Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD IN CAPE TOWN

Case no: C 717/2015

In the matter between:

FERDINAND NELL **Applicant**

and

UNIVERSITY OF CAPE TOWN **Respondent**

Heard: 27 – 29 August 2016

Delivered: 10 August 2017

Summary: (Claim for specific performance – alleged breach of contract – unilateral variation of pay class – prescription – deemed knowledge of facts on which claim based – s 12 of Prescription Act 68 of 1969)

JUDGMENT

LAGRANGE J

Introduction

[1] The applicant in this matter, Mr F Nell, was employed on 1 January 1996 in the post of University Engineer, Buildings and Services Department. He was appointed in Pay Class 12 ('PC 12'), the third highest salary notch applicable to non-academic staff and became a member of the University retirement fund ('UCTRF'), which he was obliged to belong to. His claim

arises from an alleged variation of his remuneration which he claims was a breach of his contract of employment. Accordingly he seeks an order of specific performance to rectify the breach and a consequential claim for the alleged shortfall in what he received as a salary amounting to R 1, 780, 000.00 (plus interest and costs) as well as a corresponding shortfall in contributions to the UCTRF resulting from the same short payment amounting to R 645, 000.00.

[2] During the course of the proceedings, the parties agreed that the issue of quantifying the applicant's claim would be deferred to subsequent proceedings if the applicant was successful in establishing his entitlement to be remunerated on the PC 12 scale during the period in which the remuneration he was due is in dispute. In part, this appears to have been done because even if Nell should have been remunerated in accordance with PC 12, salaries within a pay class vary in accordance, *inter-alia*, with performance assessments. Nell's own estimates of what he ought to have got were based on the maximum performance assessments in that pay class, and he agreed that was a matter for discussion.

[3] Unusually, the parties could not even agree on how to word some of the facts in dispute. In any event, the origin of the dispute lay in a restructuring exercise which took place in 1997. The University claims that Nell's original post was disestablished in the course of that restructuring and that he was appointed in the post of a Maintenance Manager: Other Campuses as an alternative to retrenchment. The central factual disputes concern whether this change in his post-designation, which he had agreed to, also entailed an agreed demotion to pay scale 11 ('PS 11'), which was the scale at which the new job was graded, or whether the University unilaterally decided only to pay him salary increases based on PS 11 until the next re-grading exercise which took place in August 2013. Nell claims that University's alteration of his pay class from PS 12 to PS 11 occurred without his knowledge or agreement. The second re-grading exercise in 2013 was described as a process of "business process re-engineering" and resulted in his post and that of other Maintenance Managers being re-graded and designated as PC 12 posts. Following that re-grading, Nell once again was remunerated on the PC 12 scale. Accordingly, his claim

relates to the period commencing with his initial post re-designation in 1998 and ending with the re-grading of the post in August 2013

[4] The University also raised a plea of prescription, but not in the form of a special plea because it argued that the facts on which the plea of prescription was based was so inextricably linked with evidence pertaining to the merits of the case that the plea could not be determined before hearing the evidence. A spat arose during the trial as to whether this was a competent way of dealing with the prescription issue because the respondent had not pleaded the date on which prescription was deemed to have begun running.

[5] The trial was conducted over three days. Nell testified on his own behalf. The University called three witnesses: Mr C J Brier (currently the Director of Projects and Capital Works and previously the University Engineer), Ms M M Tainton (Senior HR Manager: Compensation and Benefits) and Mr A Theys (Executive Director of Engineering Services) referred to respectively as Brier, Tainton and Theys. Theys was Nell's line manager, as the Head of Engineering Services, from May 2005 to October 2013. Judgment was reserved pending receipt and consideration of written heads of argument filed after the hearing.

Material issues

The Terms of Nell's Employment Contract

[6] The applicant contends that the University unilaterally changed his pay class from PC 12 to PC 11 and "in paying him lower annual increases in consequence thereof" acted in breach of the employment contract he entered into in December 1995 and in breach of an agreement reached in March 1998 which was confirmed in writing in August 1998 to the effect that his new job designation would not affect his remuneration. He further claims that it was an express, alternatively implied or tacit term of that agreement that he would continue to receive future increases on the basis that he would always be remunerated on the third and higher salary notches of PC 12.

