



**REPUBLIC OF SOUTH AFRICA**

**IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG)**

**JUDGMENT**

Reportable

Case No: JR1583/2011

In the matter between:

**NATIONAL COMMISSIONER OF THE**

**SOUTH AFRICAN POLICE SERVICE**

**Applicant**

and

**JR MOKOENA AND 92 OTHERS**

**First to ninety-third Respondents**

**PUBLIC SERVICE CO-ORDINATING**

**BARGAINING COUNCIL**

**Ninety-fourth Respondent**

**DR MOHAMED ALLI CHICKTAY**

**Ninety-fifth Respondent**

**Heard: 23 November 2012**

**Delivered: 18 July 2013**

**Summary: Review of award regarding the interpretation and application of Resolution 1 of 2007 – Resolution dealt with multi-term salary adjustments and, revised occupational specific salary structures, referred to as “OSD”- A clause in a collective agreement that an arbitrator is called upon to interpret has to be interpreted in the context of the collective agreement as a whole - award reviewed.**

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## JUDGMENT

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CELE J,

### Introduction

[1] The applicant seeks the review and setting aside of an arbitration award dated 11 April 2011 and rendered by the ninety-fifth respondent (the Arbitrator), which the applicant received on 20 May 2011. The application is brought in terms of section 158 (1) (g) of the Labour Relations Act,<sup>1</sup> (“the Act”). The review application was filed out of time and the applicant seeks condonation for such lateness. The first to further respondents opposed the review application but abide the decision of the Court in respect of the condonation application.

### Background Facts

[2] The second to further respondents (the employees) are all members employed in terms of the South African Police Act at the applicant in the capacity as legal advisors. The employees referred a dispute to the 94<sup>th</sup> respondent (hereafter referred to as the Council or PSCBC) regarding the interpretation and application of Resolution 1 of 2007 and Resolution 3 of 2008 to determine whether the two resolutions were applicable to them.

[3] Resolution 1 of 2007 (“*Resolution 1/2007*”) had been concluded as a collective agreement on 5 July 2007 by the trade unions represented in the Council and the State as employer. It is an agreement on salaries and other conditions of service for the financial years 2007/2008 to 2010/2011. As appears clearly from clause 1 of Resolution 1/2007, it dealt with a number of matters. This also appears from clauses 3 onwards, which dealt with “multi-term salary adjustment” and, importantly for purposes of this review application, “revised occupational specific salary structures”, referred to as

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<sup>1</sup> Act Number 66 of 1995.

“OSD”. The OSD is dealt with in clause 4 of Resolution 1/2007. Clause 1 articulates the objectives of Resolution 1/2007 and clause 1.2 thereof reads:

‘To introduce revised salary structures *per identified occupation* (My emphasis) 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.’

[4] Clause 4.1 deals with revised occupational specific salary structures and it then reads:

‘New salary scales will be negotiated and implemented *per identified occupation* (My Emphasis) to attract and retain professionals and other specialists over the duration of this agreement.’

[5] Prior to the introduction of OSD in the public service, there were general salary increases. For example, there would be a 6% salary increase across the board, applicable to all employees in the public service irrespective of their level or rank. Then the public service changed from the practice of general salary increases to incremental percentage salary increases with the aim of closing the wage gap between the top echelons of the public service and the lower echelons.

[6] The OSD was introduced as a new concept in the public service. Its key objective was to retain certain categories of employees through the introduction of a specific salary dispensation. In addition to general salary increases in the public service, OSD would introduce salary scales for specific occupations. The specific occupations are identified in clause 4 of Resolution 1/2007 and its sub-clauses. Resolution 1/2007 was concluded as a framework agreement. There appears to have been a need for the specific occupational sectors to which Resolution 1/2007 applied to conclude sector specific collective agreements in order to implement it, particularly in respect of OSD as can be gleaned from clause 4.14 of Resolution 1/2007. Resolution 1/2007 was then followed by certain sector specific collective agreements, namely:

