IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Case no: CA3/2021

In the matter between:

PETRUS HERBERT	**Appellant**
and	
HEAD EDUCATION: WESTERN CAPE EDUCATION DEPARTMENT	**First Respondent**
MINISTER OF BASIC EDUCATION	**Second Respondent**
EDUCATION LABOUR RELATIONS COUNCIL	**Third Respondent**
DP VAN TONDER N.O.	**Fourth Respondent**

Heard: **22 February 2022**

Delivered: **10 March 2022**

Coram: **Coppin JA, Savage and Tokota AJJA**

JUDGMENT

SAVAGE AJA

[1] This appeal, with the leave of the Labour Court, is against the judgment and orders of the Labour Court (Rabkin-Naicker J), delivered on 18 January 2021, which, on review, set aside the arbitration award issued on 27 March 2018 by

the fourth respondent ('the arbitrator') under the auspices of the third respondent, the Education Labour Relations Council ('the ELRC').

[2] The matter concerns the interpretation and application of ELRC Resolution 1 of 2012, the "Occupation Specific Dispensation (OSD) for Education Therapists, Counsellors and Psychologists employed in the Public Service" ('the OSD agreement'). The precursor to the OSD agreement was Public Service Coordinating Bargaining Council ('PSCBC') Resolution 1 of 2007,[1] objective 1.2 of which was:

> 'To introduce revised salary structures per identified occupation that caters for career pathing, pay progression, grade progression, seniority, increased competencies and performance with a view to attract and retain professionals and other specialists."

[3] Subsequent to the conclusion of PSCBC Resolution 1 of 2007, sectoral bargaining councils were required to negotiate collective agreements to give effect to the resolution. In the education sector this resulted in the conclusion of the OSD agreement to provide *inter alia* "(a)n OSD for education therapists, counsellors or psychologists employed in public education" and "a basis for the recognition of appropriate/relevant experience on appointment as provided in Annexure A3, B3 and C3"[2] of the agreement.

[4] Annexure C3 to the OSD agreement concerned the OSD for psychologists employed in public education. It specified as "appointment requirements", the qualification, registration and experience required for a particular position. The post of education psychologist grade 2 required as qualifications, "appropriate qualification that allows registration with the Health Professions Council of South Africa ('HPCSA') in a relevant registration category". Under the heading of registration, the post required "(r)egistration with the [HPCSA] as psychologist in a relevant registration category" and "(r)egistration with the South African Council for Educators (SACE), where applicable". As experience, the following was required:

[1] Agreement on Improvement in Salaries and Other Conditions of Service for the Financial Years 2007/2008 to 2010/2011.
[2] Clauses 5.1 and 5.1.10.1 of the OSD agreement.

> 'Minimum of eight (8) years relevant experience after registration with the [HPCSA] in respect of RSA qualified psychologist who performed Community Service in South Africa'.

[5] For the position of grade 3 education psychologist, in addition to holding an "(a)ppropriate qualification that allows registration with the HPCSA as psychologist in a relevant registration category", "(r)egistration with the [HPCSA] as psychologist in a relevant registration category" and "(r)egistration with [SACE], where applicable, was required", the following experience was also required:

> 'Minimum of sixteen (16) years' relevant experience after registration with the [HPCSA] in respect of RSA qualified psychologist who performed Community Service in South Africa'.

[6] The appellant, Dr Petrus Herbert, registered with the HPCSA as a psychometrist on 5 March 1990. The following year, on 1 January 1991, he was employed by the Western Cape Education Department as a school psychologist. Ten years later, on 9 March 2001, he registered with the HPCSA as a psychologist.