[7] In terms of his initial letter of appointment dated 5 December 1995, the following terms are most pertinent insofar as they may be relevant to his claim:

7.1 He was appointed to the post of University engineer, Buildings and Services Department with effect from 1 January 1996 which was designated as “a post in pay class 12”.

7.2 The University reserves the right to relocate him to another department or vary his duties if it became necessary for any reason.

7.3 The salary scale attached to the post ranged from R 5,018 to R 8,474 per month and he was appointed at a notch towards the upper end of this range of R 7,854 per month.

7.4 Progression to higher notches was subject to good performance and he qualified for annual increments.

7.5 He was required to become a member of the UCTRF, a non-contributory retirement fund (‘the pension fund’).

[8] Pay class 11 was the highest pay grade in the Peromnes based job grading system used by the University.

[9] On 31 August 1998, he was issued with a memorandum from the Project coordinator/safety and health manager, Mr C J Briers which stated:

> “MAINTENANCE MANAGER: OTHER CAMPUSES
>
> With reference to the meeting held during March, with Mr Roach, at which you accepted the duties as Maintenance Manager: Other Campuses, your revised job description is attached.
>
> As indicated remuneration package remains unaltered. The grading for the position has still to be completed.”

Based on his previous 18 years’ experience in Spoornet, which he spoke of with evident nostalgia, Nell’s understanding was that the reference to an unaltered remuneration package meant that he would retain the remuneration package on which he was originally employed, namely PC 12, for the remainder of his career even if the post he subsequently occupied was graded as PC 11. The term he used to describe this enduring personal entitlement to a prior, more favourable, remuneration

package was “personal to holder”. This was apparently a practice at Spoornet. Nevertheless, Nell did concede that this principle was not contained in his original contract with the University nor was it promised as part of the discussion about the new position he would occupy after the restructuring in 1998. Briers explained that the reference to the remuneration package remaining unaltered in the letter of 31 August, simply meant that because the grading had not been done he could not predict whether Nell’s salary would go up or down. He could have added the words “until further notice” but did not.

[10] One of the reasons for filling in such a form was if there was an “*ad hominem* promotion of incumbent”, which Briers explained was usually used in cases of academic staff who might have reached the top of their scale, but whose salary needed improvement. He conceded that it could mean that a person’s pay class was not always tied to a post, but was unaware of any cases where this had been done, except perhaps in the case of an academic staff member who was granted an increase in recognition of long service in their last year of service.

[11] In saying that the remuneration package remained unaltered, Nell understood that it was guaranteed that his remuneration would remain the same, subject to notch progressions based on annual performance reviews as set out in his original contract,. This meant he would remain at PC 12. When he was asked whether this meant he would be paid at the mid-range or maximum range of PC 12 for the duration of his employment, Nell said that he believed he could be upgraded on account of good performance to the top of the PC 12 range and remain there until he retired. That is what was meant when it was said that his remuneration package remained unaltered. As far as he was concerned, if the University understood that it meant his salary would remain at its current level and be managed back to PC 11 then it should have done so by entering into a new contract like his original one. Tainton essentially confirmed that when a previous post was disestablished and a staff member was redeployed the standard practice was that they would be issued with a new contract explaining the new post.

[12] Reference was made to the 'University Performance Improvement Plan for PASS Staff' published on the website provided 2.5.3 that:

> "Where the staff member accepts a demotion, a new contract shall be entered into at the pay class of the new post. The staff member's salary, where higher than the standard package, shall be brought in line immediately with the new pay class standard package."

