



**THE LABOUR COURT OF SOUTH AFRICA
AT CAPE TOWN**

Not Reportable

Case no: C214/2022

In the matter between:

**FRANKLIN
NGCABA**

S'KHUMBUZO

Plaintiff

And

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Defendant

Heard: 16 February 2024, adjourned until 8 March 2024.

Delivered: 9 October 2024

Summary: (Contract - Claim for remuneration – Dispute over applicable salary for full-time commissioner – alternative claim based on existence of tacit term dismissed – claim based on applicable wage scale for full-time commissioners upheld)

JUDGEMENT

LAGRANGE, JThe Plaintiff's claim.

[1] The plaintiff in this matter, Mr F Ngcaba ('Ngcaba'), claims that he was underpaid during his employment as a full-time commissioner of the defendant ('the CCMA') from 1 December 2020 until his dismissal on 11 February 2022. Prior to that he had been engaged as a part-time commissioner attached to the Cape Town Regional office of the CCMA. At the time as he was appointed as full-time commissioner, he was also transferred to work at the Johannesburg regional office of the CCMA.

[2] From 1 December 2020, he received a gross monthly remuneration of R 51,281.27 per month, whereas he claims he ought to have received R 63,866.25 per month as set out in a wage and substantive agreement (the 'WSA') negotiated between the CCMA and the Commission Staff Association (the 'CMA'). The WSA was concluded on 7 January 2018 and was applicable for the period 1 April 2018 to 31 March 2021

[3] In the alternative, Ngcaba alleges that he accepted being transferred and converting to full-time employment on the tacit, implied or, alternatively, express condition that his monthly remuneration would not be less than what he was paid as a part-time commissioner in Cape Town. If this was the case, he claims he was entitled to a monthly salary of R 61,502.40 per month.

[4] The CCMA's response to both these claims was that it had concluded a full-time commissioner contract with Ngcaba on the basis that he would be employed at the entry level salary for full-time commissioners, which was a universally applied policy, and that his representations for a salary commensurate with what he earned as a part-time commissioner could not be entertained because commissioner salary levels, excluding those of senior commissioners, were determined by collective bargaining and were not a matter of individual negotiation. In any event, he was also advised that the CCMA

could not afford the salary adjustment he wanted. A subsidiary dispute arose about the applicability of a CCMA policy which disestablished the former two-tier level A and B classification of part-time commissioners, which was referred to as 'de-categorisation'.

[5] Ngcaba testified on his own behalf and Mr J Mathebula ('Mathebula'), a human resources manager at The CCM A's head office testified for the CCMA. After the evidence was heard, the parties agreed to file written heads of argument without the need to present oral argument. On receipt of the written heads judgement was reserved.

Brief Chronology

[6] On 1 July 2017, Ngcaba was appointed as a part-time level B commissioner for a period of six years terminating on 30 June 2023 and was paid a daily fee of R 2,791.92 in terms of the contract governing that appointment.

[7] According to the CCMA's version, on 1 September 2019, in consequence of a decision by the governing body of the CCMA, the existing separate Level A and B categories of ordinary commissioner (as distinct from the senior commissioner category) were collapsed into a single level. The creation of a single category of ordinary commissioner, went hand in hand with the introduction of a three-phase career progression process in terms of which a commissioner eventually attained the status and salary level of an operational commissioner. Mathebula testified that this was necessary because there were approximately two hundred to two hundred and fifty level B commissioners at the time the decision was taken. Even at the time he testified, he claimed new commissioners are being engaged on the 60th percentile of level P07 and progress to the 80th percentile of that level once their mentorship phase is complete. Thereafter they only progress to the 8th percentile of level P06 once they have completed their thirty-six month post-mentorship phase and have satisfied the competency and training requirements.

[8] Ngcaba testified that the first time he saw a CCMA circular dated 29 August 2019 ('the de-categorisation circular' or 'the circular'), in which the details of these changes were set out, was only a few days prior to his dismissal on 22 February 2022 that. He maintained that, if the governing body had taken such a decision, he would have been notified of it and it would have been mentioned in CCMA communiques to commissioners, but he agreed that he was not a full-time commissioner at the time, and was not aware of any consultations the CCMA might have had with the CSA about the de-categorisation process.

[9] In terms of the circular, the progression process was subject to certain "*tenure, performance, knowledge and skills*" criteria being met. The first career phase was that of a candidate commissioner, during which prescribed training had to be undertaken and the candidate would be subject to mentorship. Once completed, the candidate would be placed on a salary notch of R 591,139.80 per annum. A part-time commissioner would be paid at the entry level daily rate of R 2,939.89 per day. In the post-mentorship phase, which had to be completed within thirty-six months, the candidate had to complete various elective training courses and achieve a minimum performance rating. If these criteria were met, the full-time candidate would progress to the job grade P06, and receive R 736, 210.34 per annum. A part-time commissioner would be paid R 3,524.98 per day. It was at this point a commissioner would be designated as an operational commissioner and their pay progression would be determined changes in the substantive wage agreement and performance.