1. Clause 4.14 of Resolution 1/2007 prescribes specific time frames for the implementation of OSD in the relevant sectors. For example, it provides that:
  - 1.1 the dispensation is to be implemented over the next three years commencing with effect from 1 July 2007; and in each of the instances in which it applies it specifies the date of implementation in respect of the relevant sector or affected occupation:
    - 1.1.1 clause 4.14.1 in respect of the health and social development sector;
    - 1.1.2 clause 4.14.2 in respect of the education sector; and
    - 1.1.3 clause 4.14.3 in respect of the general public service sector.
  - 1.2 Significantly, the SAPS and/or any of the occupational levels or ranks of its employees are not mentioned.
- 2 Clauses 4.15 to 4.17 of Resolution 1/2007 specify where negotiations are to be conducted within the relevant sectors, as well as when they are to be concluded. The clauses provide the following:
  - 4.15 The negotiations related to each of the above mentioned occupations and salary structures, the translation measures for the movement from the current salary structure to the new structure, shall be dealt with at the relevant sectoral bargaining council or at the PSCBC if it is a transverse occupation;
  - 4.16 All negotiations must be finalised 2 months prior to the implementation date referred to in paragraph 14.4 above. In the event that the negotiations process is not concluded, the matter will be referred to the PSCBC for finalisation within 7 days of the expiry of the 2 months prior to the date of implementation.

4.17 The revised salary structures for the occupations to be implemented with effect from 1 July 2007 shall be finalised in the relevant sectoral bargaining councils by no later than 31 July 2007. In the event that the negotiations process is not concluded by 31 July 2007, the matter shall be referred to the PSCBC for finalisation within 7 days of the expiry of 31 July 2007.'

[7] Resolutions 1 of 2008; 2 of 2008 and 3 of 2008 were similarly concluded by the parties' representatives at the Council on 7 February 2008; 13 March 2008 and 1 April 2008 respectively. Resolution 1/2008 was concluded in respect of the sector referred to as "qualified legal professionals". The employees who fell within that sector were state attorney, family advocate, state law advisor, legal administration officer, master, registrar, maintenance officer and estate controller. Resolution 2/2008 implemented the OSD for qualified legal professionals with effect from 1 July 2007 but it did not cover the individual respondents in this case. Resolution 2/2008 extended time frames agreed to in resolution 1/2007 for the implementation of OSD in the relevant sectors. Resolution 2/2008 extended time frames in respect of the legal profession within the justice cluster and social workers, which fall within the categories stipulated in clause 4.14 of Resolution 1/2007<sup>2</sup>

[8] Clause 4 of Resolution 2/2008 further states the following:

'4. The General Public Service Sector Bargaining Council and Public Health and Social Development Sectoral Bargaining Council (PHSDSBC) are in a process of finalising the revised salary structure for the identified occupations in general public and health and social development sectors'.

[9] Resolution 2/2008 did not specifically mention the South African Police Services (SAPS) and/or any of the occupational levels or ranks of its employees, including those occupied by the individual respondents.

[10] The purpose of Resolution 3/2008 was to regulate the implementation of the OSD for legally qualified categories of employees appointed in terms of the

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<sup>2</sup> See clause 2 and clause 3.

Public Service Act, 1994, who are not covered by Resolution 1/2008. It was accepted by the Arbitrator that Resolution 3/2008 did not cover any employees of the SAPS as they are not employed in terms of the Public Service Act. Neither did Resolution 1/2008 nor Resolution 2/2008 cover any employees of the SAPS.

- [11] In 2006 the SAPS introduced a special salary dispensation for its employees prior to the introduction of OSD in the public service. No similar dispensation had been introduced at the time in respect of employees in the public service appointed in terms of the Public Service Act. The OSD was therefore necessary in respect of public service employees generally. The then Minister of Public Service and Administration, Ms GJ Fraser-Moleketi (Minister Fraser-Moleketi), sent a letter dated 9 May 2008 to the then Minister of Safety and Security, Mr C Nqakula (Minister Nqakula), regarding the implementation of OSD for legally qualified employees. The letter states:

‘GPSSBC Resolution 1 of 2008 and PSCBC Resolution 3 of 2008 give effect to PSCBC Resolution 1 of 2007 and provide for the implementation of an Occupation Specific Dispensation (OSD) for legally qualified personnel in the Public Service with effect from 1 July 2007.

In terms of section 3(3) (c) of the Public Service Act, 1994, read with section 5(4), of the Public Service Act, 1994, I have determined the Occupational Specific Dispensation (OSD) for legally qualified employees, to be applicable to all legally qualified employees who are employed in terms of the Public Service Act, 1994, with retrospective effect from 1 July 2007. (Attached for ease of reference).

In terms of the authority vested in you, you are advised to make a similar determination for the implementation of the Occupation Specific Dispensation in the South African Police Services to cover employees appointed in terms of the South African Police Services Act, with retrospective effect from 1 July 2007.’

- [12] The then Minister of Safety and Security, Minister Mthethwa, approved the implementation of OSD for legally qualified employees below Senior Management Service (“SMS”) appointed in terms of the SAPS Act and who

were performing legal administration duties at the Division: Legal Services. He made the approval in November 2008. Minister Mthethwa withdrew this aforesaid approval in writing in June 2009 prior to the implementation of his earlier decision.