[7] The appellant was in the OSD process, placed into the post of education psychologist grade 2 on the basis that he had not had 16 years' experience as he was registered as a psychologist with the HPCSA only on 9 March 2001. Dissatisfied and seeking translation into a grade 3 post, he referred a dispute to the ELRC contending that his 10 years' experience after registration with the HPCSA as a psychometrist in 1991 ought to have been considered as "relevant experience" in addition to his experience after registration as a psychologist. Had he been translated into a grade 3 post, the appellant would have earned an additional amount of R691 678,00, less deductions for income tax, pension fund and unemployment insurance, between 1 July 2010 and 31 March 2018. He, therefore, sought translation to a grade 3 post, with payment of the amount R691 678,00, less deductions, plus interest.

Arbitration award

[8] After the matter was not resolved at conciliation, the appellant referred the dispute to arbitration. The arbitrator found that the first respondent, the Head of Education: Western Cape Education Department, and the second respondent, the Minister of Basic Education ('the respondents'), had incorrectly interpreted the OSD agreement. This was so in that the agreement did not provide that only experience gained after registration as a psychologist be taken into account, but included any "relevant experience" gained by the appellant after registration as a psychometrist. The fact that the translation of employees into other positions, such as senior education psychologist grade 1, made express reference to "appropriate experience as psychologist after registration with the HPCSA as psychologist", led the arbitrator to the view that had it been intended to treat all professionals in the same manner, the same or similar words would have been used regarding grade 2 and 3 education psychologists, but this had not occurred.

[9] The arbitrator found that since the functions performed by the appellant before registration as a psychologist were the same as those performed after registration, his relevant experience after registration with the HPCSA included that gained while registered as a psychometrist after 1 January 1991 until March 2001. This meant that he had more than 16 years' experience and should have been translated into the role of grade 3 education psychologist. The respondents were consequently directed to correct the appellant's designation and from 1 April 2018 remunerate him on the grade 3 scale. In addition, the first respondent was directed to pay the appellant the amount of R691 679,00 less deductions on or before 30 April 2018, with interest.

Judgment of the Labour Court

[10] The respondents sought the review of the arbitration award by the Labour Court. The Court found that the arbitrator's interpretation was "strained, incorrect" and one that "a reasonable arbitrator could not adduce". It was noted that one of the objectives of PSCBC Resolution 1 of 2007 was to attract professionals and specialists into the public service and that the role of the arbitrator and the courts is to strive to give effect to the intention of the parties to such a collective agreement. In the interpretation and application of the

agreement, the arbitrator was found to have failed to take the primary objects of the agreement into account. The meaning given to "relevant experience" did not accord with the principles of statutory interpretation to which the arbitrator referred. The arbitration award was therefore found to be one that a reasonable decision-maker could not have reached. For these reasons, the review application succeeded and the arbitration award was set aside with an order that the translation of the appellant into the post of Educational Psychologist Grade 2 accorded with the provisions of the OSD agreement.

Submissions on appeal

[11] On appeal, the appellant took issue with the judgment and orders of the Labour Court on the basis that there was no bar on his "relevant experience" being taken into account, even if such experience was not as a psychologist but as a psychometrist. The fact that different wording was used in relation to other positions meant that the appellant's experience beyond that as a psychologist was relevant. In addition, there was no logical reason to ignore the fact that the appellant had the performed the same duties while registered as a psychometrist as those performed while registered as a psychologist; and that doing so would lead to an absurdity. Since collective agreements are not ordinary contracts, it was argued that it would be unfair to expose the appellant to substantial loss solely because he was registered as a psychometrist. A sensible meaning of the OSD agreement is to be preferred; one which takes account of considerations of reasonableness, fairness and good faith.[3]

[12] The respondents opposed the appeal on the basis that the OSD agreement, considered contextually and sensibly construed, provided for a new salary and career progression dispensation in specific occupations in respect of which the respondents had difficulty retaining or attracting skills. Since annexure C3 refers expressly to the number of years' relevant experience required after registration as a psychologist, considering experience prior to registration with the HPCSA fails to accord with the express terms of the

[3] *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) at paras 32 -34.

agreement, as well as its objectives. The conclusion reached by the arbitrator therefore constituted an irregularity as contemplated in section 145 of the Labour Relations Act 66 of 1995 ('the LRA'), in that it was one which a reasonable decision-maker could not reach; and that it followed that the Labour Court was correct in setting aside the arbitration award on review. For these reasons, it was submitted, the appeal against the judgment and order of the Court *a quo* should be dismissed.

