REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable

D45/2013

In the matter between:

THE MINISTER FOR THE DEPARTMENT OF CORRECTIONAL SERVICES **First Applicant**

THE MINISTER FOR THE DEPARTMENT OF PUBLIC SERVICE & ADMINISTRATION **Second Applicant**

and

POPCRU obo S K LUKHELE & 14 OTHERS **First to Sixteenth Respondents**

A. DORASAMY NO **Seventeenth Respondent**

PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL **Eighteenth Respondent**

Heard: 5 January 2015

Delivered: 22 January 2015

Summary: Collective Agreement-Interpretation and application-Dispute concerning-Agreement providing for occupation specific dispensation for correctional service officers and rate of salary increase-Not prerogative of employer to unilaterally determine meaning of which rate of increase. Arbitrator's interpreting collective agreement in favour of employee leading to an absurdity

Collective Agreement- Interpretation and Application-No reason why the employee's interpretation should be preferred despite employer's unilateral determination being rejected.

Collective Agreement-Interpretation and Application-Whereas arbitrator to consider aim, purpose and terms of collective agreement and the objects of the LRA the words contained in the collective agreement must be given their plain, literal and ordinary meaning unless an absurdity would result-Interpretation that is fair to the parties must be adopted.

JUDGMENT

PRIOR AJ:

Introduction:

[1] This matter concerns an application in terms of section 158(1) (g) read with section 145 (2) (a) (ii) of the Labour Relations Act [1] for the review of an award handed down by the seventeenth respondent ("the arbitrator") on the 3rd December 2012 wherein the arbitrator ordered that the salaries of the second to sixteenth respondents who were on salary levels 6 and 8 be increased by 12% and 11%, retrospective to the 1st July 2009.

[2] On 7th November 2014, Cele J granted an order in chambers joining the Minister for the Department of Public Service and Administration as second applicant instead of being the nineteenth respondent.

[3] Whereas the applicants in their notice of motion sought an order setting aside the award and replacing it with an order to the effect that the salaries of the second to sixteenth respondents, who are represented by the first respondent, were correctly adjusted in accordance with PSCBC Resolution 5 of 2009, in their heads of argument the applicants added an additional arrow to their quiver seeking that in the alternative the matter be referred back to the bargaining council ("the eighteenth respondent") for an arbitration to be conducted by an arbitrator other than the seventeenth respondent.

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[1] *Act 66 of 1995 (the LRA)*

[4] The arbitration conducted before the arbitrator in this matter was one contemplated in terms of section 24(2) of the LRA where there is a dispute between competing parties about the interpretation or application of a collective agreement.

The Material Facts*:*

[5] The material facts are by and large a matter of common cause. The dispute between the parties is related in general to the application and interpretation of specific collective agreements concluded by the parties at the bargaining council. The specific collective agreements that were considered in the arbitration were an Occupational Specific Dispensation ("OSD") for Correctional Officials contained in GPSSBC Resolution 2 of 2009 [2] and the provision of a general salary improvement contained in PSCBC Resolution 5 of 2009 [3].

[6] Prior to 1st July 2009, the second to sixteenth respondents were employed by the first applicant in terms of the Correctional Services Act [4] either as correctional officers or senior correctional officers at the Waterval Management Area a centre based facility. These respondents were remunerated under the "old system" at salary levels 6 and 8 respectively.

[7] In keeping with the State's objectives of addressing the attraction and retention of employees within certain competencies and skills and flowing from the framework created by PSBC Resolution 1 of 2007, on 24th June 2009 the Department of Correctional Services entered into a collective agreement with the first respondent and other trade unions which is recorded in Resolution 2 of 2009 and which took effect on 1 July 2009.

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[2]Described as an "Agreement on the implementation of an Occupation Specific Dispensation (OSD) for Correctional Services Officials" ("Resolution 2 of 2009")

[3]Described as an "Agreement on improvement of salaries for the financial year 2009/2010." ("Resolution 5 of 2009")

[4]Section 3 (4) of the Correctional Services Act No. 111 of 1998

[8] In simple terms, Resolution 2 of 2009, provided *inter alia* for the introduction of a unique salary structure for Centre Based and Non-Centre Based Correctional Officials and the translation of the aforementioned officials from the old salary structure of levels 1 to 12 to the new OSD salary bands.