[10] In October 2020, Ngcaba successfully applied for the conversion of his position as a part-time commissioner to a full-time commissioner. He also successfully applied to be transferred from Cape Town regional office to Tshwane regional office. The first process was the end result of a settlement of a dispute Ngcaba had referred to the CCMA dated 14 June 2018, in terms of which it had been agreed that he would be shortlisted for interviews for the post of a full-time commissioner at the next round of interviews and would be exempt from certain of the preliminary assessment requirements.

[11] On 10 November 2020, Ngcaba received separate letters signed by the director of the CCMA. One letter advised that his application for a transfer had been approved and that the effective date of the transfer would be 1 December 2020. The transfer letter stated that “[a]ll terms and conditions of your current contract remain unchanged”. The other letter confirmed that his conversion from a part time to a full-time commissioner had been approved with effect from the same date and that he would “shortly be provided with a Full-time Commissioner contract to this effect”. In his testimony, Mathebula noted that the conversion letter made no reference to Ngcaba’s conditions remaining the same but referred to a contract which was still to be issued.

[12] Ngcaba testified that, before he had been issued with a written contract, he believed he would earn the same as he did as a part-time commissioner:

“In terms of the communique and as a part-time commissioner, I was booked 18 to 20 days a month. I was earning an average of 68 to 70 000 a month and in terms of the P6 salary scale, it was 766. My understanding, because it says :

“Your terms and condition will remain the same.”

And it does not say I will be earning less than what I used to earn as a part-time commissioner, nor does it make an indication that I will earn less than the entry level of the salary grade I am in. My understanding was that it is better pay. Hence I moved my family from Cape Town to Pretoria.”

Ngcaba agreed that the alleged tacit agreement his remuneration would not be less favourable than what he earned as a part-time commissioner was not contained in the conversion letter, but he asserted that it was captured by the statement in the transfer letter that “All other terms and conditions of your current contract remain unchanged.” His monthly remuneration as a part-time commissioner amounted to R 740,852.28 based on an average month of 21 working days at R 2,939.89 per day. It was put to him that that, in the context of a letter of transfer, all the sentence meant was that when a commissioner moved to another region, their job status remained unchanged. Ngcaba argued that the CCMA must have considered the salary he was earning when he was transferred and that it would have stipulated his earnings would be reduced if

that is what it intended. He also maintained that if it was intended that his terms and conditions would convert to that of a full-time commissioner on being transferred, the transfer letter would have said that. He argued that the reference to his 'current contract' could only have been a reference to his part-time contract. The parties disagreed on whether the reference to his terms and conditions remaining unchanged implied that his full-time salary would not be less than his part-time earnings.

[13] It was put to Ngcaba that the transfer and conversion letters were standard template letters issued by the CCMA when conversions and transfers of commissioners took place. It was also put to him that the provision in the transfer letter, on which he relied, was simply a standard term to say that a commissioner would retain the existing position they held when they transferred to another region. Mathebula testified that the transfer letter merely confirmed that the transferee's conditions, position and status remained unchanged after the transfer. Ngcaba disputed this, arguing that the transfer letter referred to "*all terms and conditions*" and, if the CCMA had intended to pay him less than what he was earning, it would have said so. It was his interpretation of this phrase which supported the existence of a tacit term that he would not earn less than he did as a part-time commissioner.

[14] On 1 December 2020, Ngcaba started work as a full-time commissioner and on 15 December was paid his first salary as such. The payroll authorisation form described his current job title as a part-time commissioner and his new job title as full-time commissioner, with both jobs being designated on job grade P06. The annual package on his salary slip for that month was R 615,376.53, which translated to a monthly salary of R 51, 281.27 per month. Ngcaba claims it was only when he saw his salary advice that he realised what his remuneration was and was surprised to see he was not earning a level 6 salary but was being paid on a lower grade. The minimum entry level grade P06 salary was R 766,354.97, whereas he was being paid R 615, 376.53 which was the second tier of a grade P07 salary. If the CCMA was paying him at the entry level for grade P06, as his payroll documents proclaimed, the level P07 salary he received could not be correct.

[15] Mathebula asserted that the salary grade was correct, as Ngcaba had previously been a level B commissioner and would have been paid accordingly at salary level P07. His explanation for grade P06 appearing on the payroll authorisation and salary advice was that level B had been eliminated and accordingly there was only one grade of commissioners, namely P06. However, because Ngcaba had not completed all the pre-requisites for advancement to the higher salary grade, he did not yet qualify to be paid on the P06 salary level.