[13] The decision to withdraw the earlier decision to implement OSD in the SAPS is contained in an Information Note that sets out in full the reasons for the withdrawal, specifically in paragraphs 2.10.1, 2.10.2, 2.10.3, 2.10.4, 2.10.8, 2.10.9, 3.2, 3.3, 3.4 and 3.5 that refer to the Broad Banding Salary Structure (“*BBSS*”) for the SAPS. The *BBSS* is the new salary structure introduced by the SAPS in 2006 and which has been described above. The withdrawal by Minister Mthethwa has been the subject matter of a separate application for judicial review in which the SAPS was not cited as a respondent and is bringing an application to intervene as a respondent to oppose the review application.

[14] The respondents referred a dispute to the Council for conciliation and described it at paragraph 3 as “interpretation /application” of PSCBC Resolution 3 of 2008. Under “outcome required” it was indicated that the applicant be ordered to implement the OSD in compliance with Resolution 3/2008 and, added in handwritten manuscript, “Resolution 1 of 2007”. When the dispute could not be resolved, they referred it to arbitration. The Arbitrator framed the issue for determination as:

‘The primary issue in dispute is whether Resolution 1 of 2007 and Resolution 3 of 2008 are applicable to the applicants’.

[15] He found that Resolution 3/2008 was not applicable to the respondents. This finding is not being challenged in this application. He further found that 1 of 2007 was applicable to the respondents and in his analysis he stated the reasons thereof in the award as:

‘Clause 2 of the resolution states specifically that it binds all state employees who fall within the registered scope of the council. While clause 14 specifically mentions Health and Social Development, the Education Sector and the General Public Service Sector, it does not expressly exclude the SAPS. Thus

on a literal interpretation the SAPS are not expressly excluded. The reference to specific sectors merely relates to the implementation within those sectors. If the SAPS did not fall within the ambit of the resolution there would be no need for the Minister of Public Service and Administration to send a letter to the Minister of Safety and Security to call on him to implement the provision. There would also be no need for the department to decide to implement the provision and then revoke it. Also the memorandum sent to the Minister of Safety and Security by the Divisional Commissioner of Career Management states specifically that resolution 1 of 2007 calls for the implementation of an OSD for legally qualified personnel in the Public Service and did not exclude the SAPS.

Thus resolution 1 of 2007 applies to the applicants. With regard to the implementation of the resolution my jurisdiction lies primarily with the interpretation of the specific collective agreement. In terms of clause 14 (1) of the Resolution 1 of 2007 the provisions must be implemented through negotiations. The minister's withdrawal of its determination falls outside the jurisdiction of the PSCBC.'

#### Grounds for review

- [16] The first submission was that, having made the finding that Resolution 3/2008 did not apply to the respondents and was therefore not binding upon the SAPS, the Arbitrator ought to have dismissed the dispute. That was because once Resolution 3/2008 was found not to apply, the relief sought by the respondents could not be granted. That was so because there was no other sector specific collective agreement that could be relied upon to implement Resolution 1/2007, where, on its terms, the time frames for negotiating OSD had lapsed. The failure to dismiss the dispute was so unreasonable that no other decision maker could have made it. Instead, the Arbitrator went further to make other determinations, which, it is submitted, were unreasonable, and exceeded his powers. The arbitration award, so the submission went, should be reviewed and set aside for this reason alone.
- [17] The second submission was that the direction to the parties to negotiate an OSD exceeds the Arbitrator's powers and was so unreasonable that no reasonable Arbitrator could have made it, for the following reasons:

1. The direction did not fall within the mandate of the Arbitrator.
2. The Arbitrator, as expressly stated in the arbitration award, was called upon to determine only whether Resolutions 1/2007 and 3/2008 applied. This required him to interpret and apply the provisions of the two resolutions. The Arbitrator is empowered by section 24 of the LRA to resolve a dispute concerning the interpretation and application of a collective agreement. He is not entitled to direct negotiations as he purported to do.
3. Contrary to his mandate, and in excess of his powers, the Arbitrator directed the parties to negotiate an OSD, which direction has the effect of extending the time frames for the negotiation of agreements to implement OSD in the relevant sectoral bargaining councils as provided for in clause 4.14 of Resolution 1/2007, as extended by Resolution 2/2008, in circumstances where he made no finding, and none could be made, that Resolution 2/2008 also applied to the individual respondents and bound the SAPS.
4. Resolution 2/2008 did not apply to the SAPS but only to the sectors and occupational categories specifically stated in clause 4 thereof.
5. The Arbitrator effectively purported to make a new agreement for the parties that he incorrectly found to be bound by Resolution 1/2007 – in that he effectively extended the time frames in Resolution 1/2007 in a manner not envisaged in Resolution 1/2007 and without powers to fashion a new collective agreement for the parties. In doing so the Arbitrator failed to appreciate the limits of his powers and acted unreasonably. This cannot be justified by any claim to give appropriate relief, as the individual respondents appear to contend.<sup>3</sup> It is not appropriate relief to give directions that exceed the Arbitrator's powers and mandate.
6. If the Arbitrator did not effectively extend the relevant time frames, then he gave an award that cannot be implemented because the time