[9] On 7th September 2009, the State (including the first and second applicants) concluded a broader collective agreement with the second respondent and other trade unions representing State employees in general dealing with salary adjustments in the public sector which is recorded in Resolution 5 of 2009 and which retrospectively also took effect on 1st July 2009.

[10] It is common cause between the parties that the first and/or second applicants correctly applied Resolution 2 of 2009 which resulted in the translation of the second to twelfth respondents' and the thirteenth to sixteenth respondents' salaries from the previous levels 6 and 8, under the old regime, to the salary scales of CB 1 to CB3 and CB4 under the OSD.

[11] Up to this point the parties were *ad idem*. It is in connection with the interpretation and application of Resolution 5 of 2009 that the parties part ways.

The applicants' case at the arbitration:

[12] The applicants explain that by having reference to Clause 3.1.2 of Resolution 5 of 2009 the applicants, in order to apply the correct salary increase adjustment were obliged to take into account the revised OSD salary structures, equivalent to salary levels 1 to 12+ as per table 1 of the Resolution.

[13] The applicants state that as a consequence of Resolution 2 of 2009 the salaries of the second to sixteenth respondents were increased and that the said increased salaries when subjected to a benchmarking exercise in order to determine the increase to be applied in terms of Resolution 5 of 2009, the resultant increased salaries, fell within salary levels 7 and 9 and no longer under salary scales 6 and 8.

[14] Having reference to Table 1 of Resolution 5 of 2009 and in terms of the second respondent's circular 3 of 2009, the first and or second applicants applied the salary adjustment equivalent to salary levels 7 and 9 which yielded increases of

11% and 10.5% respectively.

[15] The applicants further contended that to apply any other interpretation to Clause 3.1.2 of Resolution 5 of 2009 would lead to an absurdity.

[16] Lastly the applicants contend that the second applicant in terms of the Public Service Act 3(1) (c) is responsible, amongst others for establishing the norms and standards relating to the conditions of service and other employment practices in the public sector and that to implement the increases argued by the second to sixteenth respondents, the second applicant would be obliged to implement the said increases in the entire public service.

The second to sixteenth respondent's ("the respondents") case at the arbitration:

[17] The respondents admitted that the first applicant correctly applied resolution 2 of 2009 and adjusted the respondents' salary scales from levels 6 and 8 respectively to CB1 to CB3 and CB4 respectively. As at 1st July 2009 all the respondents' salaries were increased and improved to a higher rate.

[18] The respondents disputed the applicants' interpretation of Resolution 5 of 2009 and maintained that in order to apply the correct salary adjustment the respondents' old salary levels of 6 and 8 must be regarded and not the adjusted salary levels 7 and 9.

[19] The respondents contend that their salary levels ought to be determined again and re-categorized in terms of the service levels set out in Resolution 2 of 2009.

[20] The respondents continued and argued that the sliding scale contained in Resolution 5 of 2009 would be applied to the new salary level and the appropriate increase applied giving the respondents increases of between 11% and 12% instead of the increases of 10.5% and 11% applied by the applicants.

The award:

21. The arbitrator in this matter did not hear oral evidence on the issues in dispute. The parties agreed that the arbitrator would be provided with the relevant collective agreements, circulars and resolutions and that the parties would provide written submissions to the arbitrator for his consideration.

[22] Whereas the applicants in this matter initially raised the issue of the eighteenth respondent's jurisdiction to determine the dispute and despite the arbitrator finding that the bargaining council did have jurisdiction, the applicants have decided not to pursue the issue of jurisdiction in this review. In light of the decision in *PSA of SA obo De Bruyn v Minister of Safety and Security and Another* [5] I submit that this decision was a wise one.