However, Tainton agreed that this performance management tool was not the same as the policy of 'pegging' which had been referred to in the correspondence. A procedural agreement between NEHAWU and the University concerning the retrenchment of permanent administrative and support staff in pay classes 1 to 12 was also alluded to. That agreement provided, *inter-alia,* that person is placed on redeployment lists who are likely candidates for vacant posts would be given new contracts of employment to reflect their new position. Tainton was not sure when the policy was introduced. Nonetheless, she insisted that the practice of pegging was one that was negotiated with the unions and that it was a practice to award CPI increases in such cases. She amended her evidence on this issue slightly by saying that ultimately, it depended on the increase which had been agreed with the unions, which might exceed CPI.

[13] Nell accepted that the new post still had to be graded and when that was done it was graded at PC 11. However, he was adamant that should not have affected his personal remuneration package which could not be altered. He did not dispute that there was a practice at the University of pegging a person's salary and managing it back when they were demoted, but he was never have made aware of the practice until years later. He could not dispute that nobody was ever retained on a scale personal to them as opposed to a scale attaching to a post. Tainton who had been employed at the University since 1997 recalled that the practice of pegging someone's salary and managing their salary down with successive annual increases had always been in place. Theys confirmed a similar understanding of the practice and that he learned of its existence when he encountered Nell's case. Tainton mentioned that it was also used in cases where somebody had been overpaid. Examples of this were when the Student Affairs department was restructured.

[14] When Nell was asked if there was any reasonable basis why the other two Maintenance Managers' posts which were graded at the same time would have been graded at PC 11 and his at PC 12, Nell said that his responsibilities were greater. He did not dispute that his immediate superior, Briers occupied a post graded at PC 12, but the basis for believing he was entitled to continue receiving remuneration on that scale was because he was personally entitled to It. Briers testified that pay scales were attached to particular jobs based on that job's grading. An individual's pay scale would only change if they change jobs or if their own job was upgraded, which is what happened to Nell when his job was re-graded in 2013 to PC 12.

[15] Though he maintained that the only contract he had been given was his original contract in 1995, Nell agreed that he had accepted the appointment to the new position, which was different from his original appointment as University Engineer. He also agreed that his original post was disestablished. There was some dispute whether Briers attended the meeting with Roach in August 1998. Nell contended they were both present and Briers denied that he had attended it. According to Nell, the discussion at that meeting focused on whether he would get the position of Maintenance Engineer or Maintenance Manager and not on remuneration which did not come up as an issue. Briers could not say what had happened at the meeting, but when it was stated in the memo that his remuneration package would remain unaltered, that did not mean in perpetuity: it was subject to grading being done.

In March 1999, Nell wrote a long letter to the director of Human Resource Manager, Ms J Fish ('Fish'), complaining about various aspects of his job as an Area Maintenance Manager, which appeared to be a generic title for maintenance manager posts with specified geographic areas of responsibility. For present purposes what is relevant is that Nell seemed to be still smarting from his demotion in the 1997 restructuring. According to him Fish said that it was up to him if he wanted to resign. Alternatively, Fish told him he could accept the title and 'enjoy the ride' as long as the salary remained the same, by which he understood that he retained his PC12 remuneration scale. Further, in January 2000, he confirmed the composition of his remuneration package on a

pro forma "cost of employment" schedule, which stated *inter-alia* that his pay class was PC 12 and his cost of employment range. He maintained that the range of salaries mentioned on the form corresponded to the PC 12 salary scale as evidenced by a photocopy of Cost of Employment Ranges which he obtained from his personnel file. He also referred to a similar *pro forma* schedules of his cost of employment for 2001 and 2004 which he claimed reflected a cost of employment salary range applicable to PC 12 posts, though these forms no longer mentioned his specific pay class. The University's explanation why PC 12 still appeared on his cost of employment form in 2000 was that when he was originally appointed to the new position, the grading of the post still needed to be done but the pay class appearing on the form was never rectified subsequently as it should have been, but Nell had interpreted this as confirmation that it was only his job designation which changed and not his pay class.

