

BEFORE THE SOUTH AFRICAN LOCAL GOVERNMENT BARGINING COUNCIL.

HELD AT DURBAN

In the matter between:

CASE NO: KPD 081509

SAMWU obo KI Mkhwanazi and 31 others

Applicants.

and

Mtubatuba Local Municipality

Respondent.

Award

Background and Introduction.

- 1) When this matter was heard on the merits, the applicants were represented by Mr NSV Mfeka instructed by Hlele Attorneys and the respondent was represented by Mr I Dutton instructed by Garlicke and Bousfield. I am grateful for the assistance that I received from the legal representatives in this matter. The two interim awards issued previously must be read together with this award. The matter commenced before me on the 7th of November 2018 when the respondent was then represented by Ms W Mthetwa. Beyond saying that a settlement letter would be forthcoming from the Municipal Manager (MM), Ms Mthetwa was most reluctant to make any meaningful submissions and arguments. As it seemed that a settlement was within reach of the parties, I adjourned the matter to enable the parties to engage in meaningful negotiations. At the next sitting on the 10th of December 2018, the

respondent was represented by Mr M Shandu, its chief financial officer. He made an offer to settle the matter because, as he put it, the councillors wanted this issue resolved without incurring unnecessary legal costs. While I was not privy to the exact terms of the settlement proposal, I was informed that the applicants found the proposal to reimburse them over a period of 5 years to be unacceptable.

- 2) Mr Shandu pointed out that the respondent was severely financially constrained and that it simply did not have the funds to reimburse the applicants in a period of less than five years. He also indicated that the respondent was of the view that it was not legally obliged to pay the applicants and that if they rejected the offer, it (the respondent) would defend the matter on the merits. The applicants formally rejected the proposed settlement and the matter was adjourned for a hearing on the merits.

- 3) At the hearing on the 7th of January 2019, Mr Dutton indicated to me that the respondent categorically denied liability and would be resisting the claims made by the applicants. He also, on behalf of the respondent, distanced himself from the offer to settle made by Mr Shandu. Mr Dutton stated that while some of the discussions pertaining to the offer was made in my presence, he was not going to request that I recuse myself from hearing this matter on the merits. He stated that he was confident that I would not be unduly influenced by the offer made by Mr Shandu and consented to my hearing the matter. At my request the parties prepared a pre-arbitration minute. Further a number of bundles were handed up by the applicant and the respondent.

- 4) As I will be making reference to the documents submitted, it is advisable that I describe the various annexures for ease of reference.

Annexure A	The Pre-arbitration Minute
Annexure B	Applicants' bundle
Annexure C	Letters of Appointment
Annexure D	Respondent's Bundle
Annexure E	Respondent's Supplementary Bundle
Annexure F	Transcript of these Proceedings 7-1-2019
Annexure G	Transcript of these Proceedings 8-1-2019
Annexure H	Letters of appointment

Essence of the applicants' claim

- 5) There are thirty-two applicants in the matter and whilst they were employed at different dates¹ and at different grades, the same material facts and legal principles are applicable to all of them. The applicants called Mr KI Mkhwanazi, Ms N Shabalala, Councillor MZ Shobede and Ms M Mdletshe. The respondent relied on the evidence of Mr KE Mpungose. I do not propose to summarise the testimony of each of the witnesses but will deal with the essence of their evidence insofar as it pertains to the material issues that have to be decided. Much of the facts upon which this grievance is based in common cause. Mr KI Mkhwanazi testified on behalf of all the applicants and his evidence will be deemed applicable to all of them as it laid out the essence of their case.
- 6) The applicants claimed that the respondent had committed an unfair labour practice in respect of them. The gravamen of their claim is based on a resolution passed by the Mtubatuba Council on the 31st of May 2013. Resolution MTMC 340/2013 approved a final Municipal Organogram for the Mtubatuba Municipality for the 2012/2013 financial year and beyond (2012/2013 organogram).² In terms of the 2012/2013 organogram the posts occupied by the applicants were regraded from TASK Grades 10 and 11 to TASK Grade 12. Thus the posts occupied by the applicants had all been regraded to a higher level in terms of the 2012/2013 organogram.
- 7) According to the applicants, the new organogram was implemented in respect of employees employed after the adoption of the resolution (new employees) and certain employees who were employed prior to the resolution but whose TASK Grades were changed to conform with the 2012/2013 organogram (converted employees). Thus the 2012/2013 organogram was implemented in respect of some new employees and some converted employees. However the 2012/2013 organogram was not implemented in respect of the posts held by the applicants.

¹ . The names, dates of appointment and grades of the various applicants can be found of pages 2 to 6 of Annexure A.

² . The 2013 organogram is contained in annexure B

8) The applicants claimed that their posts were effectively regraded on the 31st of May 2013 after the Mtubatuba Council approved the resolution adopting the 2012/2013 organogram. They sought to be placed on TASK Grade 12 and further claimed back pay from July 2013 which is the date they claim was the date of implementation of the 2012/2013 organogram. In addition they also sought the correct pay progression over the years. They contended that as the resolution adopting the 2012/2013 organogram was legally passed by the Mtubatuba Council and implemented in respect of the new employees and some converted employees, it was an unfair labour practice not to implement the 2012/2013 organogram in respect of them.

9) Section 186(2) of the Labour Relations Act 66 of 1995 (LRA) to the extent relevant to this matter provides:

‘Unfair Labour practice’ means an unfair act or omission that arises between an employee and an employer involving-

(a) unfair conduct by the employer relating to the promotion, demotion, ...or relating to the provision of benefits to an employee.

Mr Mfeka was reluctant to deem this a dispute about promotion. He argued that the respondent failed to provide benefits due to the applicants after the Council adopted the resolution approving the 2012/2013 organogram. His argument was that had the respondent implemented the resolution in respect of the applicants, they would have benefitted by being remunerated at a higher TASK grade. Compounding the unfairness, according to the applicants, was the decision to afford some converted employees and some new employees these benefits.