[23] The arbitrator's award consists of thirty three pages much of which is devoted to the recording of the parties' submissions. The analysis of the "evidence and argument'' occupied three pages where most of those pages were taken up by the recital of Resolution 5 of 2009.

[24] At paragraph 157 of the award the arbitrator finds that:

> 'The respondent's arguments around the Minister's powers to issue directives and the effect of such and the regulatory effect of such are adequately directed in the above reference. The powers do not extend to interfere with the collective agreement or Resolutions struck between the parties to the negotiation process.'

[25] It is assumed that the arbitrator was dealing in essence with the second applicant's contention that section 3(1)(c) of the Public Service Act entitled the Minister to issue directives and circulars giving direction as to matters involving conditions of service contained in a collective agreement.

[26] At paragraph 158 of the award the arbitrator finds that:

> 'In the present case the applicant according to the table agreed upon and repeated below is clear at(sic) the implementation thereof where they stand according to the agreement and any deviation thereof would not be in line with the Resolution. …..The applicant's (sic) were either on salary scale 6 or 8 and their respective percentage increase is clearly directed. In the interpretation of

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[5] *(2012) 33 ILJ 1822 (LAC) at para 31 to 34. Also see PSA obo Liebenberg v Department of Defence and Others (2013) 34 ILJ 1769 (LC) at para 34 to 37.*

> the table cognizance must be taken of the salary level that they were on at the time of the implementation. (my emphasis) The fact that the employer had advanced their level may not be correct or in line with the agreement. If it was, then the employer had the prerogative of placing the issue in dispute and seek clarification. This was not done and if the employer seeks to implement the resolution in the manner it desires it must seek the consent of the employees and in this case it does not.'

[27] At paragraph 160 the arbitrator finds:

> 'I arrive at the conclusion that the Resolution clearly directs on how and at what percentage must (sic) the salary increases of the employees must be granted. I am convinced by the applicant that the respondent incorrectly interpreted the Resolution in awarding the percentage at the incorrect salary level ...'

[28] The arbitrator obviously favoured the second to sixteenth respondents' interpretation of the Resolution 5 of 2009 and he ordered that the applicants pay those respondents on the level 6 salary scale a 12 % increase and those on level 8 salary scale a 11% increase with the adjustments to be made retrospective to 1 July 2009.

The applicants' case in the review:

[29] The applicants complain in general that the arbitrator committed a gross irregularity in the conduct of the arbitration proceedings, failed to properly apply his mind to the issue in dispute and that his award is not one that a reasonable arbitrator would make.

[30] In particular the applicants expanded their complaint and aver that the arbitrator failed to properly appreciate the nature of the dispute and the relevance of the evidence and that his analysis of the evidence constitutes a cursory and superficial assessment of the matter which resulted in an irrational award.

[31] The applicants aver further that the arbitrator failed to apply his mind to the import of clause 3.1.2 of Resolution 5 of 2009 which made it clear that the sliding scale of increases was to be applied to the, "revised Occupation Specific Salary structures" and that the arbitrator's acceptance that the employees' salaries

remained at the equivalent of levels 6 and 8 notwithstanding the transition to the OSD bands was wrong.

[32] The applicants argue that a proper interpretation of clause 3.1.2 would yield that in order to apply the correct percentage increase the revised salary as adjusted by the OSD had to be taken into account which elevated the respondents' salaries into higher salary bands for the purposes of the salary increases and hence a lower percentage increase.

[33] Lastly the applicants argue that by coming to the conclusion that despite the OSD increase the respondents remained at salary levels 6 and 8 clearly showed that the arbitrator simply accepted the respondents' interpretation of the Resolution and failed to apply his mind and that this constituted a gross irregularity. In their replying affidavit the applicants extend this complaint to one in which they allege that the simply acceptance constituted an error in law.

<u>The second to sixteenth respondents' case in the review:</u>

[34] In contradistinction to the applicants' view the respondents contend that the arbitrator's acceptance of their interpretation of Resolution 5 of 2009 was correct, that the arbitrator did not commit any gross irregularity and that whilst briefly the arbitrator's reasoning in the award was not superficial and that therefore there exists no grounds upon which this Court should interfere with the award. It is significant to note that the respondents do not mention as to whether the award is one a reasonable arbitrator would make, I accept in their favour, that given their opposition to the application for review and the tenet of their answering affidavit, that this is implied.