[16] In 2013, Nell's direct superior was Theys. In his understanding, the restructuring exercise in the maintenance department was more of a re-grading exercise. Briers said it was part of an attempt to streamline the department and was a fairly lengthy process involving the trade unions. Briers also mentioned that the job of maintenance manager was not the same job as before, but this was never canvassed with Nell when he testified. Nell was shocked when Theys told him that he was being re-graded to PC 12 and he replied that he always had been at a PC 12 level. Theys told him that, when he came to the department in 2005, he noticed the anomaly that even though Nell was classified as being on PC 12, he was in fact appearing in the departmental budget as a PC 11 employee. After the second re-grading exercise, Nell received a letter from the Executive Director: Human Resources regarding his cost of employment increase with effect from 1 August 2013. The letter stated inter-alia that "All other conditions of service remain the same." Following on from Theys's observation, Nell delved further into the issue, which involved some email correspondence between Nell's wife and Theys to get to the bottom of the apparent reduction in his scale of remuneration. On 24 March 2014, Theys replied to Mrs Nell's email in which he stated:

> "I inherited this situation when heading engineering services, so I was not party to what went before. I can however report that when I took over to engineering services, Ferdi was being paid the same level, i.e. PC 11, as the other maintenance managers, despite his record showing he was a PC 12. I enquired about this anomaly I was informed that this was an HR adjustment predating my tenure and that Ferdi's position was changed back then from the University Engineer to Maintenance Manager: Other Campus, hence the change to pay class.
>
> Later, I made it my business to get all maintenance managers regraded to PC 12, which happened towards the latter part of 2013.
>
> I will however need to go back and do some more checking and will revert back later once I have more information around Ferdi's case."

[17] The upshot of the investigation was recorded in a letter dated 9 July 2014 from Ms S Hill, HR Client Services Manager. In summary, she stated that following an audit review, the building and maintenance functions were restructured in 1997. His previous post of University Engineer (PC 12) was dis-established and he accepted a Maintenance Manager post (PC 11). By accepting the new post he had accepted the demotion and the PC 11 grading of that position which was the same as two other Maintenance Managers posts at the time. It was a practice at the University that when a staff member was demoted on a no-fault basis due to restructuring "his/her salary can be pegged at the rate of pay the time of the restructure." The demoted individual's salary thereafter was only adjusted by inflationary annual increases until it was aligned with the lower pay class range, and this is what occurred in his case. As far as the University was concerned, his salary was adjusted "in line with" its "remuneration policy and practice". Briers agreed that at the time Nell was appointed as a Maintenance Manager it could not be said that he had accepted the job and the lower pay scale because the scale still had to be determined.

[18] Nell claimed that he was never told that the post he was assigned to in 1998 entailed downgrading his pay class or that his remuneration would be 'pegged' by only receiving inflation related increases. Had he known that was the position at the time he would have resigned because that would have been totally unacceptable to him. He agreed that the memo of

31 August 1998 confirming his appointment as a Maintenance Manager stated that the grading of the post still had to be completed, but he was never shown an email sent to Briers on 9 October 1998 confirming that the post had been approved at grade PC 11. Briers testified that he found the email on his personal computer and it only surfaced a few days before the trial because he had never been asked for it before. Although he was aware that Nell was querying his job change since 2014, nobody ever asked him for information.

[19] The form on which Briers authorised Nell's change in his appointment identified the reason for the change of appointment as a 'change of job title' and not a 'change of pay class of post or incumbent', but the form was undated and the entry for the pay class field on the form was blank. Nell also never received another change of appointment form in which the pay class for Maintenance Manager was confirmed. Briers explained that there was no entry for the pay class on the form because at that stage, the post had not been graded and therefore was unknown. He agreed that there should have been a change of appointment form completed to reflect the change in Nell's pay scale from PC 12 to PC 11 and that the paperwork to reflect the change did not seem to have been done. Briers also said that he never viewed pay class and a job to be inseparable and that an individual might retain a pay class, though Tainton testified that as far as she knew this never happened when a staff member had been moved to a lower graded job. Tainton testified that even if a form had not been completed for the change in pay scale, the new scale could have been effected in consultation with the line manager based on the grading of the job. Briers was not surprised that Nell was shocked to discover that his pay class had been changed.