Evaluation

[13] In *University of Johannesburg v Auckland Park Theological Seminary and Another*,[4] the Constitutional Court stated that the approach to interpretation adopted in *Endumeni*[5] had "updated" the previous position, which was that context could be resorted to if there was ambiguity or lack of clarity in the text.[6] In cases subsequent to *Endumeni*, the Constitutional Court noted that the Supreme Court of Appeal "has explicitly pointed out that context and purpose must be taken into account as a matter of course, whether or not the words used in the contract are ambiguous."[7]

[14] In *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others,*[8] the Supreme Court of Appeal stated that:

> '*…Endumeni* has become a ritualised incantation in many submissions before the courts. It is often used as an open-ended permission to pursue undisciplined and self-serving interpretations. Neither *Endumeni,* nor its reception in the

[4] *University of Johannesburg v Auckland Park Theological Seminary and Another* (*University of Johannesburg*) [2021] ZACC 13; 2021 (8) BCLR 807 (CC); 2021 (6) SA 1 (CC).
[5] *Natal Joint Municipal Pension Fund v Endumeni Municipality (Endumeni)* 2012 (4) SA 593 (SCA) at para 26.
[6] *University of Johannesburg* (*supra*) at para 66 with reference to *Coopers & Lybrand v Bryant* [1995] ZASCA 64; 1995 (3) SA 761 (A) at 768C E where it was held that a court could "apply extrinsic evidence regarding the surrounding circumstances by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document".
[7] With reference to *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* [2015] ZASCA 111; 2016 (1) SA 518 (SCA) at para 28; *Unica Iron and Steel (Pty) Ltd v Mirchandani* [2015] ZASCA 150; 2016 (2) SA 307 (SCA) at para 21; and *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* [2013] ZASCA 76; 2013 (5) SA 1 (SCA) at para 24.
[8] *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others (Capitec)* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA).

> Constitutional Court, most recently in *University of Johannesburg*, evince skepticism that the words and terms used in a contract have meaning.'[9]

[15] The Court noted that what *Endumeni* does is that it-

> '… simply gives expression to the view that the words and concepts used in a contract and their relationship to the external world are not self-defining. The case and its progeny emphasise that the meaning of a contested term of a contract (or provision in a statute) is properly understood not simply by selecting standard definitions of particular words, often taken from dictionaries, but by understanding the words and sentences that comprise the contested term as they fit into the larger structure of the agreement, its context and purpose. Meaning is ultimately the most compelling and coherent account the interpreter can provide, making use of these sources of interpretation. It is not a partial selection of interpretational materials directed at a predetermined result.'[10]

[16] In interpreting the collective agreement in this matter, the arbitrator was required to have regard to the aim and purpose of the collective agreement, the words and language used in it, having regard to ordinary rules of grammar and syntax, and the context in which the disputed terms appear in the agreement.[11] There was no dispute that the grade 3 education psychologist post required "(r)egistration with the [HPCSA] as psychologist in a relevant registration category". The experience required for appointment into the grade 3 post was a minimum of 16 years "relevant experience after registration with the [HPCSA] in respect of RSA qualified psychologist who performed community service as required in South Africa". The arbitrator found that the phrase "in respect of RSA qualified psychologist who performed Community Service in South Africa" was of no significance since prior to 2003, community service was not required and, since the appellant was registered in 2001, he was not required at that time to perform such service. It was the interpretation of the portion of the clause which concerned years of "relevant experience

[9] *Capitec* (*supra*) at para 49.
[10] *Capitec*(*supra*) at para 50.
[11] See cases such as *Western Cape Department of Health v Van Wyk & others* 2014 (35) ILJ 3078 (LAC) at para 22; *Capitec* (supra) at para 50.

after registration with the [HPCSA] in respect of RSA qualified psychologist" which therefore concerned the arbitrator.