<u>The approach when dealing with arbitrations in terms of section 24 of the Act:</u>

[35] It is submitted that the clear purpose of section 24 is to resolve disputes where a party is in breach of the collective agreement by failing to apply its terms either correctly or at all [6].

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[6] *PSA obo Liebenberg at para 2.*

[36] In *SA Motor Industry Employers Association and Another v NUMSA & Others* [7] the court held:

> 'The scheme of s 24 is to compel the parties to a collective agreement to resolve a dispute about the interpretation or application of a collective agreement, and if that fails, by arbitration, either in terms of an agreed procedure or, in the absence of an agreed procedure, by the commission...'

[37] In *Western Cape Department of Health v Van Wyk and Others* [8] the LAC held:

> '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...

[38] The LAC went on to hold:

> 'The primary objects of the Act are better served by an approach which is practical to the interpretation of such agreements, namely to promote the effective, fair and speedy resolution of labour disputes. In addition, it is expected of the arbitrator to adopt an interpretation and application that is fair to the parties.'

[39] Whereas I concur with the above purposive approach and its application to collective agreements I am also mindful of the fact that one must have regard to the tried and tested rules of interpretation when interpreting a collective agreement. In the absence of ambiguity the words contained in the collective agreement must be given their plain, ordinary and literal meaning. In addition thereto regard must be had to the application of the parol evidence rule if relevant.

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[7](1997) 18 *ILJ* 1301 (LAC) at p.1304I

[8](2014) 35 *ILJ* 3078 (LAC) at para 22

[40] In *Denel (Pty) Limited v Gerber* [9] Zondo JP as he then was opined:

> 'The rule which is generally referred to as the parol evidence rule is to the effect that "when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents….'

[41] In *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* [10], the Supreme Court of Appeal directed:

> 'First the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning. Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses...
>
> Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent…Fourth to the extent that evidence may be admissible to contextualise the document (since 'context is everything') to establish its factual matrix or purpose or for purposes of identification, 'one must use it as conservatively as possible'. The time has arrived for us to accept that there is no merit in trying to distinguish between 'background circumstances' and 'surrounding circumstances'. The distinction is artificial and in addition, both terms are vague and confusing. Consequently, everything tends to be admitted. The terms 'context' or 'factual matrix' ought to suffice'.

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[9] (2005) 26 *ILJ* 1256 at para 9

[10] 2009 (4) SA 399 (SCA) at para 39

[42] In *North East Finance (Pty) Limited v Standard Bank of South Africa Limited* [11] the SCA held:

> 'I do not propose to recite the principles of interpretation comprehensively. They are well settled. The court asked to construe a contract must ascertain what the parties intended their contract to mean. That requires a consideration of the words used by them and the contract as a whole, and, whether or not there is any possible ambiguity in their meaning, the court must consider the factual matrix (or context) in which the contract was concluded (see KPMG Chartered Accountants (SA) v Securefin Ltd).In addition, a contract must be interpreted so as to give it a commercially sensible meaning...'

Analysis and Evaluation:

[43] It is now trite law that the test for a review of an arbitration award is whether the award is one a reasonable arbitrator would not make [12]. The Constitutional Court clearly held that an arbitrator's conclusions must fall within a range of decisions that a reasonable arbitrator would make [13].

[44] It is also accepted that whereas the above test serves as a general benchmark in review matters the specific grounds set out in section 145 (2) of the LRA are not to be excluded [14].

[45] It is submitted however, that caution must be had in that the SCA opined that for it to be held that a defect in the conduct of the proceedings to be a gross irregularity the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result [15].

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[11] 2013 (5) SA 1 (SCA) at para 24 to 25.

[12] *Sidumo and Another vs Rustenburg Platinum Mines Ltd* and Others 2008 (2) SA 24 CC.