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<sup>3</sup> Heads of Argument para 7.

frames for negotiating an OSD in terms of the framework agreement have lapsed. He could not compel the SAPS to agree new time frames and negotiated an OSD with the individual respondents or their trade unions. That is a matter for collective agreement.

[18] Further reasons why the applicant said that the arbitration award should be reviewed and set aside relate to the Arbitrator's reasoning as to why Resolution 1/2007 was applicable and include the contentions that:

18.1 A clause in a collective agreement that an arbitrator is called upon to interpret has to be interpreted in the context of the collective agreement as a whole, whether or not the ordinary principles for interpreting contracts under the common law are applied. It would thus be inappropriate to interpret a clause in a collective agreement in isolation without proper regard to the other relevant provisions of the collective agreement, which, together with the Act, provide a proper context in which the clause is to be interpreted.

18.2 An interpretation that ignores the context provided by the rest of the document under consideration is not permissible in respect both of ordinary agreements under the common law, and in respect of statutes.

18.3 There is no scope for what the individual respondents described as an "*adventurous*" approach to the interpretation of collective agreements. Such an approach, imprecise as it is, would lead to the Court, as did the Arbitrator impermissibly, making a new agreement for the parties. Such is not the role of a Court or an arbitrator under the LRA.

18.4 What is required is a practical approach, constrained by the ordinary rules of interpreting a document, which do not ignore context and give effect to the ordinary meaning of words used.

#### Grounds in opposition to the review application

[19] It was the contention of the individual respondents that the decision of the Arbitrator was not reviewable, inter alia, on the following basis:

- 19.1 Clause 2 of Resolution 1 of 2007 binds the employer (the State and all employees who are employed by the State and who fall within the rigid scope of the PSCBC).
- 19.2 It is common because that the individual respondents were employed by the State and that the scope of their employment fell within the scope of the PSCBC.
- 19.3 Clauses 4.13 to 4.18 do not exclude the individual respondents from Resolution 1 of 2007.
- 19.4 It was the intention of the parties concerned that the individual respondents would be covered by the provision of Resolution 1 of 2007 as appears in correspondence between the relevant parties.
- 19.5 In the information note to the Minister of Safety and Security he approved the implementation of the OSD for legally qualified employees below the SMS who are performing legal administrative duties at the division: Legal Services with effect from 1 July 2007.
- [20] Against a contention that the Arbitrator exceeded his powers with the direction that the parties were to negotiate the OSD the submission was that courts have now indicated that arbitrators interpreting and applying collective agreements may adopt a slightly more adventurous approach on the basis that purposive interpretation is required by the Act. It was submitted that the indication from the arbitrator that parties were to negotiate the OSD constituted such a purposive interpretation.

### Evaluation

- [21] The applicant made out a case for the granting of condonation for the late filing of the review application. Lateness was limited to a period of about one week. This matter has some importance to a number of employees who await finality in the matter.
- [22] Section 145 of the Act forms the basis for this application and to the extent relevant here it states that:

‘Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award-.

- (2) A defect referred to in subsection (1) means –
- (a) that the commissioner-
    - (i) committed misconduct in relation to the duties of the commissioner as an arbitrator;
    - (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
    - (iii) exceeded the commissioner’s powers; or
  - (b) that an award has been improperly obtained.’

