GENERAL: JUSTICE AND
CONSTITUTIONAL DEVELOPMENT**

Second Respondent

**THE REGIONAL HEAD: JUSTICE AND
CONSTITUTIONAL DEVELOPMENT**

Third Respondent

THE ACTING DIRECTOR HUMAN RESOURCES:

Fourth Respondent

**JUSTICE AND CONSTITUTIONAL DEVELOPMENT,
GAUTENG**

Heard: 15 February 2017

Delivered: 23 March 2017

Summary: Applicants were appointed on salary level 8 after a job evaluation process was conducted. Subsequently their salary level was downgraded to level 7 in terms of the provisions of section 32 of the Public Service Act. The Applicants approached this Court for the review and setting aside of the decision to downgrade their salaries. The Respondents' case is that no decision was taken, thus there is no decision to be reviewed. Review is premised on the principle of legality.

JUDGMENT

PRINSLOO, J

Background facts

- [1] The Applicants are currently employed as administrative officers on salary level 7 at the Department of Justice and Constitutional Development, Johannesburg. It is their appointment on salary level 7 that caused them to approach the Court and for purposes of this application, their employment history is relevant.
- [2] The First Applicant (Tshifhango) was initially appointed as an administrative officer on salary level 7 and her salary was upgraded to level 8 in December 2010 backdated to August 2008. The Second Applicant (Makhondo) was also initially appointed on salary level 7 and she was upgraded to salary level 8 with effect from December 2012 when she was transferred from Mpumalanga to the Gauteng Regional Office.
- [3] Their salary upgrades from level 7 to level 8 came as a result of a job evaluation process that was conducted in terms of the provisions of Chapter 1 Part III of the Public Service Regulations 2001. Various posts, including administrative officers, were subjected to a job evaluation process and the job evaluation results were approved in February 2008. The results could not be implemented due to budgetary constraints and in 2010 approval was granted for the uniform implementation of the already approved job evaluation results in the regions. The job evaluation result that graded administration officers in the regional offices at salary level 8 was approved on 27 August 2008 and

after approval was sought and obtained for implementation in 2010, it was implemented with backdated effect from August 2008.

- [4] The Applicants were placed on level 8 and paid on level 8 until 1 June 2015 when their positions were 'downgraded' to level 7.
- [5] The Applicants were informed in a staff meeting on 13 May 2015 that the Department of Justice and Constitutional Development (the Department) made an error when the Applicants were upgraded to salary level 8.
- [6] On 22 May 2015 the Third Respondent issued the Applicants with letters, titled 'Downgrading from salary level 8 to salary level 7' and informing them that an instruction was received from the Chief Operation Officer at National Office that the positions they occupy have been job evaluated and approved at salary level 7. The Applicants were informed that they were 'wrongly upgraded from salary level 7 to salary level 8' and that they would be downgraded to the correct salary level with effect from 1 June 2015. They were further informed that the overpayment of salary made to them from the date they were upgraded will be recovered in terms of section 38 of the Public Service Act¹ (PSA).
- [7] The Applicants were not consulted prior to the downgrading of their positions and salary levels. The Applicants were appointed and paid on salary level 8 for a period of almost seven and three years respectively.
- [8] The Applicants exhausted other Court processes, bargaining council remedies and internal grievance procedures.
- [9] The Applicants approach this Court in terms of the provisions of section 158(1)(h) of the Labour Relations Act² (the LRA) to review and set aside the decision to downgrade them from salary level 8 to 7. The Applicants submitted that the Respondents' act of implementing the downgrades constitute a unilateral change in terms and conditions of employment and that it is illegal, unreasonable and procedurally flawed. The review application is premised on the doctrine of legality, which requires public service officials to exercise powers that are permissible and conferred by law and the exercise of

¹ Public Service Act 1994.

² Act 66 of 1995.

such power to be lawful and procedurally fair and not be arbitrary, unreasonable or irrational.

- [10] The Applicants' case is that they should have been given an opportunity to make representations before a final decision to downgrade their positions was taken.