Respondent’s submission.

10) The essence of the respondent’s case was that the 2013 resolution approving the 2012/2013 organogram was not legally binding on Mtubatuba Municipality. It was further submitted by the respondent that the 2013 resolution was part and parcel of illegal activities perpetrated by then municipal manager, Mr SR Ntuli. The respondent further contended that there is a clearly demarcated process that has to be followed before posts are regraded and that this process was not followed in this instance.

11) The parties agreed that issues pertaining to the relief that the applicants would be entitled to should they succeed on the merits would not be dealt with in this enquiry. This issue of the appropriate relief would be dealt with separately if the applicants succeed on the merits. Thus

the issue before me is whether the applicants have established that they have been subjected to an unfair labour practice.

Factual findings and assessment.

12) There are many facts and issues that are common cause in this matter. Much of this comes from the evidence of Mr KI Mkhwanazi as amplified by the bundles of documents. The applicants prior to the 31st of May 2013 were occupying posts graded TASK 10 or 11. Mr Mkhwanazi was employed as an amenities officer in the post that had been allocated TASK Grade 11. In terms of the 2012/2013 organogram this post was regraded TASK 12. All the other applicants are in a similar position. All of them were on posts that were either graded TASK 10 or 11 and all of their posts were regraded as a consequence of the resolution to TASK 12.

13) It is clear from the Council Meeting of the 31st of May 2013, that the Council resolved 'that the Final Municipal Organogram for 2012/2013 Financial Year and beyond be approved'³ There was also a Council Resolution Certificate certifying that the Council of Mtubatuba at its meeting of 31 May 2013 resolved to approve the final Municipal Organogram for the 2012/2013 financial year and beyond.⁴ This organogram clearly indicates that the posts that the various applicants hold were to be deemed to be graded as TASK 12. This would place the applicants into a higher pay bracket.

14) Subsequent to the approval of the resolution in May 2013, the Local Labour Forum (LLF) at a meeting held on the 13th of November 2015, recommended that⁵:

- i) 'the GM: Corporate services draft new appointment letters to all affected employees (the applicants in this matter) moving them from Task Grade 11 to Task Grade 12 which should be signed by each employee;
- ii) Salaries of affected employees to be paid as per the task grades on the Organogram with effect from November 2015 which will include correct progression over the years; and that
- iii) Back pays (sic) from June 2013 to November 2015 be paid in full.'

³ . Page 33 of Annexure B

⁴ . Page 29 of Annexure B

⁵ . Page 51 of Annexure B

These recommendations were endorsed by the Corporate Services Portfolio Committee (CSPC) at its meeting of 13th of November 2015.⁶ In effect both the LLF and the CSPC, subsequent to the resolution being approved by the Council, recommended that the applicants be given the relief that they sought. From the evidence placed before me, the Mtubatuba Council considered the recommendations on the 24th of November 2015 and took a resolution to establish an ad hoc committee to deal with the matter and make further recommendations to Council. It seems that the process stalled at that point. There is thus no Council resolution giving effect to the recommendations made by the LLF and the CSPC. They therefore remain recommendations.

15) Mr KI Mkhwanazi's undisputed evidence was that although the 2012/2013 organogram was not implemented in respect of the applicants, it was implemented in respect of other employees. The organogram was implemented in respect of new employees. The posts that were changed from TASK 11 to 12 were, after the adoption of the resolution, advertised as TASK Grade 12 posts. One such example is Mrs BP Mngomezulu who was employed as the LED officer at TASK Grade 12. This was the grading designated to the post in terms of the 2012/2013 organogram. This post had previously been graded as TASK 11 but regraded after the adoption of the 2013 resolution. Ms BP Mngomezulu was employed on the 2nd of January 2014 and was clearly employed on TASK grade 12 as provided for in the 2012/2013 organogram. The respondent appears to have acted in a similar manner in respect of three other employees namely Mr KV Mpungose, Ms NO Shabala and Mr P Mkhwanazi.⁷ However Mr KI Mkhwanazi for the applicants also conceded that posts were later advertised using the TASK grades that prevailed before the 2012/2013 organogram was approved by the Council. It seems that this happened after the dispute with the applicants arose.

16) Mr KI Mkhwanazi also testified, without being contradicted, that some existing employees also had the TASK grades of their posts upgraded after the 2013 resolution. These employees were Ms NL Mncwango, Mr SG Mtombeni and P Mlungwane. The TASK grades of their posts were converted from 11 to 12 after the adoption of the 2013 resolution. According to Mr KI Mkhwanazi this occurred without any interviews or reappraisal of the posts concerned. He testified that their posts were assigned the higher grade because the 2012/2013 organogram had designated their posts as TASK Grade 12. It is also not disputed that all these new and

⁶ . Page 59 of Annexure B

⁷ . Page 26 of Annexure B.

converted employees were given letters of employment reflecting their posts as being TASK 12.

17) So in summary, the Mtubatuba Council resolved to approve the 2012/2013 organogram. After this resolution was adopted, some new employees and some existing employees were either appointed or had their posts regraded because of the resolution. All these employees were officially notified that their posts were graded as TASK 12 and all were given letters of appointment indicating that they were employed on a post graded TASK 12. However the organogram was not implemented in respect of the applicants and none of them were given appointment letters indicating that they would be remunerated at TASK grade 12. Nothing was placed before me to indicate the reason for the organogram being implemented in respect of some employees and not in respect of the applicants.

The TASK Job Evaluation Policy.

18) The Mtubatuba Council in 2013 resolved to adopt the 2012/2013 organogram which is referred to in the Local Government: Municipal Systems Act 32 of 2000 (The Systems Act) as 'a staff establishment.' I have used the terms organogram and staff establishment interchangeably. The 2013 resolution referred to an organogram while the legislation talks of a staff establishment. I am of the view that, for the purposes of this award, there is no material difference between these terms.