[13] *NUMSA vs CCMA* (2013) 34 *ILJ* 2913 (LC) at para 41.

[14] *Andre Herholdt vs Nedbank Limited* and Others (2013) 34 *ILJ* 2795 (SCA).

[15] *Herholdt supra* at para 25

[46] In particular when dealing with awards emanating from a section 24 arbitration and that whilst the reasonableness test is still applied 'the correct question to be answered is not whether the award in issue was correct but whether the arbitrator acted fairly and considered and applied his mind to the issues before him [16].

[47] Whereas it is Resolution 5 of 2009 that has occupied much of the parties' attention it is necessary to traverse the relevant portions of Resolution 2 of 2009 that may assist in determining this matter. This document serves to address and assist the aspect of the context of Resolution 5 of 2009.

[48] Clause 1 of the Resolution 2 of 2009 provides that this agreement gives effect to Resolution 1 of 2007 providing OSD for Correctional Officers.

[49] Relevant portions of Clause 3.1 of the said Resolution provides *inter alia*:

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

[50] Clause 6.1 of the said Resolution under the heading of Translation Measures provides:

> '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) <u>Unique Remuneration Structure</u>
>
> The introduction of a unique implementation structure, with 3% increments between notches.

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[16] *SA Municipal Workers Union v SA Local Government Bargaining Council and Others (2012) 33 ILJ 353 (LAC). See too NUMSA v CCMA and Others op cit at para 42.*

(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.'

[51] A table is then provided which links the OSD Band with the Occupational Bands. For the purposes of this judgment the relevant portions relate to:

NO	**WORK STREAM**	**OSD BAND**	**OCCUPATIONAL GROUPS INCLUDED**
	A	B	C
1			
2	Security Stream (Centre Based)	CB 1	• Security Officer Grade III, II and I
		CB 2	• Specialised Security Officer Grade II and I
3	Corrections Stream (Centre Based)	CB1	• Case Officers Grade III, II and I • Social Re-integration Officers Grade III, II and I
		CB2	• Specialised Case Officers Grade II and 1 • Specialised Re-integration Officers Grade II and I
		CB3	• Case Management Supervisors Grade II and I • Senior Re-integration Officer Grade II and I
4	Management of Correctional	CB4	• Security Manager • Re-integration Manager

	Centres (Centre Based)		• Unit Manager • Head of Correctional Services (Small Centre) • Head of Community Corrections (Small)

[52] Clause 6.1.1 (3) provides:

> 'Centre Based Correctional Officials shall translate to the salary scales in accordance with Annexure B1. (my emphasis)

[53] Clause 7.2 of the Resolution provides:

> 'Correctional officials shall translate to the appropriate salary scales in accordance with the posts that they currently occupy.'

[54] Clause 7.3 of the Resolution provides:

> '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'

[55] I refer only to Annexure A1 as it is common cause that the respondents were all centre based correctional officials. This annexure is a complex diagram of figures and depictions showing the salary scales, basic notches and OSD Band allocations in graphic form.

[56] Annexure B1 is the translation key which shows, for the purposes of this matter, the translation measures from the salary scales under the old system, 1 to 12 to the OSD bands CB1 to CB4.

[57] It is common cause that the applicants applied the translation provisions which related to respondents who were at salary levels 6 and 8 to the correct OSD band and allocated the correct remuneration which appear in Annexure B1. [17]

[58] At this juncture it must be accepted that in giving effect to the purpose and objectives of the OSD and the plain, ordinary and literal meaning of the clauses traversed above that the respondents were translated to a unique remuneration dispensation that saw increases in their annual remuneration of between 15% and 19%. It is clear therefore that only the salaries and not the grades of the respondents were affected.

[59] Whereas Resolution 2 of 2009 reflected a modicum of good draftsmanship the same cannot be said of Resolution 5 of 2009. Despite my view that the actual wording in Clause 3.1.2 is unambiguous there is to my mind a *lacuna* with regard to the provision of a practical example as to how the salary increases would be applied in relation to salary increases affected by the OSD translation scales.