[17] The arbitrator found that the appellant was entitled to rely on his "relevant experience" gained as a registered psychometrist between 1991 and 2001 in that:

18.1 such an interpretation accorded with the primary objectives of the agreement to retain and attract professionals in public education;

18.2 ignoring the appellant's experience as an unregistered psychologist would lead to "the inequitable and absurd result" that had he not improved his qualifications to register as a psychologist, his salary on translation as a psychometrist would have been higher given his greater number of years' experience in that role;

18.3 the parties had "agreed and intended" that relevant experience after registration was not restricted to that gained after registration as a psychologist;

18.4 since other posts specified "appropriate experience as psychologist after registration with the HPCSA as psychologist" or "appropriate experience as counsellor after registration with the HPCSA as Counsellor or psychometrist", while the grade 2 and 3 education psychologist posts only referred to "relevant experience", the latter reference was intended to be broader and was not limited to experience gained after registration as a psychologist; and

18.5 the reference to "in respect of RSA qualified psychologist" after "registration with the [HPCSA]" was of no assistance given that there was no indication that the experience required was as a psychologist.

[18] Having regard to the plain meaning of the words, the language used in the light of the ordinary rules of grammar and syntax and the context in which the words are used, it is apparent that the "relevant experience" required for the role of grade 2 and 3 education psychologist was that gained "after

registration with the [HPCSA] in respect of RSA qualified psychologist…". The registration required for appointment into both grades was "(r)egistration with the [HPCSA] as psychologist". It follows that the relevant experience referred to is that obtained "after registration" as a psychologist and not in any different role. As much is supported by the reference to relevant experience, after registration, in respect of "a RSA qualified psychologist". It is therefore years of experience as a registered psychologist that is required and which is "relevant" for purposes of the provision. A different finding does not accord with the plain meaning of the OSD agreement, nor with its aim and purpose, which expressly sought to retain and attract specialist skills in particular identified roles in public education.

[19] Had it been intended that relevant experience prior to registration as a psychologist was permissible, the provision would have stated as much expressly. The wording and language used in other provisions does not assist the appellant given the stated registration and experience required for the posts of grade 2 and 3 education psychologist. To find that experience gained after registration in a different professional role, such as that of psychometrist, could be considered would be to undermine the purpose of the agreement which was to recognise and reward years of experience post-registration in particular skilled and professional roles. It would also lead to the impractical result that experience after registration in one job category could be relied upon to bolster years of experience in another. This was plainly not what the OSD agreement intended and was not the purpose of the agreement.

[20] It is so that the appellant was employed from 1991 in the position of education psychologist despite the fact that he was not registered as such with the HPCSA; and that had he been registered with the HPCSA as psychologist from that date, his years of experience would have been sufficient to meet the requirements for a grade 3 post. Yet, this anomaly does not permit a different interpretation to be attributed to the relevant provisions of the collective agreement, nor does it warrant a different finding in this matter. This is so in that the OSD agreement applied across various job categories, with specified requirements prescribed in order to allow for appointment or translation into

particular positions. The appellant did not meet the clearly stated requirements for translation into a grade 3 education psychologist post. The arbitrator incorrectly interpreted the collective agreement in finding differently.

[21] In *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae*),[12] the Court made it clear that:

> 'A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)*(a)* of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)*(a)*(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'

[22] In *DENOSA,*[13] it was suggested that –

> '…the concept of the error of law is relevant to the review of an arbitrator's decision within the context of the factual matrix as presented …; that is a material error of law committed by an arbitrator may, on its own without having to apply the exact formulation set out in *Sidumo*, justify a review and setting aside of the award depending on the facts as established in the particular case.'[14]

[23] This Court, in *MacDonald's Transport,*[15] had regard to the different context in which private arbitration occurs. In *Telcordia Technologies v Telkom*[16] it was made clear that the review of material errors of law in a private arbitration are prevented because the arbitrator is, in accordance with the limitations which