19) Two sections of the Systems Act are relevant in this context.

Section 66 deals with staff establishment and provides:

- (1) A municipal manager, within a policy framework determined by the municipal council and subject to any applicable legislation, must-
 - (a) develop a staff establishment for the municipality, and submit the staff establishment to the municipal council for approval;
 - (b) provide a job description for each post on the staff establishment;
 - (c) attach to the posts the remuneration and other conditions of service as may be determined in accordance with any applicable labour legislation; and
 - (d) establish a process or mechanism to regularly evaluate the staff establishment and the remuneration and conditions of service.

Section 71(3) of the Systems Act states that 'municipalities must comply with any collective agreement concluded by organized local government within its mandate on behalf of local government in the bargaining council established for municipalities.'

It is imperative that an organogram or staff establishment has to be developed within an existing policy framework and must be approved by the municipal council. The Council is invested with the discretion as to whether or not to approve the staff establishment. It is clear that this discretion should be exercised having regard to the applicable policy. In other words, the existing policy must guide and structure the exercise of the Council's discretion as to whether the proposed staff establishment should be approved or not. A council must do more than simply rubberstamp the decision of the MM. Section 66(1)(d) of the Systems Act requires that a process or mechanism be established to regularly evaluate the staff establishment and remuneration and conditions of service. The TASK Job Evaluation Policy (TASK JE Policy) for Municipalities approved by the South African Local Government Association dated 2012⁸ does exactly that and more. The 2013 resolution approving the 2012/2013 organogram was an approval of a new staff establishment and therefore had to comply with section 66 of the Systems Act.

20) Mr KI Mkhwanazi was taken through the detail of the TASK JE Policy. Mr KI Mkhwanazi disagreed that this policy was binding on the Mtubatuba Municipality at the time the Council approved the 2012/2013 organogram. He was of the view that for a document to be binding on the municipality, it must be accompanied by proof that it had been approved by a resolution of Council. He accepted that the Mtubatuba Municipality did not comply with the TASK JE Policy prior to the adoption of the 2013 resolution approving the 2012/2013 organogram.

21) The TASK JE Policy⁹ was approved by the National Executive Committee of SALGA and was designed as part and parcel of the TASK Job Evaluation System for the Local Government sector. It is pertinent that the policy be described in some detail. In terms of section 2.1, the TASK JE policy is applicable to all municipalities but does not apply to municipal managers and those managers directly accountable to the municipal manager. It is common cause that none of the applicants fall within this category. The purposes of the policy is to 'achieve uniform norms and standards in the description of similar jobs and their grading across the municipal sector.'¹⁰ Further the policy provides for structures, institutional arrangements and procedures for the evaluation of jobs in municipalities in order to have a single job evaluation system thus avoiding remuneration disparities for similarly categorized municipalities.

⁸. Page 62 of Annexure D

⁹.Page 62 of Annexure D

¹⁰.Page 64 of Annexure D

22) The policy adopts the following key principles¹¹:

- i) The wage curves for the different categories of municipalities shall be used to determine the salaries of the TASK graded jobs.
- ii) Any post which undergoes a permanent substantial change in job content, shall be re-evaluated.
- iii) No post in the local government sector shall be filled without having been subjected to the TASK Job Evaluation process;

The policy also requires the establishment of a Job Evaluation Unit (JE Unit).¹² The primary purpose of the JE Unit is to conduct evaluations of all jobs within the municipalities falling within its jurisdiction and to present the outcomes for auditing to the Provincial Audit Committee (PAC). The function of the PAC is to conduct an audit having regard to the integrity of the TASK Job Evaluation System. In terms of section 7.2 of the TASK JE policy, once the PAC decides on the outcome of the evaluation results, they become final and binding.

23) The implementation requirements as contained in section 8 of the TASK JE Policy are prescriptive and are described as critical elements in the implementation of the TASK Job Evaluation System. There has to be an approved staff establishment recording the position of all jobs and their designation. Job descriptions have to be written for each post in the prescribed TASK format. The job descriptions together with the approved staff establishment shall be used to evaluate the job using the TASK Software to determine the appropriate TASK grade. Further there is a directive that the policy be strictly adhered to in order to ensure consistency and adequate implementation.

24) Section 9 of the policy indicates how the job evaluation process is to occur. If the job has 'changed substantially and permanently' and if the functions were performed for more than 6 months, an incumbent or manager may make an application that the job be re-evaluated initially by the JE Unit. The TASK Job Evaluation Process is to be conducted on a continuous basis as long as new posts are added to the staff establishment. There has to be a job description signed off by the employee and his or her manager before a proper job analysis is done.