[16] Mathebula explained that Level B commissioners were paid at salary level P07, and received 60 % of the level P07 salary during their mentorship period. On completion of their mentorship they would advance, to the 80th percentile of the level P07 salary. He testified that the salary scales of the wage agreement were not altered by the de-categorisation decision. He conceded that the de-categorisation circular did not specify which salary grade commissioners fell into under the different phases, but it did stipulate the respective salary levels a commissioner would be placed on after completing the mentorship and post-mentorship phases. He also agreed that the document did not distinguish between part-time and full-time commissioners and applied to both groups.

[17] Ngcaba could not dispute that, prior to de-categorisation, a level B commissioner earned R 615,376.53 per annum. Even though Ngcaba claimed not to have been informed of the alleged decision by the governing body to de-categorise part-time commissioners, he acknowledged that, by the time he applied for conversion, there were only commissioners and senior commissioners and no longer Level A and B classes of ordinary commissioners. Level B had previously been the entry level for commissioners. He claimed to have been aware of the entry level salary of a full-time commissioner, namely the R 766,395 annual salary at level P06. He had applied for conversion because it was a higher salary than what he earned as a part-time commissioner. If, as the CCMA claimed, the entry level salary of level B full-time commissioner, prior to de-categorisation was only R 615,376.00, he would have been told that was the salary when he enquired about it. He did not identify

whom he had allegedly spoken to in the HR department before he applied for conversion. He conceded being aware that there had previously been two categories of ordinary commissioner and that following a legal dispute over the validity of those categories, the distinction between classes of ordinary commissioners had been eliminated. At that time he was not involved in the collective bargaining process.

[18] Ngcaba claimed he had spoken to the HR department who advised him he would be appointed on level P06 and head office would issue him with a contract. He disputed the CCMA's claim that even though commissioner categories A and B were eliminated, because there were a large number of category B commissioners, it was necessary to establish a progression based on experience and training before they would qualify for the full salary on grade P6. In his view the progression of commissioners through different phases as outlined in the de-categorisation circular conflicted with the stated intention to eliminate level A and B commissioners. There was supposed to be a single class of commissioners on job grade P06. Once again, Ngcaba's stance was that, if that had been the case, he would have been advised accordingly. Moreover, when he settled his dispute in 2018, it had been agreed he would be appointed as a full-time commissioner and would be exempted from assessments¹. The settlement did not stipulate that he would be engaged under a certain sub-classification of a full-time commissioner. Contrary to the CCMA's claim that salary level P06 was only attainable on achievement of certain milestones, this was not provided for in the substantive wage agreement. Mathebula emphasised that the conversion process and transfer processes were distinct.

[19] The CCMA contended that when this declassification took place, there were many level B commissioners, and it was decided that they should be

¹ The relevant portion of the settlement agreement read:

"The CCMA agrees that Mr Ngcaba will be shortlisted for the initial round of interviews before the Governing Body in the next round of recruitments for the Full Time Commissioner position he had previously applied [sic]. He will be exempted from the preliminary assessments in the process."

placed on level P06. However, they would not automatically be paid at that level: this would be the result of a progression during which certain milestones would have to be met. The CCMA believed it would be unfair to remunerate all former level B commissioners the same. Ngcaba's response to this was that he was simply told he would be a full-time commissioner: there was no issue of his status being qualified. In fact, he had spoken to the HR department and had been told his salary grade would be P06. Moreover, the progression was never agreed to in the substantive wage agreement.

[20] Ngcaba disputed the legal status of the de-categorisation circular dated 29 August 2019. Apart from denying he had ever received it either in his capacity as a commissioner or through the staff association, he maintained that the governing body had to have approved it, whereas it was merely signed by Mr M Ncana, the Executive: Corporate Services. Although he did concede he was aware that the de-categorisation process had occurred years ago, he claimed to be unaware of the contents of the circular, which conveyed that the decision to collapse the two levels had been taken by the governing body and a task team had been established to look at the implementation process.

[21] Ngcaba initially avoided answering whether there had been a rigorous advancement process from a level B to level A commissioner before 1 September 2019. As far as he was concerned, his appointment took place after that, and the salary he should have been that of a full-time commissioner on grade P06. Later, under cross-examination, he maintained that, in any event, he had completed the advancement process, whilst he was still a part-time commissioner, in the three years preceding his appointment to a full-time commissioner's post.

[22] Paragraph 2.21 of the de-categorisation circular set out the training component of the post-mentorship phase in these terms:

"The required time to complete this period is a minimum thirty-six (36) months. The Commissioner needs to avail him or herself to attend a minimum of two level one training electives and one level two or level three training elective. These electives may be reviewed from time to

time, but the principle remains the same. The CSCs have the information relating to the training record and will be sharing this with the Commissioners during face to face consultation. In addition, ETD will shortly be publishing further information in this regard. In addition, the Commissioner is required to meet the minimum performance requirements which is a score of 3 or higher in terms of performance rating.”