[12] (2013) 34 ILJ 2795 (SCA) at para 25.
[13] *Democratic Nursing Organisation of South Africa obo Du Toit and Another v Western Cape Department of Health and Others (DENOSA)* [2016] ZALAC 15; (2016) 37 ILJ 1819 (LAC) at para 21-22.
[14] At para 22.
[15] *MacDonald's Transport Upington (Pty) Ltd v Association of Mineworkers and Construction Union* [2016] ZALAC 32; (2016) 37 ILJ 2593 (LAC).
[16] *Telcordia Technologies Inc v Telkom SA Ltd* [2006] ZASCA 112; [2006] 139 SCA (RSA) ; 2007 (3) SA 266 (SCA); [2007] 2 All SA 243 (SCA); 2007 (5) BCLR 503 (SCA).

arise from the Arbitration Act,[17] intended to have exclusive jurisdiction over questions of fact and law.[18] In a different context, in *Hira v Booysen,*[19] it was stated that:

> '…Where the complaint is that the tribunal has committed a material error of law, then the reviewability of the decision will depend, basically, upon whether or not the Legislature intended the tribunal to have exclusive authority to decide the question of law concerned. This is a matter of construction of the statute conferring the power of decision.'[20]

[24] In *MacDonald's Transport* it was found that the Labour Relations Act ('the LRA')[21] did not contemplate that a CCMA or bargaining council arbitrator, both statutory roles, would have the last word on the proper interpretation of an instrument as this would mean that a patently wrong interpretation would be left intact, which "would be absurd". [22] The wrong interpretation of an instrument by an arbitrator could therefore constitute a reviewable irregularity as envisaged by section 145 of the LRA, in the sense that a reasonable arbitrator does not get a legal point wrong. The Court concluded that either "the reasonableness test is appropriate to both value judgments and legal interpretations. If not, 'correctness' as a distinct test is necessary to address such matters".[23] This view was echoed in *NUMSA,*[24] in which it was stated that an incorrect interpretation of the law by a commissioner constitutes a material error of law which "will result in both an incorrect and unreasonable award", which "can either be attacked on the basis of its correctness or for being unreasonable".[25]

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[17] Act 42 of 1965.
[18] *Telcordia* (*supra*) at para 65.
[19] 1992 (4) SA 69 (A).
[20] At 93A -94A, paras 43 – 47.
[21] Act 66 of 1995.
[22] At para 29.
[23] At para 30.
[24] *Supra*.
[25] *National Union of Metalworkers of SA v Assign Services* [2017] ZALAC 44; (2017) 38 ILJ 1978 (LAC) at para 32 with reference to *Herholdt v Nedbank Ltd* [2013] 11 BLLR 1074 (SCA) at para 25; *Democratic Nursing Organisation of South Africa obo Du Toit and Another v Western Cape Department of Health and Others* (2016) 37 ILJ 1819 (LAC) at para 21-22; *MacDonald's Transport (supra)* at para 30.

[25] The arbitrator in this matter incorrectly interpreted the relevant appointment provisions contained in annexure C3 to the OSD agreement insofar as they related to the appellant. This error was of such a material nature that it resulted in a decision which, on a proper interpretation of the OSD agreement, was one that a reasonable arbitrator on the material before them could not reach. The Labour Court was correct in finding that the arbitration award fell to be set aside on review.

[26] It follows for these reasons that the appeal must fail. There is no reason why, having regard to considerations of law and fairness, an order of costs should be made in the matter.

Order

[26] For these reasons, the following order is made:

1. The appeal is dismissed.

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SAVAGE AJA

Coppin JA and Tokota AJA agree.

APPEARANCES:

APPELLANT: A C Oosthuizen SC

Instructed by John MacRobert Attorneys

FIRSTAND SECOND RESPONDENTS: E A De Villiers-Jansen

Instructed by the State Attorney