



THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Not Reportable

Case no: D165/2013

DEPARTMENT OF CORRECTIONAL SERVICES

Applicant

and

THEMBINKOSI MADALA MATHENJWA

First Respondent

**GENERAL PUBLIC SERVICE SECTORAL BARGAINING
COUNCIL**

Second Respondent

BHEKI KHUMALO

Third Respondent

Heard: 14 August 2014

Delivered: 13 August 2015

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

- [1] The applicant seeks to review and set aside the arbitration award dated 3 December 2012, issued under case number GPBC1591/2012 by the third respondent (Arbitrator), acting under the auspices of the second respondent (GPSSBC).

- [2] The dispute before the arbitrator related to the interpretation and application of the OSD Resolution 2 of 2009 of the GPSSBC. The main issue was whether Mathenjwa was entitled to an adjustment from salary level 9 to salary level 10 consequent upon his migration from non-centre based to a centre-based correctional service facility¹. The arbitrator had found in Mathenjwa's favour, and ordered the applicant to correct his migration by aligning his salary structure to salary scale or notch CB5 (salary scale 10) retrospective from 1 July 2010.

Condonation application:

- [3] The applicant seeks condonation in respect of the late filing of its supplementary affidavit and amended Notice of Motion. In this regard, the delay was about 9 days, which delay was explained as being attributable to the non-availability of the applicant's Counsel to draft the supplementary affidavit.
- [4] The application for condonation was not strenuously opposed. I have had regard to the length of the delay, and even though the unavailability of Counsel cannot be a valid excuse, I am satisfied that further having had regard to the applicant's prospects of success, the importance of the case to both parties, the interests of justice, and other factors pertinent to such applications, the late filing of the supplementary affidavit and amended Notice of Motion should be condoned.

Background:

- [5] Mathenjwa had following an application in terms of the OSD Resolution 2 of 2009, migrated from a non-centre based correctional service facility to a centre based facility with effect from 1 July 2010. Prior to his migration he was employed as an Assistant Director at level 9 salary scale. After the migration,

¹ Defined under clause 2 of the resolution as;

"Centre Based Correctional Officer":

"...all categories of employees, based at correctional centres and Social Integration Offices and include all other employees who fall under the establishment of the Correctional Centre, working 45 hours per week"

"Non-Centre Based Correctional Official"

"means all categories of employees, not referred to as centre based correctional officers, working 40 hours per week"

he currently occupies the position of Assistant Director, Centre Coordinator, Operational Support at Qalakabusha Correctional Centre in Empangeni.

- [6] The applicant's contention is that the position to which Mathenjwa migrated to was on salary scale level 10. Mathenjwa had nevertheless lodged a grievance, contending that despite being a salary level 10, his salary had not been adjusted accordingly to be commensurate with the new position.
- [7] The grievance had reached the Area Coordinator Corporate Services and the Area Commissioner, and according to Mathenjwa, both had recommended that his salary be adjusted accordingly. The Regional Office however refused to make the necessary adjustments. A dispute was then referred to the GPSSBC, and when it remained unresolved, it came before the Arbitrator for arbitration.

The arbitration proceedings and the award:

- [8] Mathenjwa's evidence at arbitration was essentially that he was entitled to a salary notch level 10 by virtue of his migration to a post that was at that level. He further submitted that the applicant had misinterpreted and wrongly applied the provisions of the OSD by failing to adjust his salary to level 10.
- [9] The applicant's case at the arbitration proceedings as presented by its human resources manager, Mr. Ian Shelembe and its representative, Chamane, was that in terms of the OSD, migration required that an employee should be translated at minimum requirements. In this case, Mathenjwa was correctly migrated at salary level 9 according to minimum requirements, and was therefore not entitled to a salary adjustment. Evidence was further led to the effect that the OSD did away with salary levels and introduced scales linked to the posts for all employees appointed in terms of the Correctional Services Act. The salary level claimed by Mathenjwa was applicable to non-centre based employees employed in terms of the Public Service Act, and also, the OSD was not meant to be a promotion.
- [10] The Arbitrator upon the interpretation of the OSD concluded that there was no maximum or minimum translation or migration according to the OSD, and that

upon the migration, Mathenjwa's salary scale or level should have been aligned to CB5 according to "Translation Key", which provided for salary level 10 and related to CB5 scales which had since been reviewed with effect from 1 May 2012. The Arbitrator also found that upon migration, the 'discrepant salary notch' of Mathenjwa should have been aligned to salary level 10 and related to CB5 appropriate scale taking into account the guiding principles and his experience.