[20] The only Human Resources document, which indicated that Nell's pay class was PC 11 was his personal performance appraisal form for 2012, but he claimed that he did not notice this because he did not complete the form and Theys had simply turned it around and presented it to him for signing. Theys testified that 2012 was the first time this particular format of the form had been used and universally applied throughout the University. Along the top of each page was a table containing details of the individual

being assessed including the employee's name, job title, staff number, department, pay class, faculty and year of review. Nell signed the document in the signature portions on the last two pages. Theys claimed that he knew Nell was on pay class 11 because all maintenance managers were on that grade. He also said that, he gave a copy of the performance appraisal form to Nell, but this was not canvassed with Nell. Nell had testified the form was not in his personnel file when he photocopied other documentation. Nevertheless agreed that it would have made sense to give him a copy of the form because it set out performance related issue he had to attend to in the future, but he maintained that he did not notice the references to his pay class as PC 11 when he signed the form. In passing, it should be mentioned that Theys drew attention to the statement on the last page of the form to the effect that "Signature by any staff member denotes participation in the discussion, not necessarily agreement to the outcome"

[21] Nell was referred to a detailed letter issued by the HR department in February 2010, headed "Cost of Employment (CoE) Increases for Pay Classes 5 to 12 for 2010". According to the University, this was a standard letter sent out annually to all employees. The annual increase was determined by collective-bargaining between the University and trade unions. Although Nell could not recall that specific letter, he agreed that such letters were issued. Attached to the letter was a table specifying the salary ranges for each performance category per pay class. He conceded that in that year his R 390,000.00 cost of employment fell below the minimum performance category in pay class 12, but said he had no reason to investigate his pay class because at that stage, he had no reason to doubt the correctness of his pay scale. Similarly in 2011, his cost of employment was R 413,234.00 but in the table accompanying the 2011 circular letter, the lowest remuneration rung in PC 12 was R 462,657.00, which also showed that his pay scale fell outside PC 12. Although he did not dispute receiving such letters annually, he was critical of the fact that information of this nature was only been provided in the course of the trial, whereas when he had tried to get this information from the University after 2013 he could not obtain it. That also explained why

his own estimate of what he should have been paid in places reflects figures which do not correspond to the actual pay scales because he could not get that information from the University and had to estimate figures. He could not understand why the figures were so readily available now when he had struggled to obtain them all previously. His request for the history of pay class ranges was made as early as April 2014. Tainton implied she would have asked for a pay scale schedule to be re-generated if she had been asked for this information, but said the previous schedules were not retained on the system and were not readily accessible. The scales had been accessible on the Internet since 2004 but only the current one was accessible at any particular time. Nell agreed he would have got a similar letter in 2006 showing that his cost of employment fell outside the range of PC 12 and within the range of PC 11, but still insisted that he had no reason to suspect anything was amiss which required him to investigate further. He claimed to be unaware of pay scales being available online since 2004. Although Briers was sceptical about Nell's lack of knowledge about UCT policies he was not sure of anything which would have alerted him to suspect that something was amiss. No copies of the letters he ought to have received were in his personnel file. The cost of employment form which he acknowledged in April 2006, unlike the 2004 form, did not mention his pay class.

[22] It was the same year that Theys became Nell's superior and noticed the anomaly in the pay system in terms of which Nell was classified as being on pay scale 12, when his job had been graded on pay scale 11. He explained that he received a spreadsheet and pay scales from the HR department. The system would reveal any anomalies once the increases were entered. In Nell's case, it revealed an error message which read "out of range" which meant that his remuneration was outside the pay class 12 range. He consulted Briers, who told him that Nell had been demoted and he return the spreadsheet to HR with a comment to that effect. Theys did not see it as his responsibility to correct Nell's HR record as a result of previous mistakes made. He never had a discussion with Nell concerning his pay class until he moved back to PC 12, when he congratulated him on the up-grading. Theys never thought to mention the correction of the

anomaly to Nell because he had no reason to think that Nell himself believed he was on PC 12 because the appointment had been a demotion and the other maintenance managers were on PC 11.