[23] The CCMA accepted that, at the time of his conversion, Ngcaba had passed the mentorship phase outlined in the circular. This was the first of three phases, namely, the candidate commissioner phase, the post-mentorship commissioner phase and the operational commissioner phase. However, it maintained that Ngcaba was still in the post-mentorship phase which took a minimum of thirty-six months to complete and during which certain training and performance criteria had to be met. Mathebula testified that Ngcaba needed to have obtained performance appraisal scores of three or more on a five-point scale, though this was not put to Ngcaba. Mathebula could not say with any certainty that Ngcaba had not met this performance criterion and could only say that as far as he was aware, Ngcaba had not completed the course modules for the second phase. He could not specifically identify which of two compulsory and one elective modules Ngcaba had not completed, but he had expected Ngcaba to produce evidence of the training he had done if he claimed he had satisfied the training criteria for the post-mentorship phase. It was not put to Mathebula which modules, Ngcaba claimed to have completed. When Ngcaba had been asked to provide evidence of the training he had done, he claimed he did not see it was necessary to prove what he had done, because he disputed the validity of the circular in which the training requirements were mentioned. In any event the circular only required that a commissioner was available for the training.

[24] Mathebula claimed that relied on the fact that Ngcaba was not being paid on the higher rate of P06 at the time of his conversion was evidence that he had not met the criteria by then. Accordingly, he did not yet qualify for the P6 job

grade at the time of his conversion. Ngcaba rejected this contention on the basis that, if that was the case, he would not have been classified as P06. Moreover, clause 2.3.5 of the substantive wage agreement concluded in 2018, provided that:

“Employees earning below the entry level of the 2020/1 salary scales after the implementation of the ATB and performance related salary adjustments will be adjusted up to the entry level, irrespective of the percentage increase. Notwithstanding the exclusion in 1.3² above, employees on training or mentorship will also be adjusted to the entry level of the salary scales in their respective job grades. Fixed term employees and independent contractors are still excluded from this provision.”

Ngcaba argued that the August 2019 circular was at odds with this provision and breached Section 3 of the Basic Conditions of Employment Act, 75 of 1997 (‘the BCEA’). In any event, he had already passed beyond the thirty-six-month period, as he concluded his mentorship period by 1 September 2018. The letter he received, dated 7 September 2018, confirmed that he had successfully completed his mentorship programme and his appointment as a commissioner was confirmed. The CCMA argued that the thirty-six-month post-mentorship period only began when he was appointed as a full-time commissioner and would only have been completed in April 2023, but Ngcaba disputed this pointing out that the circular containing the progression criteria, did not state that the progression only applied when a person was appointed as a full-time commissioner. It applied equally to part-time commissioners, in terms of which he would have completed his post-mentorship phase by 31 August 2021. Ngcaba accepted that clause 1.3 excluded him when he was a part-time commissioner, but the agreement applied to him once he became a full-time employee. However, it did not mean that his post-mentorship phase only began once he was in full-time employment. Even the director’s de-categorisation

² Clause 1.3 stated: “The Agreement covers all employees who are employed on a full-time basis, had completed training and/or mentorship before 01 October of the preceding financial year and are still in the employ of the CCMA when this Agreement is implemented [implementation being the date when payment is affected as opposed to the effective date of 01 April], the Agreement will apply based on each individual employee’s annual salary package as at 31 March of the preceding financial year.” [sic]

letter, the validity of which he disputed, did not distinguish between part-time and full-time commissioners in that respect. He rejected the idea that the post-mentorship phase could only have begun when he was employed on a full-time basis. Under re-examination, he also argued that it made no sense that the thirty-six-month phase would only begin with his appointment as a full-time commissioner, when his contract was only for two years and seven months, expiring on 30 June 2023.

[25] When Mathebula testified, he stated that both full-time and part-time commissioners were employed on six-year fixed term contracts and that once they had served for thirty-six months and completed the necessary modules they were advanced to the higher pay grade. Yet, he maintained that Ngcaba did not satisfy the criteria for grade advancement. One reason was because his conversion to a full-time position meant that his tenure only began when that occurred. Secondly, he also had not completed all the training modules. However, under cross-examination he agreed that a commissioner could complete the different phases whether or not they were full-time or part-time. Further, he said the settlement said “... *the tenure requirement for the conversion would be fast-tracked to the governing body interviews for the position of a full-time commissioner without having to go through the written assessment phase of the selection process*”. Confusingly, when pressed that Ngcaba would have completed his post-mentorship phase by 31 August 2021, Mathebula disputed this, because during that period Ngcaba had changed from an independent contractor contract to an employment contract owing to his conversion to a full-time commissioner in 2020.