The grounds of review:

- [11] The applicant complains in general that the arbitrator's conclusion in the light of the evidence before him was irrational; had failed to properly apply his mind to the issue in dispute, and that his award is not one that a reasonable arbitrator would make.
- [12] In particular, the applicant complains that the arbitrator in the award stated it as being common cause that the post to which Mathenjwa migrated was at salary level 10 and not 9, and further that by reference to Annexure "B1" as being the translation key for the OSD which formed the basis for the conclusions. The applicant contends that this was never common cause between the parties at the arbitration hearing, as the post of Centre Coordinator and Head of Correctional Centre in Medium Institution fell within salary scale of CB5 and previously contained personnel in salary level 10 or 9 as evident from annexure "B1".
- [13] It was further pointed out that before Mathenjwa was transferred, his salary as Assistant Director at a non-centre based correctional service facility on salary level 9 was R175 977.00. This was increased to R210 267.00 after 1 July 2009 with the transfer still on level 9, and again to R232 344.00. A further salary adjustment to R249 771.00 took place on 1 July 2010, which according to the applicant, fell within the previous salary level 10 as evident from annexure "B". To this end, it was submitted that Mathenjwa had been upgraded to salary scale 10; that he was not in any event entitled to be paid at salary level 10 by virtue of his migration, and that the OSD was not a promotional policy.

- [14] Lastly, it was submitted that despite such evidence being placed before the arbitrator, he had nevertheless still found that Mathenjwa had not been properly translated in accordance with the OSD and the translation key.
- [15] The heads of argument submitted on behalf of Mathenjwa appears to be a cut and paste job in that in the introduction, reference is made to an “...*Order reviewing and setting aside the arbitration of the 1st Respondent who dismissed her referral to the 2nd Respondent and found that her dismissal was fair*” (Sic). Thereafter, five pages are dedicated to reference to authorities.
- [16] In regards to the merits of the application, it was submitted on his behalf that the award was unassailable as it was consistent with the evidentiary material before him, and that the arbitrator had not misconstrued the Resolution.
- [17] It was however conceded that Mathenjwa’s salary was adjusted upon his translation to the centre based post and that salary levels 9 and 10 fell within salary scale CB5. It was nevertheless submitted that salary level 10 was inherently higher than salary level 9 scale.

The legal framework in respect of review applications:

- [18] The review test is as set out in *Sidumo and another v Rustenburg Platinum Mines Ltd and others*² is whether the decision reached by the commissioner is one that a reasonable decision-maker could not reach. The Supreme Court of Appeal in *Herholdt v Nedbank Ltd*³ held further that whether there is a defect in the conduct of the proceedings which amounts to a gross irregularity as contemplated by s 145(2) (a) (ii) involves an enquiry as to whether the arbitrator misconceived the nature of the inquiry or arrived at an unreasonable result.⁴
- [19] The net effect of the interpretation of the *Sidumo* test in *Herholdt* is that even where the reasons given by an arbitrator may be wrong and there has been some irregularity, the decision may not necessarily be set aside, if on the

² [2007] 12 BLLR 1097 (CC), held that [at para 110]:

³ At para [12]

⁴ 2013 (6) SA 224 (SCA) at para [25]

basis of the material placed before the commissioner, the outcome was a reasonable one. However, in accordance with the *Sidumo* test, there will be cause to set aside the award on review, if that decision was “entirely disconnected with the evidence” or is “unsupported by any evidence” and involves speculation by the arbitrator⁵.

- [20] When dealing with awards emanating from a referral in terms of section 24 of the Labour Relations Act, the *Sidumo* test is still applied. Significant however for the purposes of the review application before the Court, and further in view of the basis upon which the award is attacked, is that the pertinent question to be posed and answered is not whether the award in issue was correct or not, but whether the arbitrator acted fairly, and considered and applied his mind to the issues before him⁶.