[23] Briers denied that his failure to mention the scale had been an attempt to disguise the change: all that had happened was that the HR department had not corrected something that should have been corrected in the past. However he did concede that Nell should have been advised of this. Tainton testified that the format of the cost of employment forms changed in 2006 and that was the only reason that the pay range and pay class were not mentioned. However, she said the applicable pay class would be mentioned in the letter sent to employees. When asked if Theys ought not to have contacted Nell when he saw that he was on PC 12 but should have been on PC 11, Tainton's comment was that, she would have thought that it would have been understood given the fact that other maintenance managers were on the same PC 11 class. Theys was also of the view that Nell could not have been unaware that the other two Maintenance Managers were on PC 11 and was sceptical that Nell would never have compared his cost of employment with the pay scales which were publicised every year. He thought it was unlikely Nell would have believed he should have been paid more than the other maintenance managers. On 10 April 2014, Nell sent a very detailed letter to the Executive Director: Human Resources requesting information pertaining to his remuneration record including the Pay Class ranges for every year from 1996 to 2014; his CoE for every year; the date upon which the employer changed his CoE from PC12 to PC11; and the identity of the person who authorised the change. The Director, Ms M Hoosain did not respond to his queries and he referred the letter to Hill on 25 April, who responded saying he had not raised issues with the person he had been previously been referred to but nevertheless undertook that the issues raised would be investigated further and they would endeavour to respond by 9 May.

[24] Eventually, in mid-August 2014 he received a response from Hill who said that she was relying on documents from his personal file and records from

the payroll system as a guide. The gist of her response was set out in the following paragraph of her email, viz:

> "**Letter of Appointment as Maintenance Manager and Acceptance:**
>
> On further investigation, your Letter of Appointment as Maintenance Manager and acceptance thereof have been misplaced. Your personal file does contain a memo sent to you on 31 August 1998 in reference to you accepting the duties as Maintenance Manager. A job description is included in the correspondence. Please find copies attached. You also make reference to the job change (and your title of Area Maintenance Manager) in other correspondence written by you which is in your personal file.
>
> You will be aware that all maintenance managers across the University are at the level of PC 11. However, in line with our practice of "pegging ", our system (Heritage and SAP) shows that your remuneration remained unaltered from the level of PC 12 when you were demoted to Area Maintenance Manager and that you have received inflationary salary increases annually."

[25] Thereafter, Nell first sought the assistance of the staff association and subsequently that of an attorney to try and unravel how it had happened that his pay scale had been reduced to PC 11. His erstwhile attorney's polite and clear enquiry of 24 August 2014 yielded no response from the University and a follow-up letter was sent on 5 November 2014. Nell's spouse also subsequently tried to pursue the matter by approaching Theys, who did respond but could add nothing to what he had previously said and he defended the University's previous direct responses to Nell. Nell responded through his wife that he had never agreed to a change in his remuneration. On 7 November, the University responded to Nell's attorney's letter as follows:

> "...please be advised that the University have investigated this matter as follows:
>
> - We confirmed that in 1997, following recommendations from KPMG audit review, the building and plant maintenance functions were restructured.
> - Discussions with the Executive Director: Property and Services confirmed that Mr Nell's post of University engineer (PC 12) was

subsequently disestablished and he was offered a demotion in 1998 to the post of Maintenance Manager (PC 11) with his "remuneration package remaining unaltered".

- It was then, and remains, a university practice that when a staff member is demoted due to restructuring on a no-fault basis, is/her salary can be pegged at the rate of pay at the time of the restructure. Only inflationary increases are allowed until such time that the salary is aligned with the new pay class range.
- We confirm that our records indicate that Mr Nell received increases and have remained within the PC 12 range for the last 16 years. We believe that you have not been prejudiced due to the restructuring in 1997 and Mr Nell's pension and other related benefits have been compensated fairly."