[26] Ngcaba denied not having done the required training modules. However, he did not include the supporting documents of the training he said he had done, because he disputed the validity of the de-categorisation circular. Further, he argued that, according to the disputed circular, during the post-mentorship phase it was only necessary to make oneself available to attend courses and it was not necessary to pass any. Moreover, when he engaged with the HR department prior to applying for conversion, he had made reference to the P06 salary scale, but he was not told that scale would not apply to him.

[27] On 26 December 2020, Ngcaba was issued with a written contract of employment, signed by the CCMA director, appointing him as a full-time commissioner for a period of two years and seven months, starting on 1 December 2020 and terminating on 30 June 2023, the same date on which his part time appointment would have ended. The contract was not signed by Ngcaba, but he made certain handwritten alterations to clause 10, which dealt with remuneration. Ngcaba wrote the following over part of the typed text of that clause:

“The contract was not signed due to the salary offered which is less than the grade linked to my appointment. There is an ongoing dispute & the signing of this contract should not be deemed as an acceptance of the offer.”

[28] On 30 December 2020, Ngcaba returned the contract he had received, with the abovementioned annotation. He attached it to an email he sent to the legal services and human resources departments of the CCMA. The pertinent portions of the email read:

“Subject: New document requires your attention: Franklin S’nkhumuso Ngcaba –

Dear Legal Service and Human Resources Directorate,

Thank you for giving me the opportunity to work as a full-time Commissioner. I welcome this challenge and look forward to a fruitful working relationship. I would also like to bring it to your attention that the attached contract which requires approval and signature bears reference.

However, I have some concerns regarding the compensation package of R615, 376.53. Which is far less than what I expected, based on the fact that I have the skills, qualifications and experience to do well in this role given the amount of work expected of me and the fact that I have been a Commissioner for three years and five months to date.

Thus, I feel that the current offer as stipulated in the employment contract is too low taking into consideration that I earned an average salary of R61, 502.40 per month, which equates to R738, 028.80 per annum as a

part time Commissioner. That was excluding the two days income I used to earn for the two days I used to allocate to the Bargaining Councils. The position I am currently occupying is challenging because it requires someone committed and experienced in this field, taking into consideration the case load we are currently dealing with, and the fact that I would be at the office on a full time basis.

Further, the signed transfer and conversion letters dated 10 November 2020 never indicated that I would be earning far less than what I used to earn as a part time Commissioner. It stipulates that the terms and conditions of my employment would remain the same, beside the knowledge of obvious benefits applicable to full time employees.

I believe the current offer will better suit the job's demands if it's increased by at least the average monthly income of R61.502.40 per month, which is the average salary I used to earn as a part time Commissioner or alternatively a minimum of P6 Commissioner entry level which amounts to R738, 028.80 per annum (ctc). I hope that we can come to an agreement about this matter, and I look forward to hearing from you in this regard as to finalise my employment contract.

Yours sincerely,..."

In his testimony, Ngcaba confirmed he was unhappy about being paid less than what he was earning as a part-time commissioner, and it was below the entry level salary for grade P06. He said he had left Cape Town earning "above R 615,376.15" knowing that he would be earning "not less" than what he used to earn, or alternatively earning at level P6 which entailed an annual salary package of R 738, 028.80. As he was working on level P06 he was entitled to the salary for that level. He disputed the suggestion that he was simply asking the CCMA to improve his salary. Rather, he wanted it to rectify it and pay him what he was entitled to. Ngcaba's claim that he mostly worked for the CCMA and only worked a couple of days a month for two bargaining councils, was not disputed.

[29] Eventually, on 14 January 2021, Mathebula replied by email as follows:

"As promised telephonically, I consulted on your request.

Under the current fiscal environments and given dire financial constraints the organisation is under, it is not possible to consider a salary review. You may be aware that the CCMA has suspended the employment of Full-time Commissioners as a result. It was quite fortuitous that your application was approved when it was. I hope you'll consider the response above favourably given the current circumstances...."

Ngcaba pointed out that the only explanation offered for the offered salary was fiscal constraints, and no mention was made of scrapping of the level A and B commissioner categories.

[30] On 28 January 2021, following a telephone conversation with Ngcaba, Mathebula suggested responded to the email above. He confirmed that he had asked Ngcaba to sign the contract, or his pay would be stopped, but that he had suggested Ngcaba could flag that his acceptance was contingent on the pay issue being acknowledged and that it would be attended to. Mathebula explained that it was important that the CCMA had a contract to validate the payment for accounting purposes. It could not simply pay Ngcaba a salary without a contract. Ngcaba's emailed response was that he could not sign the contract because the digital software on which it was communicated did not make it possible to edit the contract to include his reservation on the salary question. Ngcaba's view was that, if the CCMA did not agree with the salary he was claiming, it should have said so and he would not have been advised to write an endorsement on the contract saying that he may "*flag [his] acceptance ... on the understanding that the said pay issue are acknowledged and are being attended to*".