¹¹ , Page 65 of Annexure D

¹² . Section 6 of the TASK Policy – Page 67 of Annexure D

- 25) Section 9.7 of the policy also indicates how the evaluation of the jobs are meant to occur. The JE Unit is meant to determine the 'skill level of the post.' In making its determination, the JE Unit has to score factors and sub-factors relating to complexity, knowledge, influence and pressure associated with the post. Thereafter it is obliged to compile a JE outcome report to be sent to the PAC. The chairperson of the PAC has to sign off the results of the job evaluation process prior to the JE Unit communicating the outcome to the Municipal Manager for implementation.
- 26) It is apparent that in order to achieve the important outcome of having uniform norms and standards in the local government sector, the policy requires specific steps to be taken prior to job evaluation, and details a careful procedure that has to be followed including an appraisal by the JE Unit and confirmation by the PAC of the outcome. Finally it suggests how the discretion as to whether the post should be regraded is to be exercised. In order to ensure a fair outcome, all members of the JE Unit has to undergo TASK Job Evaluation System Training. In terms of the policy it is the responsibility of the Municipal Manager to ensure that the TASK Job Evaluation System is properly implemented. It is therefore not within the powers of the Municipal manager to regrade posts himself or herself.
- 27) There is no evidence before me that any of the processes and substantive requirements that are prescribed in the TASK JE policy were followed by the Mtubatuba Municipality before or at the time the resolution to approve the 2012/2013 organogram was adopted. Indeed Mr KI Mkhwanazi testified that not all the posts of the applicants had job descriptions and that the last job evaluation exercise occurred in 2008. No evidence was placed before me to suggest that the regrading of these posts occurred after the JE Unit properly evaluated those posts and that these outcomes were subsequently confirmed by the PAC. In addition no information was placed before me that these posts were properly evaluated and assessed by anyone against pre-determined objective criteria before the resolution approving the 2012/2013 organogram was adopted. In the light of this, I must conclude that the Mtubatuba Municipality did not comply with the TASK JE policy in respect of the regrading of the posts.
- 28) I was informed by the applicants that while there may not have been compliance with the TASK JE policy, there was compliance with an alternative regrading policy used by the Corporate Services Department. I requested to see this alternative policy and was given an

undertaking that this will be produced to the hearing. I was subsequently informed by the applicants that they were unable to produce such a policy. I must therefore conclude on a balance of probability that no such policy exists.

29) It is also clear from the evidence that the Council meeting that approved the 2012/2013 organogram took less than an hour even though it had to consider some eighteen items. It is also relevant that the minutes¹³ of the meeting do not reflect that any meaningful discussion occurred in respect of item MTMC 340/2013 which related to the approval of the 2012/13 organogram. It is clear from the testimony of Councillor Shobede that no motivation or other documents were submitted in respect of this item. Similarly Ms Mdletshe who was employed as a committee officer in 2013 and was responsible for taking minutes also stated that besides the 2012/2013 organogram being attached, there was no other documents submitted in support of the resolution. According to her evidence, there was only a cursory discussion after the resolution was read out by the then Municipal Manager. This was followed by the adoption of the resolution being proposed and then seconded. There did not appear to be any discussion of job descriptions or policy. It therefore appears that this important decision was made without any in-depth discussion and without any written motivation being submitted to councillors in support of the resolution. This, despite the serious and ongoing financial implications that the resolution would have for the municipality.

30) The TASK JE policy was approved by the National Executive Committee of South African Local Government Association (SALGA). Section 163 of the Constitution of the Republic of SA 1996 provides that an Act of Parliament must provide for the recognition of national and provincial organisations representing municipalities and must determine procedures by which local government may consult with national or provincial government. The Organised Local Government Act 52 of 1997 as amended provides for the recognition of national and provincial organisations representing the different categories of municipalities. SALGA has been recognized in terms of section 2(1)(a) of the Organized Local Government Act as the organization representing different categories of municipalities. The TASK JE policy is meant to be read in the light of the TASK Job Evaluation System for the Local Government sector.¹⁴ Mr KE Mpungose's undisputed evidence was that at all relevant times the respondent was a

¹³ . Page 33 of Annexure B

¹⁴ . Section 1.2 of the TASK Policy Page 64 of Annexure D.

member of SALGA. On the evidence before me and in the light of section 66 of the Systems Act, I am of the view that Mtubatuba Municipality was obliged to act in accordance with the TASK JE policy prior to approving the 2012/2013 organogram. They clearly did not do so and neither, on the evidence before me, did they act in terms of any other existing policy.

31) In the light of this, the following key questions remain unanswered:

- i) Why did the Council and the municipal manager not follow the TASK JE Policy when regrading the posts in 2013?
- ii) What policy or objective criteria, if any, did the Municipal Manager follow in recommending the regrading of the posts to the Council?
- iii) If no policy or objective criteria were used in regrading, was there any legitimate explanation for Council approving the regrading of the posts on the recommendation of the municipal manager?
- iv) Why did the Council in 2013, given the requirements of Section 66 of the Systems Act, approve the regrading of the posts without any motivation or justification being submitted?

32) In the light of sections 66 and 71(3) of the Systems Act, serious questions can legitimately be asked about the lawfulness of the resolution approving the 2012/13 organogram. No documentary or other evidence has been submitted of any process of job evaluation prior to the resolution being adopted and neither is there any evidence demonstrating that the regrading of the posts was justified in terms of objective and reasonable predetermined criteria. It appears that the then Municipal Manager subjectively decided, for reasons that are unknown, to regrade the posts and the Council without adequate consideration and analysis adopted a resolution effectively approving the regrading. This appears to be in direct violation of the TASK Job Evaluation System for the Local Government Sector. The TASK JE policy specifically stipulates procedures that need to be followed prior to regrading, criteria that must be used in the job evaluation and a process of oversight and auditing by the Provincial Audit Committee. The detailed procedures, mechanisms, stipulated criteria for job re-evaluation and oversight mechanisms were all ignored. Equally importantly the adoption of the resolution in these circumstances undermined the objective of 'creating uniform norms and standards in the description of similar jobs and their grading across the municipal sector.'¹⁵

¹⁵ . Section 3.1 of the TASK Job Evaluation Policy for Municipalities.

33) At some point and for reasons unknown to me, the Mtubatuba Municipality decided not to implement the 2013 resolution in respect of the applicants. It may have adopted this course of action after becoming concerned about the legality of the resolution. However it was most regrettable that decisive steps such as reviewing and setting aside the resolution were not taken. Mtubatuba Municipality allowed this situation to fester for many years without decisively dealing with the situation as it ought to have done.

The implications of the Oudekraal Principle.