Evaluation:

- [21] Having had regard to the purpose of the Resolution, the relevant clauses as shall be pointed out below, the interpretation to be imputed to those relevant clauses and annexure “B1” to the Resolution, I am in agreement with the applicant that the arbitrator arrived at a decision that no reasonable arbitrator could have come to on the material placed before him. In essence, the arbitrator in coming to his conclusions did not act fairly, nor did he consider and apply his mind to the issues before him. These conclusions are based on the following;

- [22] The purpose of section 24 is to resolve disputes where a party to an agreement is in breach of the provisions of that agreement by failing to apply its terms either correctly or at all⁷. In *Western Cape Department of Health v Van Wyk and Others*⁸ the Labour Appeal Court re-emphasised that;

⁵ At para [13]

⁶ *SA Municipal Workers Union v SA Local Government Bargaining Council and Others* (2012) 33 ILJ 353 (LAC) at para [10]

⁷ *PSA obo Liebenberg v Department of Defence and Others* (2013) 34 ILJ 1769 (LC) at para [2]

⁸ (2014) 35 ILJ 3078 (LAC) at para 22. See also *North East Cape Forests v SAAPAWU and Others* [1997] 6 BLLR 711 (LAC)

“In interpreting the collective agreement the arbitrator is required to consider the aim, purpose and all the terms of the collective agreement. Furthermore, the arbitrator is enjoined to bear in mind that a collective agreement is not like an ordinary contract. Since the arbitrator derives all his/her powers from the Act he/she must at all times take into account the primary objects of the Act...”

[25] Central to Mathenjwa’s dispute is that having been migrated to a centre based post (ASD: CC Operational Support: Qalakabusha Correctional Centre: Empangeni Area) with effect from 1 July 2010, his salary was not accordingly adjusted to be in line with the level or salary scale commensurate with the position in terms of the OSD. As I understand the argument, despite his migration to post level 10 as approved on 1 July 2010, he remains being remunerated at post level 9. These contentions are made despite it being conceded on his behalf that his salary was adjusted upon his translation to the centre based post and that salary levels 9 and 10 fell within salary scale CB5.

[26] Clause 1 of the Resolution provides that the agreement gives effect to the PSCBC Resolution 1 of 2007 in providing an Occupational Specific Dispensation for Correctional Officers. The objectives of the Resolution as found in clause 3.1 provide *inter alia* that:

“3.1 To introduce an Occupational Dispensation (OSD) for Centre Based and Non-Centre Based Correctional Officials that provide for:

3.1.1 a unique salary structure

3.1.3 pay progression

3.1.4 grade progression based on performance

3.1.8 introduction of differentiated salary scales for the different categories of Correctional Officials.”

[27] **Clause 6.1 Translation Measures**

“6.1.1 Centre Based and Non Centre Based Correctional Officials, as defined in this agreement shall translate to OSD, which shall provide for the following:

(1) Unique Remuneration Structure

The introduction of a unique implementation structure, with 3% increments between notches.

(2) Differentiated Dispensation

Differentiated salary structures for Centre Based and Non Centre Based Correctional Officials attached as Annexure A1 (Centre Based) and Annexure A2 (Non Centre Based) and as summarized hereunder.”

A table is then provided which links the OSD Band with the Occupational Bands. Insofar as this pertains to Mathenjwa, he had migrated to CB5 in relation to the OSD band and by virtue of his position as Assistant Director, Centre Coordinator, Operational Support, he falls under occupational group C.

Clause 6.1.1 (3) provides that:

“Centre Based Correctional Officials shall translate to the appropriate salary scales in accordance with **Annexure B1**”

Clause 6.1.1(4) provides that;

“Non-Centre Based Correctional Officials shall translate to the appropriate salary scales in accordance with **Annexure B2**”

[28] Clause 7 makes provision for the translation measures for correctional officials, and clause 7.1 provides the principles under which translation to the OSD for correctional officials shall be subject to. Clause 7.2 provides that:

“Correctional officials shall translate to the appropriate salary scales in accordance with the posts that they currently occupy.” (My emphasis)

Clause 7.3 provides that:

“Translation measures to facilitate translation from the existing dispensation to the appropriate salary scales attached to the OSD are based on the following principles:

7.3.1 ...