[60] It appears clear from Clause 3.1.2 however, that the parties, despite the fact that the collective agreement would have general application to all affected State employees, were aware of the OSD processes that had preceded the conclusion of this agreement and which had yielded not only Resolution 2 of 2009 affecting Correctional Services Officers but for example also an OSD that affected employees in the Public Heath Care Sector and that they also intended to deal with salary bands or levels which deviated from the old salary levels of 1 to 12+.

[61] Despite the wording contained in Clause 3.1.2 of this Resolution that the sliding scale, 'shall be implemented for salary bands, (my emphasis) taking into account the revised Occupation Specific Salaries structures, equivalent to salary levels 1 to 12+ as per the table below,' there is no provision relating to how this would be applied in practice.(my emphasis). It is surprising that the parties to this collective

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[17] *pages 153 to 155 of the Record*

agreement, who are no strangers to collective bargaining and to the plethora of cases adjudicated before various bargaining councils and the Labour Court on these types of dispute did not seek to explain by way of a practical example as to how the increases would apply to OSD salary structures.

[62] It must be accepted nevertheless that once the correct salary scale is determined then the correlating percentage as appears in the table to Resolution 5 of 2009 is easy to apply. It is establishing what the appropriate salary scale is that presents the thorny issue.

[63] I am inclined to agree with the arbitrator that the Ministerial Circular 3 of 2009 (which sought to apply the increases to the salary scales as the Minister deemed fit), should not have bearing on the interpretation of Resolution 5 of 2009. By applying the parol evidence rule as traversed above the circular falls to be excluded. My view is bolstered, albeit for different reasons, by the LAC judgment In the matter of *Western Cape Department of Health* [18] where it was held:

> 'It is common cause that the process adopted by the DG is a process undertaken outside the bargaining process and was not sanctioned by the OSD collective agreement. Parties that concluded the collective agreement with the employer party at national level were not part of this process. It would be incorrect and unfair, in my view to hold that the PSA gives the appellant, through its DG, a prerogative to impose its understanding of the bargained collective agreement on the other parties thereto, without specific authority for such prerogative in the collective agreement...'

[64] Once one excludes the Ministerial Circular one is left with the "bare bones " of Resolution 5 of 2009 and Resolution 2 of 2009 which document in my view must be used to assist in the proper interpretation as to what salary scale is to be considered for the purposes of the increase.

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[18](2014) 35 *ILJ* 3078 (LAC) at para 20

[65] It is interesting to note that in Clause 3.1.2 of Resolution 5 the words "salary bands" are used. These words are not used at all in Resolution 2 of 2009. The words "salary scale" and "notches" are used but the words "OSD band" are used. Is salary band the same as salary scale?

[66] As poor as the draftsmanship of clause 3.1.2 is, one cannot escape the fact that this clause is not in itself ambiguous. This being so in interpreting this clause one must give effect to the plain, literal and ordinary meaning of the words [19], '...for salary bands, taking into account the revised Occupational Specific Salary structures equivalent to salary levels 1 to 12+'.

[67] The on line Oxford Dictionary [20] defines the words "taking into account" as "considering something along with other factors before making a decision." In my view a plain and ordinary interpretation of these words connotes an inclusive meaning rather than an exclusive one and that is that the increased OSD salaries had to be considered when applying the percentage increase.

[68] The arbitrator after correctly excluding the Ministerial Circular appears to have lost his way in dealing with the words,' *for salary bands, taking into account the revised Occupational Specific Salary structures equivalent to salary levels 1 to 12+'*. In my view the award shows that he simply ignored them. Nowhere in his award does he either deal with these words or their impact and nor does he give an indication as to why he has chosen not to give effect to them in reaching his decision.