34) The applicants relied heavily on the resolution of Council approving the 2012/2013 organogram while the respondent questioned whether the resolution was legally binding. In an effort to focus the issues after the testimony of Mr KI Mkhwanazi, I discussed with the parties, whether sitting as an arbitrator in the Bargaining Council, I had any jurisdiction to determine the legality or otherwise of a resolution passed by the Mtubatuba Council. My prima facie view was that as an arbitrator in this Bargaining Council, I did not have jurisdiction to set aside a resolution passed by the Mtubatuba Council. This view was not contested by any of the parties. I asked the parties specifically to consider the dicta of the SCA in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*¹⁶ which states:

For those reasons, it is clear, in our view, that the Administrator's permission was unlawful and invalid at the outset. Whether he thereafter also exceeded his powers in granting extensions for the lodgement of the general plan thus takes the matter no further. But the question that arises is what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view, it was not. Until the administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognized that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.

¹⁶ . *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 at 241

This has been referred to as the *Oudekraal* principle and has been re-affirmed in a number of Constitutional Court judgments including *MEC for Health v Kirland Investment (Pty) Ltd.*¹⁷

It is also material to point out that in the *Oudekraal* case, the court reached this conclusion¹⁸:

Whether the Administrator, *as the ultimate decision-maker*, was ignorant of the graves and kramats or not, the inescapable conclusion must be that he either failed to take account of material information because it was not all before him or if, in the unlikely event that it was before him, that he wrongly left it out of the reckoning when he should have taken it into account. (my emphasis).

35) The *Oudekraal* principle is premised on the fact that the decision taken is made by the ultimate decision maker and is capable of producing legally valid consequences. It is for this reason that the court held that ‘if the validity of consequent acts is dependent on no more than the factual existence of the initial act then the consequent act will have legal effect for so long as the initial act is not set aside by a competent court.’¹⁹

36) There was no evidence before me that the respondent had successfully applied to a court having jurisdiction to set aside the resolution approving the 2012/2013 organogram on the basis that it violated the principle of legality or any other applicable law. Given that, I requested the parties to address me on the application of the *Oudekraal* principle. Even if the 2013 resolution approving the 2012/2013 organogram was unlawful, was I not obliged to give effect to it in the light of the *Oudekraal* principle as it had not been set aside by a competent court? This would mean that the resolution had to be implemented in respect of the applicants until it was set aside by a competent court and that it could thus not be ignored by the respondent on the basis that it may be unlawful.

The effect of the intervention in terms of section 139 of the Constitution.

37) Mr Dutton informed me that the respondent was on the 31st of May 2013 under an intervention instituted by the Kwazulu-Natal provincial government in terms of section 139 of the Constitution of the Republic of South Africa 1996. The applicants accepted that this was indeed the case. The respondent’s submission in this context was that any resolution of the Council had to be ratified by the Administrator before the decision had legal force and effect.

¹⁷ . *MEC for Health v Kirland Investment (Pty) Ltd* 2014 (5) BCLR 547 (CC); *State Information Technology Agency Limited v Gijima Holdings (Pty) Limited* [2017] ZACC 40

¹⁸ . *Oudekraal* at para 25

¹⁹ . *Oudekraal* at para 31.

38) Section 139 of the Constitution sanctions intervention by the provincial government when a municipality 'cannot or does not fulfil an executive obligation in terms of the Constitution or legislation.' Thus the intervention can only occur when there is a failure on the part of the municipality to fulfil an executive obligation or if one of the other conditions justifying intervention in section 139 is established. The intervention is thus carried out in order to remedy a failure on the part of the municipality. The issue then before me was whether as a consequence of the section 139 intervention, the Mtubatuba Council was the ultimate decision maker and from a factual perspective, at the very least, was able to make a final decision.

39) In a letter²⁰ dated the 25th of March 2013 addressed to the Mr K Mpungose from the Department of Co-operative Governance and Traditional Affairs (COGTA), it is apparent that this was an intervention in terms of section 139(1)(b) of the Constitution.

Section 139(1)(b) permits the relevant provincial authority to assume responsibility for the relevant obligation in that municipality to the extent necessary to-

- (i) maintain essential national standards or meet established minimum standards for the rendering of a service;
- (ii) prevent that Municipal Council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole; or
- (iii) maintain economic unity.

The intervention in terms of section 139(1)(b) is less drastic than that contemplated in section 139 (1)(c). An intervention in terms of section 139(1)(c) empowers the provincial executive to dissolve the municipal council if exceptional circumstances warrant such a step. Therefore an intervention in terms of section 139(1)(b) would leave the municipal council in existence but would impose constraints and safeguards to ensure the fulfilment of the executive obligation that the municipality is failing to fulfil and to achieve the objectives listed in the section. There is thus a legal necessity to ensure that there is compliance with these constraints and safeguards.

40) This intervention empowers the relevant provincial department to 'assume responsibility for the relevant obligation in that municipality.' In this instance, COGTA decided to carry out its constitutional obligation by appointing Mr K Mpungose as administrator and detailing his powers and obligations in the terms of reference.

²⁰ . Page 1 of Annexure E

41) In the letter of the 25th of March 2013, COGTA informed Mr K Mpungose that the Kwazulu-Natal Executive Council resolved to extend the intervention under section 139 in respect of Mtubatuba Municipality. Mr Mpungose is further informed that his appointment as administrator had also been extended. This extension of his tenure as administrator commenced on the 1st of April and was to end on the 31st of December 2013. Given that a section 139 intervention was in place, the terms of reference become important. The full list of the specific terms of reference as resolved by the Provincial Executive Council are detailed in the letter. ²¹For the purposes of this award, the following terms are material. The Administrator was required to:

- (i) ratify all decisions of the municipal council and its committees, prior to implementation;
- (ii) rectify²² (sic) all decisions taken by the Municipal Manager and section 57 Managers in terms of delegated or original authority.
- (iii) Implement all governance systems and procedures including appropriate councilor(sic) oversight mechanisms
- (iv) Ensure implementation of financial systems, policies and procedures;
- (v) Review the organizational structure of the municipality.