The Respondents' case

- [11] The Respondents raised a number of points *in limine*. The first is that the Applicants seek to review and set aside a decision to demote or downgrade them and a demotion would amount to an infringement of section 185(2)(a) of the LRA and the dispute has to be referred to the bargaining council as this Court has no jurisdiction to entertain such a dispute.
- [12] On the Respondents' own version they are of the view that the action taken does not amount to a demotion. It will become clear later what the Respondents' case is.
- [13] I am alive to the fact that the Applicants are not legally represented and that they may not be *au fait* with the legal meaning or consequences of certain legal concepts or phrases. In argument before me the Applicants made it clear that they are not seeking to pursue an unfair labour practice dispute in terms of section 186(2) of the LRA. They are seeking the review and setting aside of the decision to downgrade them to level 7.
- [14] I accept that the dispute before this Court is not an unfair labour practice dispute relating to demotion.
- [15] The second point *in limine* is that the Applicants seek an order reviewing and setting aside a 'decision' and they must demonstrate that the decision constitutes administrative action in terms of the Promotion of Administrative Justice Act³ (PAJA). The Respondents deny that the decision constitutes administrative action and submitted that the Applicants failed to demonstrate that the decision constitutes administrative action.
- [16] The Applicants have not relied on the provisions of PAJA and the decision they seek to review does not constitute administrative action. The Applicants

³ Act 3 of 2000.

approached this Court in terms of the provisions of section 158(1)(h) of the LRA. There is no merit in the second point *in limine* as this review is not one brought under PAJA, but it is a legality review.

- [17] The Respondents' case is that the Applicants were upgraded in 2010, backdated to August 2008 and December 2012 respectively pursuant to an administrative error in the Gauteng regional offices.
- [18] The Respondents explained that the process of job evaluation commenced in February 2004 and it was decided to use the 'equate system' in the process of comparing jobs within the organisation. According to the Respondents the job evaluation process was ultimately approved in February 2008. In support of this the Respondents referred to a memorandum to the Department's Director General, dated 12 February 2008, wherein it was stated that the jobs were graded according to the equate job evaluation system and presented to the job evaluation panel on 11 February 2008 for consideration. It was recommended that the job grades in the memorandum be approved, and it was indeed approved on 19 February 2008. In this memorandum the post of administration officer had been graded under the system as 6+ and it was recommended that it be graded as level 7.
- [19] This is where the error crept in, according to the Respondents. A job evaluation exercise was also performed in relation to the administrative officers in the Magistrate's Courts and the Master's Office and those jobs were evaluated at salary level 8 and was approved on 27 August 2008. In support of this the Respondents relied on a memorandum dated 21 August 2008, relating to 44 vacant funded posts of administrative officer on the approved establishment of the Magistrate's Courts. The administrative officers in the Magistrate's Courts and the Master's Office were evaluated on salary level 8 and it did not apply to administrative officers not located in those offices. It is for this reason that the Respondents submit that the Applicants' upgrades to salary level 8 were made in error and that they were not upgraded as a consequence of a job evaluation exercise, but in conflict with the outcome of such an exercise. The Applicants' should have been at level 7 as that is where their positions were graded.
- [20] This is disputed by the Applicants. They relied on a memorandum dated 9 February 2010 and 4 June 2010 wherein approval was sought for the uniform

implementation of job evaluation results in the regional offices and courts in regions. Their case is that they are part of the regional offices (Gauteng Regional Office), thus this memorandum applied to them. They dispute that this approval was for the Magistrate's Courts and Master's Office only. They further pointed out that their positions were not vacant, therefore what the Respondents seek to rely upon, does not apply to them.

- [21] They further dispute that memorandum wherein the post of administration officer had been graded under the system as 6+ recommended to be graded as level 7 applied to them as it specifically applied to positions in the directorate: Organisational Development, of which they are not part.
- [22] The Respondents' case is that there are only two categories of administrative officers employed at salary level 8 and those are employed in the Magistrate's Courts and the Master's Offices. This is disputed by the Applicants who allege that other individuals employed as administration officers at the Regional Office: Gauteng, Free State and Durban are still employed on salary level 8 and were not downgraded after the alleged error was discovered.
- [23] The Respondents place specific reliance on the provisions of section 38 of the PSA which provides that if an incorrect salary, salary level, salary scale or reward is awarded to an employee, the relevant executive authority shall correct it from the date on which it commenced. *In casu* the Applicants were remunerated on the incorrect salary and in terms of the provisions of section 38(1)(a) of the PSA the executive authority is given no discretion on whether to correct it or not, but is obliged to correct it from the date on which it commenced.
- [24] The Respondents' case is that it is unnecessary to engage in any procedure to reverse an error, as provided for in section 38 of the PSA.
- [25] The Applicants dispute that there is an error to be corrected as they were remunerated on salary level 8 after being upgraded to that level as the result of approved job evaluation results. They submit that the Respondents must have informed them of the fact that the downgrading of their salaries was considered, must have given them reasons for that and an opportunity to make representations before the final decision was taken.
- [26] After the matter was fully argued in Court, I afforded the parties an opportunity to explore a possible amicable solution to this dispute. Instead the