[26] On 20 November 2014, a further letter was sent by Nell's erstwhile attorney which the University failed to respond to. In May 2015, Nell's current attorneys of record advised that he was considering legal proceedings and that his estimated claim against the University was approximately R 2, 4 Million but also appealed to the University to see if the matter could not be settled. This prompted a response from University seven weeks later in which the University's defence to Nell's claim was developed further with additional allegations not previously made in the University's correspondence. While reaffirming the contents of Hill's letter of 9 July 2014, the University elaborated further:

"2. Our instructions are that:

2.1 Your client's employment history is summarised in our client's letter to your client dated 9 July 2014.

2.2 Despite his assertions to the contrary, your client was at all material times aware that the position that he occupied from 1998 was at a pay class 11, in common with other maintenance managers employed at the same level as him at the time.

2.3 It is correct that your client was informed, when he took up the maintenance manager position in 1998, that his remuneration package would remain unaltered. His remuneration package did indeed remain unaltered at the time, and it was in fact increased from year to year by at

least the minimum percentage agreed by collective agreement from time to time. Your client was not at any stage given an undertaking that his remuneration package would remain within the range applicable to pay class 12 positions.

2.4 Since 2005 your client's remuneration package has fallen below the range applicable to pay class 12 position. At all material times until 2013, however, the position he occupied fell within pay class 11 and not pay class 12.

2.5 Your client was aware of this, raised no objection to it, and cannot now seek to contend that he was entitled to higher remuneration for a period that goes back some 10 years. In confirmation of this, we attach a copy of the performance document for your client used the year 2012, signed at various places by client and reflecting clearly at various pages that his position was a pay class 11.

2.6 During 2013 your client's position in common with other positions at the same level, was re-graded and he has since been compensated within the range applicable to pay class 11I positions.

3. Our client is satisfied it is treated your client fairly at all material times, and in a manner consistent with his contract of employment and its remuneration policy and practice. .."

[27] The last letter acknowledged that, Nell was actually not remunerated within the pay scale 12 range after 2005, contrary to what was previously stated. It also asserted that, he was fully aware that he was employed in a lower rated position quite apart from what was asserted in the letter of 9 July to the effect that his acceptance of the new post entailed acceptance of the associated pay scale. It also effectively equates the phrase "remuneration package" with his existing salary and not with his existing salary scale.

Analysis

Prescription

[28] The respondent pleaded that Nell's claim had prescribed. Nell was well aware that proceedings were initiated years after the breach allegedly arose and in replication to the plea of prescription stated that he was not

aware of the facts giving rise to his claim prior to 15 August 2013. When respondent's counsel started to question Nell about when he became aware of his claim, an objection was raised by Nell's counsel to permitting such questions because the date on which the respondent alleged Nell became aware of the facts of his claim had not been pleaded. If the applicant felt prejudiced by the respondent's failure to allege a specific date when he would have become aware of those facts the proper procedure would have been to except to the plea on the ground it was vague and embarrassing or to ask for further particulars before trial. The applicant led evidence as to why he believed he only became aware of the facts giving rise to his claim at a certain time and ultimately the court had to decide this on the basis of all the evidence. Accordingly, I allowed the respondent to proceed with its attempt to adduce evidence from Nell in support of its prescription point.

[29] The period of prescription for an ordinary debt which includes a debt for arrear remuneration is three years in terms of s 11(d) of the Prescription Act 68 of 1969 ('the Prescription Act'). Section 12 of the same Act provides :

> "12 When prescription begins to run
>
> (1) Subject to the provisions of subsections (2), (3), and (4), prescription shall commence to run as soon as the debt is due.
>
> (2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.
>
> (3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care."

[30] Nell's counsel submitted that he did not know that his remuneration package had fallen into the range applicable to PC11 until August 2013. Consequently he did not know of the facts on which his claim of arrear wages was based until then and prescription only began to run from that

date. Accordingly, any arrear salary claim prior to August 2013, could be launched provided he did so by August 2016.