42) Mr Mfeka for the applicants when leading his witnesses and cross-examining Mr Mpungose appeared to suggest that Mr Mpungose impliedly ratified the resolution. He did not pursue this contention with any rigour during his closing argument but clearly did not abandon it and I will deal with it later. His main argument in this context rested on the decision of the Labour Court in *Rudman v Maquassi Hills Local Municipality and others*.²³ He submitted that in that case, as in the matter before me, the administrator was appointed in terms of section 139(1)(b) of the Constitution and not section 139(1)(c) which requires the Council to be dissolved. He quoted the *Rudman* judgment as concluding that because of that, the Council retains its autonomy to pass resolutions and that such resolutions can only be declared invalid by a Court. The court then concluded that the appointed administrator, in the circumstances of that case, did not have the power to rescind such resolution even when the legal validity of the resolution was questionable. Based on this, the applicants submitted that the 2013 resolution approving the 2012/2013 organogram was a legally binding decision even if the administrator had not ratified the decision.

²¹ . Page 1 and 2 of Annexure E

²² . It does appear that the use of the word 'rectify' was an error and that the writer intended to write 'ratify'

²³ . *Rudman v Maquassi Hills Local Municipality and Others* (J3495/18) [2018] ZALCJHB 371 (8 November 2018)

43) I am of the view that *Rudman* is distinguishable for the following reasons. It is unclear from the judgment, as Mr Dutton correctly pointed out, what were the exact terms of reference of the intervention in *Rudman*. Reference is made in the judgment to the administrator 'being empowered to approve the decisions and resolutions of the Council...'.²⁴ In the matter before me, Mr Mpungose was explicitly required to ratify all decisions of the municipal council and its committees prior to implementation. Thus Mr Mpungose, as administrator, was obliged to determine whether to ratify decisions of Council or not and he was not simply empowered to do so. But much more significantly, the court in *Rudman* held²⁵:

In this case, the resolution in terms of which Rudman was appointed to act as Municipal Manager was adopted on 12 September 2018. The Administrator was appointed on 17 September 2018 in terms of a resolution of the PEC backdated to 1 September 2018. He was however introduced to the Municipality on 19 September 2018. At the time that the administrator took over, the acting appointment had already been made in terms of a resolution taken before his taking over, and whether he could terminate that appointment depended on his terms of reference and the authority vested in him by virtue of the resolution of the PEC and those of provisions of section 139(1)(b) of the Constitution under which his appointment was made. In essence, the issue in the light of the timeline of the appointments of both Rudman and the Administrator remains whether the latter could rescind Rudman's appointment which was made before he effectively assumed his position.

44) The court in *Rudman* concluded that the Administrator could not rescind an appointment that occurred before his appointment. These facts are materially different from the facts before me. The undisputed evidence before me was that Mtubatuba Municipality was already under a section 139 intervention when the 2013 resolution adopting the 2012/2013 organogram was approved. Further, Mr K Mpungose was the duly appointed administrator as from the 1st of April 2013. It is clear from the terms of reference that it was obligatory for Mr Mpungose to approve all resolutions, including the 2013 resolution, prior to implementation. The corollary of this must be that decisions of the council could not be implemented unless they were ratified by the administrator.

45) In the normal course of events, Section 11 of the Systems Act vests the executive and legislative authority of a municipality in the council of the municipality which is empowered to take all decisions. The picture changes quite dramatically once there is an intervention in terms of section 139 of the Constitution. If the terms of reference accompanying the

²⁴ . *Rudman* at para 14

²⁵ . *Rudman* at para 15.

intervention place fetters and constraints on the authority of the council, then these have to be abided by.

46) An intervention in terms of section 139 occurs only if the procedural and substantive checks and balances built into the section have been satisfied. It occurred in this instance because Mtubatuba Municipality did not or could not carry out an executive obligation. The failure on the part of a municipality to fulfil an executive obligation has serious prejudicial consequences for service delivery. It is for this reason that the drafters of the Constitution deemed it appropriate to vest these powers of intervention in the provincial executive. An essential aspect of this intervention was that all decisions of the council had to be ratified by the administrator prior to implementation. This was one of the safeguards that was deemed necessary to ensure that the intervention realized its objectives. It was obvious that the MEC deemed this condition to be important for the purposes of stabilizing Mtubatuba Municipality.

47) From a legal perspective, for a resolution and decision of the Mtubatuba Council to be legally binding from the date the intervention commenced, it had to have been ratified by the administrator. That is the consequence of the intervention. If a decision of the Council could be implemented immediately and have a binding legal effect without it having been ratified by the administrator, the purpose and objectives of the section 139 intervention would be undermined. I am not prepared to adopt an interpretation that would undermine the effect and impact of a constitutionally sanctioned intervention.

48) Thus all decisions of the Council, during the section 139 intervention, had to meet the additional requirements imposed by the terms of reference before they had any legal effect. It is apparent from the terms of reference that the ratification by the administrator was peremptory before decisions taken by the Council could be implemented. Prior to the section 139 intervention, the Council of Mtubatuba Municipality could adopt a resolution which would be legally binding upon approval. However once the intervention in terms of section 139 commenced with these specific terms of reference, a decision would only be legally binding if it was approved by Council and ratified by the Administrator. At the time the 2013 resolution approving the 2012/ 2013 organogram was adopted, Mtubatuba Municipality was, because of the section 139 intervention, not the ultimate decision maker. If the decision was

not ratified by the administrator then it would remain an incomplete decision. The 2013 resolution adopting the 2012/2013 organogram would thus not be legally binding without the ratification of the administrator.

Did Mr K Mpungose ratify resolution MTMC 340/2013 approving the final organogram for the 2012/2013 financial year and beyond?

49) The issue then is whether Mr K Mpungose had ratified the resolution taken by the Council on the 31st of May 2013 to approve the 2012/2013 organogram. The applicants appeared to contend that he did ratify the resolution. However the respondent strenuously contended otherwise. It was therefore important to hear Mr K Mpungose's testimony in this regard.