Respondents filed an application to submit further legal argument. The argument so submitted addresses factual issues rather than legal arguments. The Applicants objected to the filing of supplementary heads of argument.

[27] In view of the relief I grant and the order I make in this matter, I am not inclined to allow the Respondents to file further submissions.

Analysis

[28] Mr Hulley for the Respondents submitted that pursuant to the job evaluation exercise the post of administrative officer was to be remunerated at salary level 7, but instead the Applicants were remunerated at salary level 8. Section 38 of the PSA provides for such situations in that the executing authority is obliged to correct the incorrect salary, salary level or salary scale.

[29] Mr Hulley argued that section 38(1) of the PSA is cast in the form of a conditional syllogism, "if X, then Y", where X is the condition and Y the consequent, if the condition is present, the consequent must necessarily also be present. In my view this conditional syllogism begs the question of the existence or the truth of "X".

[30] *In casu* the condition is the existence of an incorrect salary, salary level, salary scale being awarded to an employee. If the condition exists, the consequence is that the relevant executing authority shall be obliged to correct it. The executing authority exercises no discretion as the said consequence that flows from the existence of the condition arises by operation of law and not by the exercise of any discretion.

[31] The Respondents' case is thus that since no discretion was exercised, no decision was taken. The right to be consulted before a decision adverse to one's interest is taken, can only exist where there is a decision taken. The power to correct the salary, salary level or scale is permissible in law as it is expressly provided for in section 38 of the PSA.

[32] I agree with the submission that where an incorrect salary, salary level, salary scale or reward is awarded to an employee, the consequence is that the relevant executing authority is obliged to correct it and no discretion is exercised.

[33] I however do not agree that no decision or action was taken. The consequence of correcting an incorrect salary flows from the existence of an

incorrect salary, salary level, salary scale or reward being awarded to an employee. The determination of whether an incorrect salary, salary level, salary scale or reward awarded to an employee indeed exists, would require some form of investigation or assessment. The executing authority certainly does not wake up one morning and correct incorrect salaries, without any preceding process or action to determine whether a salary is indeed incorrect.

[34] Section 38 of the PSA permits the State as employer to correct salaries and to make deductions from an employee's salary in circumstances where the employee was awarded an incorrect salary, salary level, salary scale or reward. The question as to whether the provisions of section 38 of the PSA had been triggered and whether the requirements or conditions for the said section to apply have been met or not, is a factual enquiry. Once it is found that the requirements or conditions have been met, section 38 of the PSA will be triggered and the executing authority is obliged to correct the incorrect salary, salary level, salary scale or reward, as the case may be.

[35] On the other hand, if the requirements or conditions have not been met, section 38 will not come into operation.

[36] In my view the Department has to follow some process to determine whether an employee was awarded an incorrect salary or level or scale before the provisions of section 38 of the PSA could be applied. This process and the exercising of powers the executing authority has in respect of section 38 of the PSA, must be effected reasonably and must be exercised within the confines of legality, fairness, rationality and reasonableness.

[37] The principle of legality derives from the provisions of the Constitution and the components of legality relevant to this application are that the action taken must be procedurally fair and it must be rational and not be arbitrary or capricious.

[38] Where the Department thus foresees a situation that the executing authority will correct an incorrect salary, the action taken to initiate the process whereby the executing authority will act in terms of the provisions of section 38 of the PSA, must be procedurally fair. The very first step in a process that is fair, will be to afford the individual whose rights or benefits will be adversely affected the opportunity to be heard.