[31] Ngcaba advised Mathebula that he had referred a dispute about this to the CCMA (in its capacity as a dispute resolution body). He also expressed the view that he had accepted the letter of appointment and had started working on that basis. It is common cause he began working on a full-time basis on 1 December 2020, albeit without a concluded written contract. Since 'the letter' referred to his terms and conditions of his 'initial service contract' being applicable aside from his conversion from part-time to full-time commissioner,

his written confirmation of acceptance of the appointment was sufficient to establish his claim. It was put to him that during the phone call, Mathebula had explained which grade he would be placed on, though he did say he would see if Ngcaba's salary could not be reviewed on a gratuitous basis, but Ngcaba denied Mathebula had even mentioned the issue.

[32] Ngcaba did concede that his contract did not mention his appointment being on salary level P06. Even so, he found support for his claim in the fact that the payroll authorisation form reflected his job grade as P06 both in the description of his current job as a part-time commissioner and in his new job title of full time commissioner, and the P06 grade was reflected on his payslip. He testified that he nevertheless claimed he accepted all the other terms of the written contract.

[33] Ngcaba agreed that he had received a daily fee of R 2,939.89 for the days he worked as a part-time commissioner, which he claimed was most days, except when he did work for two bargaining councils, once or twice a month. He based his average monthly salary as a part-time commissioner on working 21 days a month at this daily fee, which amounted to R 61,737.69 per month, which was slightly more than what he set out in his statement of claim. He did concede that he had no entitlement to a monthly salary as a part-time commissioner as his earnings were dependent on the days he worked.

Evaluation

[34] For ease of discussion the alternative claim of tacit consent will be dealt with first.

Existence of a tacit term determining Ngcaba's remuneration on being transferred.

[35] In *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration*³, the SCA set out the requirement for a tacit term in a contract to be inferred:

³ 1974 (3) SA 506 (A)

“The tacit term, on the other hand, is a provision which must be found, if it is to be found at all, in the unexpressed intention of the parties. Factors which might fail to exclude an implied term might nevertheless negative the inference of a tacit term. ... The Court does not readily import a tacit term. It cannot make contracts for people; nor can it supplement the agreement of the parties merely because it might be reasonable to do so. Before it can imply a tacit term the Court must be satisfied, upon a consideration in a reasonable and businesslike manner of the terms of the contract and the admissible evidence of surrounding circumstances, that an implication necessarily arises that the parties intended to contract on the basis of the suggested term.”⁴

(Emphasis added)

[36] Therefore, in order to succeed, Ngcaba must prove that it necessarily follows from the sentence in his transfer letter that “(a) *all other terms and conditions of your current contract remain unchanged.*”, meant that the monthly salary he would receive as a full-time commissioner would at least be equivalent to his average earnings as a part-time commissioner. There are immense difficulties with this interpretation. Firstly, the transfer letter was primarily concerned to confirm that his transfer was approved. The effective date of his transfer was the same date as the conversion of his status from a part-time to a full-time commissioner, namely 1 December 2020. The conversion letter stated that he would receive a full-time commissioner contract to give effect to his new status. It seems inconceivable that the parties would have intended that his monthly salary on engagement as a full-time commissioner under a new contract of employment, would be governed not by the express terms of that new contract but would be derived indirectly from a letter which simply was intended to give him permission to render his services in a different region. Given the existence of a proposed contract that was supposed to expressly set out his new salary, it would be illogical to conclude that the parties, if asked, would have unhesitatingly replied that they naturally intended that his salary would instead be derived, indirectly, from another

⁴ At 532H-A, and endorsed *inter alia* in *Food And Allied Workers Union v Ngcobo NO and Another* 2014 (1) SA 32 (CC) at para [37].

document. Moreover, it does not follow why, as a matter of necessary implication, they would have agreed that his monthly remuneration as a full-time commissioner should be based on his average earnings as a part-time commissioner. It is also telling that when he expressed his unhappiness about the salary contained in the proposed contract in his letter of 30 December 2020, he merely used his previous average earnings as a benchmark for arguing why the salary offer should be improved. He did not assert that he was already entitled to the salary in question by virtue of the transfer letter, which illustrates that even when the salary question was his primary focus, he did not consider it a matter that had been settled by his conversion letter.

[37] In conclusion, the argument that the value of Ngcaba's remuneration must be inferred from a reading of his transfer letter as a matter of necessity does not withstand scrutiny and must be rejected.

Claim based on substantive agreement with staff association.