50) Mr Mpungose was meant to testify on the 3rd of April 2019. Mr Dutton informed the hearing that Mr Mpungose was unable to testify on that day as he had to attend to an industrial dispute in Ulundi. The applicants vigorously opposed any further postponements. I agreed to a postponement to the 8th of April 2019 mainly on the basis that the evidence of Mr Mpungose was highly material and a delay of a few days would not unduly prejudice the applicants.

51) I am satisfied that Mr Mpungose is very knowledgeable about organizational development in so far as it relates to local government. He testified that the staff establishment is developed in accordance with the needs of the municipality. With reference to section 66 of the Systems Act, he stated that the staff establishment must be determined within a policy framework determined by the Municipal Council subject to applicable legislation. He was of the view that the TASK JE policy of 2012 was binding on the Mtubatuba Municipality as it was part of SALGA. He stressed that the purpose of the TASK Job Evaluation System is to achieve uniform norms and standards in the description of similar jobs and their grading across the municipal sector. He emphasized the importance of job evaluations being conducted using the TASK policy. He was of the view that it would be prejudicial to the local government sector and to the country if individual municipalities were to operate as fiefdoms by regrading their posts according to their own criteria and not in accordance with the TASK JE policy. The effect would be that employees doing similar work in similarly categorized municipalities would be remunerated differently and in a disparate fashion. This would ultimately be prejudicial to the interests of other municipalities and the province as a whole. He concluded this aspect by stating that remuneration of employees should be based on a scientific yardstick. This was necessary to achieve uniformity and consistency.

52) He confirmed that he was appointed as administrator of Mtubatuba Municipality by the provincial MEC. He initially served a six month term and his tenure was extended for a further period from 1st April 2013 to the 31st of December 2013. It is clear that Mr K Mpungose was at the Council meeting on the 31st of May 2013 when the resolution approving the 2012/2013 organogram was adopted. His name and signature appears on the attendance register of the 31st of May 2013.²⁶ The witness accepted that if his name and signature appeared on the attendance register, he would have been present at the meeting. The applicants appeared to suggest that his presence at the Council Meeting at which this resolution was adopted and his failure at the meeting to express his reservation about the resolution, amounted to a tacit ratification of the resolution. The minutes of the Council meeting do not reflect that any person attending the meeting had any reservations about the resolution.

53) Mr K Mpungose stated that during his tenure as administrator at the Mtubatuba Municipality during this period, the ratifications that were required by the terms of reference were always done in writing. As evidence of that, he referred to the resolution approving the 2013/2014 final operating, capital and Multi-year Budget for Mtubatuba Municipality which was referred to as item MTMC 365/2013 in the minutes of the Mtubatuba Council meeting of the 31st of May 2013. Subsequently a certificate dated 29th of July 2013²⁷ referring to the resolution was signed by then Municipal Manager, Mr Ntuli and approved and ratified by Mr K Mpungose. This was thus a formal ratification by the Administrator of the resolution approving item MTMC 365/2013.

54) Mr K Mpungose stated that he was scrupulous in ensuring that the decisions that he ratified were in writing so that he would have proper records. He testified that he took his responsibilities as administrator very seriously and therefore he had to ensure that all the safeguards put in place had to be enforced. It was imperative for him to keep an accurate record of the decisions that he had ratified and hence all the ratification decisions were done in writing. He also testified that the environment at the Mtubatuba Municipality was fraught with tension and that he had to function in an acrimoniously climate. This was very different from the assignments that he performed at other local governments that were placed under

²⁶ . Page 16 of Annexure D.

²⁷ . Page 202 of Annexure D

administration. His uncontested evidence was that reports were received from the SAPS that there were plots to assassinate him. As a consequence of these reports, the MEC for COGTA provided him with private security to ensure his safety for the last few months of his tenure. He testified that his relationship with Mr Ntuli, the erstwhile MM, was not particularly good. He stated that he received reluctant compliance from the MM. His version was that no one in the municipality was prepared to work with him for fear of recrimination because employees who supported the intervention were ostracized. Quite unusually, he had to request the MEC to provide him with a professional assistant as no one was prepared to act as his PA. He also stated that there were factions within the Mtubatuba Municipality but they appeared to come together to oppose the intervention. He referred to this to substantiate his argument that he was meticulous in ensuring that there were proper written records of the decisions that he had made. I have no reason to doubt the veracity of his testimony in this regard as the justification that he provided was convincing and persuasive.

55) Importantly, the respondent referred me to a document dated 17th of October 2013 which is titled 'Council Resolution Certificate.'²⁸ This certificate refers to the approval of the organogram for 2012/ 2013. The certificate states 'The Council resolved that the Final Municipal Organogram for 2012/2013 financial year and beyond be approved.' Thereafter the certificate states 'approved by:' and the only name approving the resolution is that of Mr SR Ntuli, the then MM. Conspicuous by its absence is the signature of the then Administrator, Mr K Mpungose. This is in stark contrast to the certificate ratifying the resolution approving the 2013/ 2014 Budget which carries both the signatures of Mr Ntuli and that of Mr K Mpungose. The absence of Mr Mpungose's signature on the certificate approving and ratifying the resolution adopting the 2012/2013 organogram is weighty evidence in support of the contention that he did not ratify the Mtubatuba Council's adoption of the resolution.