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19 *North East Finance (Pty) Limited v Standard Bank of South Africa Limited* 2013 (5) SA 1 (SCA) at para 24 to 25

[20] *Oxford Dictionary on line www.oxforddictionaries.com.*

[69] In addition given the material before him the arbitrator fails to provide a factual basis for the reasons he accepted the respondents' interpretation. He simply makes bald assertions such as:

> ' 69.1 The applicant's (sic) were either on salary scale 6 or 8 and their respective percentage increase is clearly directed. In the interpretation of the table cognizance must be taken of the salary level that they were on at the time of the implementation ...'
>
> 69.2 I arrive at the conclusion that the Resolution clearly directs on how and at what percentage must (sic) the salary increases of the employees must be granted. I am convinced by the applicant that the respondent incorrectly interpreted the Resolution in awarding the percentage at the incorrect salary level...'

[70] Given that it was common cause that the respondents had enjoyed rather substantial increases in their salaries due to the OSD translation, the clear purpose of Clause 3.1 was to implement a general salary adjustment for the period 2009/2010.

[71] If one has regard to Annexure "B1" of Resolution 2 of 2009 one cannot maintain, as the arbitrator did, that for the purposes of applying the increase after the translation to the OSD bands (the table at para 6 of Resolution 2) that the respondents' salaries remained at the old salary scales, namely at 6 and 8 respectively. To do so would be to ignore the express words in the clause 3.1.2, namely, "*taking into account the revised Occupational Specific Salary Structures*."

[72] As I have indicated above the translation to the OSD bands meant an increase in salary for the respondents of between 15% and 19%. The effect of this unique increase was to elevate the respondents to a higher salary scale without affecting their occupational grade.

[73] In Clause 3.1.2 of Resolution 5 of 2009 the words “salary band” are used and despite there being no references thereto in Resolution 2 of 2009 the words “salary scale” are used. The Collins Concise Dictionary [21] defines the word “band” as, ‘a range of values that are close or related in number, degree or quality’ and defines the word “scale” as ‘a progressive or graduated table of things, wages, etc.’ Graduated means to “change by degrees from one thing to another.’ It is clear therefore that it is possible to conclude that the words ‘scale’ and ‘band’ have a similar meaning and concomitantly a reasonable interpretation would be that a ‘salary band’ is the same as ‘salary scale’.

[74] It follows therefore that the salary bands referred to in Clause 3.1.2 which are applicable before the adjustment increases are implemented must relate to the salary scales inclusive of the OSD translation referred to in Resolution 2 of 2009. It is to be noted that it has always been the respondents position that they rely on the fact that salary bands referred to in Clause 3.1.2 relate to the salary scales 6 and 8 respectively referred to in Resolution 2 of 2009.

[75] If one has regard to Annexure “B1” of Resolution 2 of 2009 and the resultant increased OSD salary for each respondent, the equivalent annual salary band can be found in salary scales 7 and 9 respectively [22]. I explain what I believe is a reasonable construction by way of an example in each category and which is contained in the table below:

NAME	**OLD SALARY SCALE**	**OLD SALARY**	**NEW OSD BAND**	**NEW OSD SALARY**	**EQUIVALENT IN OLD SALARY SCALE/BAND**
S K LUKHELE	8	1565447.00	CB 4	186816.00	186810.00 (9)
S C ZULU	6	107355.00	C1-3	127212.00	127233.00 (7)

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[21] *Collins Concise Dictionary 21st Century Edition, Harper Collins, 2001*

[22] *The Record Volume 1 at p.153 to 154*

[76] The arbitrator clearly did not apply his mind to the fact that despite the fact that the general salary increase was made retrospective to the 1st July 2009, that the parties to Resolution 5 of 2009 (concluded on 7th September 2009) were alive to the *de facto* position that the respondents were already on a higher salary as a result of the translation and which fell into a higher scale or band before the percentage salary increases were to be applied.

[77] I find that by giving the words in Clause 3.1.2 their plain, literal and ordinary meaning the parties must have intended that the increased salary band is equivalent to the increased salary scale (my emphasis) as brought about by the revised Occupational Specific Salary Structures and that this would be the starting point before the increases were to be applied and not the respondents' original salary scale of 6 and 8 respectively. To hold otherwise would lead to an absurdity.