[38] The first issue to be determined is whether the WSA applied to Ngcaba. The CCMA claimed it did not because clause 1.3 of the agreement stated that it only applied to full-time employees who had completed training and, or alternatively, mentorship by 1 October and are still employed by the CCMA when the payments are made. It is true that Ngcaba had not been employed when the agreement was concluded and that until 1 December 2020, when he became a full-time commissioner, he was not covered by the terms of the agreement because it did not cover remuneration of part-time commissioners.

[39] However, the agreement was a multi-year agreement and the reference to full-time employees in clause 1.3 of the agreement, clearly applied to qualifying full-time employees who were still in employment when an annual increase was implemented and had already been in full-time employment by 1 October the previous year. Though somewhat ungrammatical, the application of an increase to qualifying employee was based on an employee's existing salary package. Although the agreement itself did not stipulated the existing salary

scales, it was premised on the existence of updated salary scales for each year. For example, clause 2.1.4 stated:

“The 2018/19 Salary scales will be the equivalent of the 2017/2018 salary scales matured by the CPI factor of 5.7 %”

Clauses 2.2.4 and 2.3.4 of the WSA for the subsequent years are similar. Obviously, because the CPI factor for subsequent years was not known at the time the agreement was concluded, the applicable wage scales could only have been drawn up once that was known.

[40] In conclusion, I am satisfied that the WSA would have been applicable to Ngcaba once he became a full-time commissioner. It must also be mentioned that, despite arguing that the agreement did not apply, the CCMA clearly also relied on the same salary scales which Ngcaba referred to in asserting what his correct salary should have been. Thus, the parties were *ad idem* on the applicable salary scales. What they differed on was on which salary level of those scales, Ngcaba should have been placed once he became a full-time commissioner. The relevant scale which they both referred to was the following:
2020/2021 CCMA Bargaining Unit Salary Scales: An escalation of the 2019/2020 Salary Scales by (4.1%)

Job Grade	0.6	0.8	0.9	1	1.1	1.2
6		R766 394.97	R862 194.34	R957 993.71	RI 053 793.08	RI 149 592.45
7	R461 532.40	R615 376.53	R692 298.60	R769 220.66	R846 142.73	R923 064.80
8		R497 989.09	RS60 237.72	R622 486.36	R684 734.99	R746 983.63
9		R414 480.17	R466 290.20	RS18 100.22	RS69 910.24	R621 720.26
10		R353 403.34	R397 578.76	R441 754.17	R485 929.59	R530 105.01
11		R301	R339	R376	R414	R452

		580.47	278.03	975.59	673.15	370.71
((12 Day Interpreters)	11	R167 003.49	R187 878.93	R208 754.36	R229 629.80	R250 505.24
	12	R243 514.99	R273 954.36	R304 393.74	R334 833.11	R365 272.48
	13	R206 869.33	R232 728.00	R258 586.66	R284 445.33	R310 304.00
	14	R176 903.90	R199 016.89	R221129.88	R243 242.86	R265 355.85
	17	R108 669.65	R122 253.35	R135 837.06	R149 420.76	R163 004.47

[41] Ngcaba claimed that the applicable level was 80% of P06, namely R 766, 394.97 per annum. the CCMA asserted that it had correctly paid him at R 615, 376.53 per annum, which is 80% of P07. It was common cause that the P07 grade had been the grade on which level B commissioners had been engaged. Ngcaba's contention was that with the collapse of the level A and B categories of commissioner all commissioners now were on a single grade which was P06, and this was reflected in his payroll documentation. On his version he could not be employed on any level less than the entry level for P06. Moreover, clause 2.3.5 of the substantive agreement meant that he had to be employed at that level. Even if the employer was correct about the applicability of the 2019 circular which implemented the de-categorisation commissioner levels, he argued that he still qualified to be recognised as having finished the post-mentorship phase.

[42] the CCMA insisted that the terms of the circular applied to Ngcaba and that, even if his post-mentorship service of thirty-six months was recognised, which it disputed, he had not completed the necessary training components to progress to the third phase. It maintained that irrespective of his prior length of service as a part-time commissioner, his appointment as a full-time commissioner and employee was the start of a completely different relationship

and the thirty-six-month period started with the commencement of that new relationship.

[43] The question whether the WSA applied to Ngcaba at the time of his conversion has been dealt with above. the CCMA did not plead any other reason why Ngcaba's salary determined by the agreement was not enforceable, and the parties agreed that the wage schedule referred to above was the salary applicable salary scale derived from the WSA. The crux of the dispute was whether Ngcaba should have been remunerated on the 80th percentile of P06, or the 80th percentile of P07.