- [39] *In casu* the Applicants complain that they were merely informed that the Department made an error when their salary levels were upgraded and that it would be corrected. The letter the Applicants received mentioned an instruction from the Chief Operation Officer at national office that the positions the Applicants occupy have been job evaluated on salary level 7 and approved as such and that they were wrongly upgraded from salary level 7 to 8 and they would be downgraded to the correct level.
- [40] As much as Mr Hulley argued that no decision was taken in this matter, I find it hard to accept. I do accept that the executing authority does not take a decision but simply applies section 38 of the PSA, but before the executing authority applies section 38 of the PSA, a decision or some action is indeed taken to decide that the salary or level or scale is incorrect. Once this is decided, section 38 of the PSA is triggered.
- [41] The Applicants were not informed that the downgrading of their salaries was considered prior to being informed that their levels were to be downgraded from 1 June 2015, they were not provided with reasons, apart from being told that they were wrongly upgraded from salary level 7 to 8, and they were not afforded an opportunity to make representations before the Department decided that an error occurred and that it should be corrected. Only after the decision was taken that the Applicants were wrongly upgraded or some act performed to determine that, the executing authority acted in accordance with the provisions of section 38 of the PSA.
- [42] In my view the Applicants were entitled to be told why the Department alleges that a mistake was made when they were upgraded to salary level 8 and they should have been afforded the opportunity to make submissions and to respond to the Department.
- [43] Before the application of section 38 of the PSA is triggered, there has to be an incorrect salary or scale or level that requires correction. The Department cannot unilaterally decide that an error exists and that the Applicants were placed on the incorrect salary scale or level, without affording them the opportunity to respond and to make representations on the issue. There is the possibility that the Department or the executing authority may be wrong in determining whether an incorrect salary or level or scale was awarded.

- [44] If the existence of the prerequisite is based on wrong information, it is doubtful that the provisions of section 38 of the PSA could be triggered.
- [45] It cannot be that the Applicants have no recourse if the application of section 38 of the PSA is triggered by a mistake or a possible mistake, more so where the determination in respect of the existence of an incorrect salary or level or scale is made unilaterally and without any consideration of the employee's case and without following any due or fair process.
- [46] The Applicants have to be informed about what the error is the Department seeks to correct and be afforded the opportunity to make representations on that.

The relief sought

- [47] The Applicants approached this Court for the review and setting aside of the decision to downgrade or demote them from salary level 8 to salary level 7. They approached the Court in terms of the provisions of section 158(1)(h) of the LRA, which provides for the review of any decision taken or act performed by the State in its capacity as employer on such grounds as are permissible in law.
- [48] In my view the Applicants are entitled to this relief for the reasons I have set out *supra*.
- [49] The Applicants further seek to be reinstated to salary level 8 and that they be paid the difference between salary level 7 that they were downgraded to and salary level 8.
- [50] The entitlement to be reinstated to salary level 8 and to be paid accordingly is an entirely different and separate question. *In casu* the Applicants' attack on the decision is largely process related and for that reason alone substitution is not appropriate. The matter ought to be remitted to the Respondents to comply with due process.
- [51] It is not for this Court to decide whether the Applicants should be placed and remunerated on salary level 8 or whether they are correctly placed on salary level 7. This is an issue that should be addressed and resolved internally, after due consideration of the facts, the applicable prescripts and the Applicants submissions. The outcome of the internal process to be followed, will determine what consequences are to flow from that.

[52] In the premises I make the following order:

Order:

1. The decision to downgrade the Applicants from salary level 8 to salary level 7 is reviewed and set aside;
2. The Respondents must provide the Applicants with reasons as to why their salary levels were downgraded from salary level 8 to 7 within 15 days of date of this Order;
3. The Applicants must submit written submissions in response thereto within 15 days after receipt of the reasons as per paragraph 2 *supra*;
4. The Respondents must assess and consider the Applicants' written submissions and determine whether the Applicants were indeed awarded an incorrect salary level that has to be corrected;
5. The Applicants should be informed about the outcome of the assessment in paragraph 3 *supra* within 15 days after they submitted their written submissions;
6. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicants: Ms Tshifhango in person

For the Respondents: Advocate G I Hulley SC

Instructed by : State Attorney

LABOUR COURT