[78] In applying the above interpretation one comes to a the inevitable conclusion that by having regard to the equivalent salary scales of 7 and 9 which appear in Annexure "B1" of Resolution 2 of 2009 and then giving effect to the table in Clause 3.1.2 an increase of 11% and 10.5% respectively is a fair and reasonable interpretation and that the same gives purpose to the collective agreement.

Conclusion:

[79]. In the totality of all the circumstances herein and being mindful to avoid a piecemeal approach [23] I am of the view that:

79.1 the arbitrator's failure to take into account the crucial and material inclusive wording in Clause 3.1.2 of Resolution 5 of 2009 relating to the a revised Occupational Specific Salary Structure when interpreting the collective agreement caused him to arrive at an unreasonable result. [24]

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[23] *Quest Flexible Staffing Solutions (Pty) Ltd v Abram Legobate* (JA104/13) [2014] ZALAC 55 (21 October 2014) at para [16]

[24] *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and Others (*2014) 35 *ILJ 943 (LAC) at para 21*

79.2. the arbitrator's finding that the old salary scales were applicable bore no rational connection to the material and facts before him and that his reasoning and ultimately his decision does not fall within the band of decisions a reasonable decision maker would reach. I am satisfied that having regard to *Fidelity Cash Management Services vs CCMA* [25] that given the evidence and material before me there exists no other facts or reasons upon which the arbitrator did not rely in his award in order to support his decision but which would have rendered his decision nonetheless reasonable.

[80] I find that the decision arrived at by the arbitrator in this matter is not one a reasonable decision maker could reach. In the circumstances the award falls to be set aside.

Remit or substitute?

[81] This dispute has been in existence since the 13th April 2011 when the parties first attempted to conciliate the matter before the bargaining council

[82] The parties at the arbitration which was conducted 10th February 2012 decided not to lead evidence but to provide the arbitrator with all relevant collective agreements, documents and written submissions on the issue in dispute. The arbitrator acquiesced to this approach and made his decision based on the documents provided to him and the submissions. There is no further evidence that can be led in this matter.

[83] This matter has finally come to the Labour Court some three and a half years later which in my view defeats the stated aims of the LRA to arrive at expeditious resolutions of disputes.

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[25](2008) 29 *ILJ* 964 (LAC) at para 102.

[84] I gained the impression from Counsel in their addressing me from the bar that in this matter that there exists no other possible interpretation other than the interpretations relied upon by each party. Equally so it was conceded by both Mr. Pillay and Mr. Mbili that the exclusion of the Ministerial Circular 3 of 2009 from the process was the correct decision. In this context there appears to be no other issue that can be ventilated by an arbitrator in coming to a proper interpretation.

[85] In my view it serves no practical or equitable purpose to remit this dispute back to the bargaining council to be dealt with by another arbitrator. This Court is in as good a position as a new arbitrator to decide the issue. It would only lead to further costs and delays to remit the dispute to further arbitration which in my mind would be contrary to the stated aims of the LRA. [26]

Costs:

[86] As I have mentioned before this matter has had a long history stretching back to September 2009 when the parties engaged in national collective bargaining. There is an ongoing relationship between the parties in this matter. In the circumstances and given the considerations of law and fairness each party should bear their own costs.

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[26] *National Minister of the South African Police Service v JR Mokoena and 92 Others* (JR1583/2011) [2013] ZALCJHB 142 (18 July 2013*); Cape Clothing Association v De Kock NO and Others* (2014) 35 ILJ 465 (LC) at para 44.

ORDER:

I make the following order:

1. The arbitration award dated 3 December 2012 and issued by the seventeenth respondent under case number PSCB 601-10/11 is reviewed and set aside.
2. The award is replaced and substituted with an award that the salaries of the Second to Sixteenth Respondents be adjusted in accordance with PSBC Resolution 5 of 2009 and that the rates of increase to be applied are 10.5% in respect of the second to twelfth respondents and 11% in respect of the thirteenth to sixteenth respondents;
3. No costs order is made.

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Prior AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Adv. D.Pillay instructed by the State Attorney

For the Respondent: Mr. T.Mbili from Shangase and Company Attorneys