[23] In *Southern Sun Hotel Interests (Pty) Ltd v CCMA and Others*,<sup>4</sup> the Court held *inter alia* that:

‘...section 145 requires that the outcome of CCMA arbitration proceedings (as represented by the commissioner’s decision) must fall within a band of reasonableness, but this does not preclude this Court from scrutinising the process in terms of which the decision was made. If a commissioner fails to take material evidence into account, or has regard to evidence that is irrelevant, or the commissioner commits some other misconduct or a gross irregularity during the proceedings under review and a party is likely to be prejudiced as a consequence, the commissioner’s decision is liable to be set aside regardless of the result of the proceedings or whether on the basis of the record of the proceedings, that result is nonetheless capable of justification’.<sup>5</sup>

[24] In the case of *Komape v Spoorinet (Pty) Ltd and Others*,<sup>6</sup> the Court held that:

‘...The question for consideration at the review level is not whether the decision of the commissioner is correct but rather whether the inference

<sup>4</sup> [2009] 11 BLLR 1128 (LC)

<sup>5</sup> *Supra* at para 17

<sup>6</sup> (2008) 29 ILJ 2967 (LC) at para 27.

drawn from the facts before the commissioner is one which a reasonable decision maker could not have drawn'

- [25] Court has now to scrutinise the process in terms of which the decision of the Arbitrator was made in this case to determine whether the decision he reached is one that a reasonable decision maker could have reached. It will not be for this Court to establish whether the decision of the arbitrator is correct but rather whether the inference drawn from the facts before him is one which a reasonable decision maker could not have drawn.
- [26] Part of the objective of Resolution 1/2007 is to introduce revised salary structures *per identified occupation* (My emphasis) 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<sup>7</sup>. When dealing with the revised occupational specific salary structures clause 4.1 states that new salary scales will be negotiated and implemented *per identified occupation* (My Emphasis) to attract and retain professionals and other specialists over the duration of this agreement. Resolution 1/2007 is replete with the description "*per identified occupational category*". Clause 4.14 deals with the implementation of the revised salary structures and it states that:

'The revised salary structure per occupation shall be implemented as follows:

4.14.1 Health and Social Development Sector...

4.14.2 Education Sector...

4.14.3 General Public Service sector...'

- [27] Members of the SAPS are not mentioned in any specific provision. Under the General Public Service sector clause 4.14.3.2 mentions the legal profession within the justice cluster. The "justice cluster" appears to be a limited categorization referring to employees of the Department of Justice and Constitutional Development. Had it been used in a looser wider sense, it

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<sup>7</sup> See clause 1.2.

would have included employees in the Department of Correctional Services who are specifically mentioned in clause 4.14.3.4.

- [28] Resolution 1/2007 was couched in very specific terms and the categories of employees who are to be affected by it appear to have been specifically referred to. To suggest that any categories of employees who are not specified have not been excluded does not find support from the resolution itself. Such an approach could possibly be justified by some extrinsic evidence. No such evidence was led in this arbitration hearing.
- [29] In my view, the Arbitrator's finding that, clause 14 specifically mentions Health and Social Development, the Education Sector and the General Public Service Sector, it does not expressly exclude the SAPS, and that on a literal interpretation the SAPS are not expressly excluded, is not premised on any reasonable grounds. Clauses 3 onwards deal with "multi-term salary adjustment" and, importantly "revised occupational specific salary structures", referred to as "OSD". As these clauses are couched in specific terms, they leave no room for the inclusion of a category of employees that is not specifically mentioned.
- [30] Further, the contents of the letter from the Minister of Public Service and Administration to the Minister of Safety and Security are misconstrued by the Arbitrator. The Minister of Safety and Security was being asked to exercise his discretion in terms of the authority vested in him to make a similar determination for the implementation of the OSD in the South African Police Services to cover employees appointed in terms of the South African Police Services Act, with retrospective effect from 1 July 2007.
- [31] Ms Fraser-Moleketi indicated in her letter that she had determined the OSD for legally qualified employees, to be applicable to all legally qualified employees who were employed in terms of the Public Service Act, and not in terms of the South African Police Act. Again, the Arbitrator misguided himself on the utilisation of the evidential material available before him with the result that he reached a conclusion that a reasonable decision maker could not have reached.

[32] The findings I have made, make it unnecessary that each and every other ground of review be traversed. This award cannot stand. The applicant took the position that in the event the application is granted, the matter be remitted for a de novo arbitration hearing, due to paucity of evidence in the record. The respondents asked that the matter be finalised by this Court. By and large the facts in this matter were common cause. In my view, there is no need for a remittal of the matter.

[33] Accordingly, the following order will issue:

33.1 Condonation for the late filing of the review application is granted.

33.2 The arbitration award of the ninety fifth respondent in this matter is reviewed and set aside.

33.3 In its place a finding is substituted, that Resolution 1 of 2007 in this matter did not bind the first to ninety third respondents.

33.4 No costs order is made.

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Cele J,

Judge of the Labour Court of South Africa.

APPEARANCES:

For the applicant : N M Maenetjie

Instructed by : The State Attorney Johannesburg.

For the respondents : P H Kirstein

Instructed by: : van der Merwe Du Toit Inc.

LABOUR COURT