[44] In the course of the trial, the CCMA relied heavily on the de-categorisation circular. However, the only reference it made to de-categorisation in its answering statement was simply to record that there were three fee structures for part-time commissioners prior to de-categorisation. In fact, when it came to full-time commissioners, it pleaded that their salary adjustments were determined after consultation and negotiation with the CSA within the bargaining unit. The CCMA did not plead that the de-categorisation circular amended or superceded the WSA nor did it plead the legal basis on which it claimed it was binding. Other than referring to the bargaining unit in which management negotiated with the CSA, no other basis was laid in evidence or in the pleadings about other mechanisms for determining conditions of employment for those employees falling under the bargaining unit.

[45] More than once in his evidence Mathebula agreed that, after de-categorisation, the job grade for commissioners was P06. However, he sought to explain how the preservation of differentiated remuneration levels commencing at the 60th percentile of P07 and progressing to the 80th percentile of P06 was nonetheless retained when the de-categorisation process was devised as set out in the circular. The circular claims that after the governing body of the CCMA decided to collapse level A and B commissioner categories into a single commissioner level, a task team had been established to effect the implementation thereof. The circular explains that it is being sent to all commissioners to ensure '*a common understanding*' of how it would be

implemented. At face value, nothing on the document shows it was the product of an agreement with the CSA, though Mathebula claimed it was 'workshopped' with the CSA.

[46] The CCMA's unpleaded defence relating to the de-categorisation circular might have been a valid one. However, it was never pleaded that it disentitled Ngcaba to be paid on level P06. Further, no proper basis was even laid during the trial why the circular lawfully permitted the CCMA to engage him at the 80th percentile of level P07, despite him occupying a level P06 job grade.

[47] Even if the circular and Mathebula's evidence could be construed as establishing a case that a salary progression from P07 to P06 was the lawfully binding method for commissioners to advance despite being classified as working in a level P06 job, the question would still arise whether Ngcaba was correctly placed on level P07. For the sake of completeness this will be considered below.

Would Ngcaba have been entitled to remuneration at level P06, if the de-categorisation circular was enforceable?

[48] The CCMA argued that Ngcaba's prior progress as a part-time commissioner was irrelevant once he converted to a full-time commissioner, so the three year post-mentorship period would only commence on his full-time employment. This proposition is completely at odds with the circular itself. It is clear from that document that it is envisaged that part-time commissioners are also included in the three phase progression from mentorship to occupational commissioner. The document specifically identifies the increased daily rate part-time commissioners would be entitled to on completion of each phase. There is no suggestion that a part-time commissioner's progress through the phases was intended to be any different from that of a full-time commissioner.

[49] An ancillary argument advanced by the CCMA was that there was a complete change in the nature of his relationship with the CCMA once he

became a full-time commissioner, because he was now an employee. This seems to be something of a red herring. The point about the progression envisaged in the circular is that both full-time and part-time commissioners can complete the same stages. It makes no sense that a part-time commissioner, thirty-six months after completing his mentorship phase, who had performed satisfactorily and who had done the required training modules could be classified as an operational commissioner today, but on joining the CCMA as a full time employee tomorrow, he must restart as if he had just finished his mentorship phase. Moreover, it makes no sense why a part-time commissioner's mentorship phase would be recognised for the purposes of full-time employment but not their post-mentorship progress in a part-time capacity.

[50] Apart from the question of recommencing the post-mentorship phase on obtaining a full-time post, Mathebula claimed Ngcaba was not entitled to move to the third phase because he had not completed the necessary training modules for the second phase. This was put to Ngcaba under cross-examination who said he believed he had, but no concrete evidence of any particular course he failed to attend was put to him, nor did Mathebula allude to a single such course in his own evidence. Consequently, even if Ngcaba's entitlement to remuneration was subject to fulfilling the requirements of the post-mentorship phase, there was no cogent evidence adduced that he had not.

[51] Accordingly, I am satisfied that even if the CCMA is correct that a salary progression from P07 to P06 still applied notwithstanding the absence of a commissioner grade on level P07, there was no reason why Ngcaba should not have been recognised as entitled to advance to the operational commissioner stage and receive a salary on the 80th percentile of salary level P06.

Conclusion

[52] Accordingly, I am satisfied that Ngcaba was entitled to be remunerated at the 80th percentile of salary level P06 on his appointment as a full-time commissioner. This being an essentially contractual claim and the parties no

longer having any ongoing relationship, there is no reason why costs should not follow the result, in my view.

Order

1. Within 21 days of the date of this judgment, the Defendant must pay the Applicant R 176 174.32, being the aggregate difference between the remuneration he received as a full-time commissioner and what he should have been paid by the Defendant for the period 1 December 2020 until 11 February 2022 if he had been paid the correct salary of R 63,866.25 per month.
2. The Defendant must pay the Applicant's costs including the costs of counsel.

R Lagrange
Judge of the Labour Court of South Africa.

Representatives

For the applicant: N Williams
Instructed by: MSCH Attorneys
For the Respondent: T Maodi from Gildenhuys Malatji Attorneys