7.3.2 A minimum translation will be implemented to the appropriate salary scale attached to the posts (and grades in respect of production levels). As contained in Annexure B1 and B2”

- [29] Further pertinent to this dispute is Annexure ‘A1’ as Mathenjwa was centre based following the migration. The annexure sets out salary notches, percentages and occupational levels. By virtue of his position after migration, as per the annexure, his position in accordance with the OSD bands is at CB5.
- [30] Annexure ‘B1’ is the translation key which shows the translation measures from the salary scales under the old system, 1 to 12 to the OSD bands from CBA to CB6 (Centre Coordinator and Head of Correctional Centre in a large Institution).
- [31] When implementing the OSD, the applicant’s contention was this implied that the salary levels were done away with, and that salaries for officials were to be referred to as salary scales which allowed for a single post to be linked to more than one salary grade (scale) in order to facilitate grade progression as per clause 10 of the Resolution. In effect therefore, this implementation meant that all officials who were on salary level scale of 9 or 10 prior to the OSD implementation, were then translated to CB5 within the minimum notch of R210 267.00 to R347 544.00 upon progression. I did not understand the submissions made on behalf of Mathenjwa to dispute this understanding. In my view, it is in line with the objectives set out in clause 3 of the Resolution, and also with the provisions of clause 10.
- [32] The arbitrator however had a different interpretation, and had concluded that upon an interpretation of clause 7.3.2, the appropriate salary scale attached to the post to which Mathenjwa had migrated was at level 10 and not nine. The arbitrator found that there was no minimum or maximum translation or migration according to OSD, and an official either qualified or did not. Since Mathenjwa qualified and was therefore migrated, upon his migration his salary scale or level should have been aligned to CB5 according to the “Translation Key”, which provided for salary level 10 and relates it to CB5 scales ranging

from R210 267.00 to R347 544.00 then. The scales had however been reviewed in accordance with "Translation Key" dated 1 May 2012.

- [33] When interpreting collective agreements, one must have regard to the trite rules of interpretation. Thus in the absence of ambiguity the words contained in the collective agreement must be given their plain, ordinary and literal meaning. Where relevant however, regard must also be had to the application of the parol evidence rule.
- [34] The basis of the Arbitrator's conclusions was that it was common cause that the post to which Mathenjwa had migrated was at salary level 10 and not 9. The applicant disputes that this issue was common cause, and points out that the post of Centre Coordinator and Head of Correctional Centre in Medium Institution clearly fell within the salary scale of CB5, which previously contained personnel that was either at salary level 9 or 10 as evident from Annexure "B1". The arbitrator in his interpretation clearly missed this point.
- [35] In terms of clause 6.1.1 (3) of the Resolution, centre based correctional officials shall translate to the appropriate salary scales in accordance with Annexure "B1". This annexure formed the basis of the Arbitrator's conclusions and is the "Translation Key" which shows the translation measures from the salary scales under the old system, 1 to 12 to the OSD bands from CBA to CB6.
- [36] Mathenjwa's application for migration was approved with effect from 1 July 2010. At the time he sought migration, he held the position of Regional Inspector KZN, Assistant Director at a non-centre based correctional service facility, which according to the applicant was at level 9 salary scale. He currently holds the position of Assistant Director, Centre Coordinator, Operational Support after the migration on 1 July 2010, which is at salary level 10.
- [37] In the light of the above, and having considered the translation measures from the salary scales in the old system to the OSD bands as contained in Annexure 'B1', it is apparent that the Arbitrator misconstrued the purpose of

these translation measures, and imputed an interpretation that is completely at odds with the objectives.