56) While Mr K Mpungose could not recall all the resolutions that he had ratified some six years ago, he was unequivocal that the absence of his signature on this certificate was clear evidence that he had not ratified the resolution. He described the resolution as important because of the potential financial implications for a municipality that was severely financially constrained at the time. He stated that he would not have supported any resolution that was beyond the means of the municipality. He also asked on a number of occasions whether the

²⁸ . Page 5 of Annexure D

jobs were properly evaluated prior to the resolution being adopted. It was clear that he asked this question rhetorically because as far as he was concerned a proper job evaluation was a pre-condition to any post being regraded to a higher TASK grade. It is also apparent to me that in the absence of a proper job evaluation process, it is unlikely that Mr Mpungose would have ratified the resolution given that it would have major financial implications for the financially strapped Mtubatuba Municipality. Also he understood the importance of the TASK JE policy and the Job Evaluation process being abided by prior to any regrading of posts. There is no evidence that any job evaluation process preceded the adoption by Mtubatuba Municipality of the resolution approving the 2012/2013 organogram. Given that Mr Mpungose had a mandate to ensure proper governance, the rendering of services and ensuring that no unreasonable action is taken that is prejudicial to the interests of another municipality, it is most improbable that he would have ratified a resolution effectively regrading posts without a proper job evaluation process being conducted.

57) On a balance of probability, I find that Mr K Mpungose did not ratify the resolution approving the 2012/2013 organogram. I am satisfied that Mr Mpungose, whenever he ratified resolutions and decisions of Mtubatuba Council during the intervention, did so in writing. The certificate approving the resolution adopting the 2012/2013 organogram was signed by Mr Ntuli and was not signed by Mr Mpungose. There is no other evidence before me that Mr Mpungose signed a certificate ratifying this resolution. The fact that he was present at the meeting and did not object to the resolution being adopted cannot be translated to a ratification of the resolution.

58) In the circumstances, I find that the Council resolution taken on the 31st of May 2013 approving the final Municipal Organogram for 2012/2013 financial year and beyond not to be legally binding.

Implications of implementing the 2012/2013 organogram in respect of some new and converted employees.

59) Mtubatuba Municipality implemented the 2012/2013 organogram in respect of some new and converted employees. Each one of these employees received letters of appointment confirming that the posts that they occupied were graded TASK 12. It is also clear that these letters of appointment were based on the 2012/2013 organogram. As stated earlier none of the applicants received similar letters of appointment. Mr Dutton, on behalf of the

respondent, informed me that while these letters of appointment were sent in error, the respondent was of the view that they were contractually bound to honour the contracts of employment entered into with these new and converted employees. It is not necessary for me to comment on the legality or otherwise of the contractual arrangements with these employees and expressly desist from doing so.

60) The issue is whether it is an unfair labour practice for the respondent to implement the 2012/2013 organogram in respect of some of the new and converted employees and not to do so in respect of the applicants. Except for pointing out that some of these letters were sent after his tenure as administrator and that none bore his authorization, Mr Mpungose was not able to provide any explanation for the disparity in treatment between the new and converted employees on the one hand and the applicants on the other.

61) In response, the respondent relied heavily on the following dicta of the Labour Court in *Newcastle Municipality v SAMWU and others*:²⁹

In any event, it is clear from the minutes of the last two meetings that the post level adjustment of the drivers irregularly came about. It happened following adjudication which went against the applicant. As the SALGA representative said, it is something that never should have happened but did, and the applicant must live with this insofar as the drivers are concerned. This, however, cannot mean that it establishes some or other form of precedent or basis of workplace level bargaining going forward. ... In my view, it is entirely inappropriate for the first respondent and its members to in essence seize on what was erroneous conduct of the applicant following a situation that it was confronted as a result of legal action by some drivers, as a basis to secure a salary increase for all employees.

In the matter before me, Mtubatuba Municipality did not act in terms of the TASK JE Policy prior to adopting the 2013 resolution approving the 2012/2013 organogram. There is no evidence that any proper job evaluation was done in terms of any policy as required by the Sectiona 66 of the Systems Act. For the reasons stated earlier, the resolution was not ratified by the Administrator and was therefore not legally complete and binding. Resolution MTMC 340/2013 ought not to have been implemented in respect of anyone. It was an error in law for Mtubatuba Municipality to implement it in respect of some new and converted employees. It is inappropriate for the applicants to seize on these errors by Mtubatuba Council in an effort to have their posts regraded. The respondent cannot be compelled to do something which

²⁹ . *Newcastle Local Municipality v SAMWU and Others* (D448/2014) [2014] ZALCD 36 (12 August 2014) para 36

they are not legally competent to do simply because they did so in error in respect of some of the new and converted employees. I am satisfied for these reasons that it was not an unfair labour practice for the respondent not to implement resolution MTMC 340/2013 in respect of the applicants.

Conclusion:

62) I have been informed that Mtubatuba Municipality has been placed under a section 139 intervention yet again. I request that a copy of this award also be sent to the MEC for COGTA and to SALGA. Given the nature of this matter, it may be prudent for me to summarise the main findings made on the basis of the evidence before me:

- i) The regrading of the posts did not comply with the TASK JE policy adopted by SALGA.
- ii) No proper job evaluation was done before the posts were regraded to TASK 12 in the 2012/2013 organogram.
- iii) No motivation or supporting documents justifying the regrading were placed before the Mtubatuba Council prior to their adopting the resolution approving the 2012/2013 organogram.
- iv) Resolution MTMC 340/2013 by the Mtubatuba Council approving the 2012/2013 organogram had to have been ratified by the Administrator before it became legally binding.
- v) As resolution MTMC 340/2013 was not ratified by the Administrator, it is therefore an incomplete decision and is not legally binding.
- vi) It was not an unfair labour practice for the respondent not to implement resolution MTMC 340/2013 in respect of the applicants even though the resolution had, in error, been implemented in respect of some of the new and converted employees.

In the circumstances the following order is made:

Order:

The dispute lodged by the applicants, asserting that the respondent committed an unfair labour practice in failing or refusing to place them on TASK Grade 12 in accordance with the 2012/2013 organogram approved by resolution MTMC 340/2013 dated 31st May 2013, is dismissed.

Dated at Durban on the 16 of May 2019



K Govender

Senior Arbitrator