- [38] Mathenjwa prior to the migration was on salary notch R232 344.00. As per Annexure "B1", that salary scale is at level 10 and in accordance with the OSD, which now falls into CB5 scale. It was not disputed that following the migration, his salary was adjusted to R249 771.00 on 1 July 2010, which fell within the previous salary level 10, and further to R274 755.00 which again still falls under the old salary level 10 and the new CB5 scale.
- [39] I fail to appreciate Mathenjwa's contentions that despite his migration to post level 10 as approved on 1 July 2010, he remains being remunerated at post level 9. The salary range after translation at level 9 which is also at CB5 scale as outlined in annexure 'B1' is between R210 267.00 and R236 655.00. It being common cause that his current salary is R274 755.00, which is at CB5 scale and the old salary level 10, it is difficult to appreciate what could have persuaded the arbitrator to arrive at the conclusion that on a reading of clause 7.3.2, there cannot be a minimum or maximum translation or migration according to the OSD, and that Mathenjwa was therefore entitled to a further adjustment.
- [40] The arbitrator's finding as above is completely at odds with various provisions of the Resolution including those of clause 6.1.1 (3) which provides that Centre Based Correctional Officials shall translate to the *appropriate salary scales* in accordance with Annexure B1; clause 7.2 which provides that Correctional officials shall translate to the *appropriate salary scales in accordance with the posts that they currently occupy.*", and lastly, with clause 7.3.2, which provides that a *minimum* translation will be implemented to the appropriate salary scale attached to the posts (and grades in respect of production levels). In finding that Mathenjwa was entitled to a further adjustment, the arbitrator also placed reliance on the "Translation Key", which provided for salary level 10 and related to CB5 scales which had since been reviewed with effect from 1 May 2012. It is not clear under what circumstances the arbitrator took the 1 May 2012 Translation Key into

account, in view of the fact that the adjustment claimed related to a translation that took place on 1 July 2010 and long before the review.

- [41] Having gone through the record of arbitration proceedings and submissions made on behalf of Mathenjwa, it can be inferred that he clearly misconstrued the migration as some form of promotion when this was not the case. The effect of the translations per the OSD is merely to elevate officials to a higher salary scale without affecting their occupational grade. It is not meant to gratuitously grant promotions. Mathenjwa is already on an aligned scale of level 10 in the light of the salary he is currently earning, and the applicant's implementation of the Resolution in this regard cannot be faulted.
- [42] Even more perplexing however is the order of the arbitrator which *prima facie* is incapable of being enforced even if the applicant wished to abide. The order reads as follows;

"The respondent (applicant in this application) is ordered to;

- A. With retrospective effect from 1/7/2010 correct the migration of the applicant (Mathenjwa) by aligning his salary structure to an applicable salary scale or notch CB5 salary level 10; according to "Translation Key" on page 36 of bundle "A", taking into account all guiding principles including but not limited to his experience as per paragraph 11.2 of OSD (Sic)*
- B. Further pay the applicant the difference between what he earned and what he was supposed to be paid had his alignment been done (correctly) at migration.*
- C. In compliance with A and B above, take into account and apply all annual reviews or adjustments of the "Translation Key" as per bundle "C"*

- [42] It is apparent from the order that the arbitrator failed to appreciate the purpose of applications in terms section 24 of the LRA and his role in that regards. Rather than resolving the dispute, the order is so ambiguous and incomprehensible that it can freely be said that it created more disputes for the parties than resolve them.

[43] By failing to appreciate this apparent purpose of the Resolution, and concluding that Mathenjwa was entitled to anything more than he was as a result of the migration, the arbitrator failed to act fairly, and also failed consider and apply his mind to the issues before him. As a result he arrived at conclusions which no reasonable decision maker could have arrived at in the light of the material before him.

[44] As already indicated, I have had regard to the record of the proceedings and further having had regard to the protracted history of this matter, no purpose will be served by remitting it back to the second respondent. I have further had regard to the issue of costs, and it is my view that considerations of law and fairness militate against such an order. Accordingly, the following order is made.

Order:

- i. The late filing of the applicant's Supplementary Affidavit and Amended Notice of Motion is condoned.
- ii. The arbitration award issued by the third respondent under case number: GPBC159/2012 dated 3 December 2012 is reviewed and set aside.
- iii. The above award is replaced substituted with an order that:
 - (a) The Department of Correctional Services interpretation and application of the Occupational Specific Dispensation, Resolution 2 of 2009 in regards to the migration of Mr TM Mathenjwa from non-centre based correctional service facility to a centre based facility declared is declared to be correct.
 - (b) The salary adjustments made by the Department of Correctional Services in respect of Mr. TM Mathenjwa following the latter's migration was in terms of the provisions of the Occupational Specific Dispensation, Resolution 2 of 2009.
- iv. There is no order as to costs.

Tlhotlhemaje, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant:

Adv. NSV Mfeka

Instructed by:

State attorney

On behalf of the Third Respondent:

Mr. P Shangase of AP Shangase &
Associates