[31] For the purposes of this discussion, it seems that insofar as Nell was not paid what was due to him there are two dates when salary arrears would have started to accrue, depending on whether his claim is confined to a claim of not being paid less than a PC 12 employee or if one considers his claim that he was entitled to be remunerated at the third highest notch on PC I2, which he had identified with the mid-point of PCI 2 salary range. In the latter case his remuneration fell below the mid-point of PC12 in 2000 and in the case of falling below the PC12 range altogether the debt became due in 2006.

[32] Nell's spontaneous and undisputed reaction to the news that he was being 'upgraded' to PC 12 when congratulated by Theys was not the reaction of someone who was under the impression they were on a lower grade. There was no reason to suggest that his response at this point was contrived but was an accurate reflection of what he believed. The next question to consider then is whether, despite that being his genuine state of mind, he should nonetheless in law be deemed to have had such knowledge at an earlier date because 'he could have acquired it by exercising reasonable care'

'.

[33] More commonly, disputes about when deemed knowledge arises concern cases where the identity of the debtor is not obvious or when damage or losses were suffered, as in the case of delictual claims. In this instance, the dispute is solely about when by exercising reasonable care Nell could have learnt that he was either not being paid as a PC 12 employee at all, or was not being paid at the PC 12 notch he believed he was entitled to.

[34] The SCA has summarised the interpretation of the requirements of care in *Gunase v Anirudh* [1] as follows:

> "[14] Section 12(3) imposes a duty on the creditor to exercise reasonable care to obtain knowledge of the identity of the debtor and the facts from

[1] 2012 (2) SA 398 (SCA) at 402

which the debt arises. A creditor is not allowed to postpone the commencement of the running of prescription by his failure to take necessary steps. In Burley Appliances Ltd v Grobbelaar NO and Others 2004 (1) SA 602 (C) ([2009 3 All SA 505) at 607G Nel J said that —

> 'the declarator is contrary to the established principle that a creditor cannot by supine inaction arbitrarily and at will postpone the commencement of prescription' .

See also Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd and Another (2) 2005 (6) SA 23 (C) ([2004] 1 All SA 1) para 26; and D Uitenhage Municipality v Molloy 1998 (2) SA 735 (SCA) ([1998] 1 All SA 140) at 742A – C.

[15] In Drennan Maud & Partners v Pennington Town Board 1998 (3) SA 200 (SCA) ([1998] 2 All SA 571) at 209F – G Oliver JA said

> 'Section 12(3) of the Act provides that a creditor shall be deemed to have the required knowledge if he could have acquired it by exercising reasonable care. In my view the requirement exercising reasonable care requires diligence not only in the ascertainment of the facts underlying the debt, but also in relation to the evaluation and significance of those facts. This means that the creditor is deemed to have the requisite knowledge if a reasonable person in his position would have deduced the identity of the debtor and the facts from which the debt arises.'

In Leketi v Tladi NO and Others [2010] 3 All SA 519 (SCA) para 18 G Mthiyane JA said:

> 'It seems to me that the adverse operation of s 12(3) is not dependent upon a creditor's subjective evaluation of the presence or absence of knowledge or minimum facts sufficient for the institution of a claim. In terms of s 12(3) of the Prescription Act, the deemed knowledge imputed to the creditor requires the application of an objective standard rather than a subjective one. In order to determine whether the appellant exercised reasonable care, his conduct must be tested by reference to the steps which a reasonable person in his or her position would have taken to acquire knowledge of the fraud on the part of Albert.'

The impact of s 12(1) read in conjunction with s 12(3) is that prescription starts to run as soon as the creditor has or ought to have knowledge of the identity of the debtor and the facts from which the debt arises."

(emphasis added)

[35] In the circumstances of this matter, what steps would a reasonable person in Nell's position have taken to acquire knowledge of the alleged breach of contract and consequential underpayment. It is clear that once he heard that the University did not share his view that he was not graded as an employee on PC 12 before the restructuring of the maintenance department in 2013, he began what turned out to be an arduous process of investigating his pay class status and whether he had been remunerated in accordance with his previous understanding that he was on PC 12. There can be no question in my mind that he took reasonable steps to ascertain if he might had been unlawfully relegated to a lower pay class. The issue therefore is whether he had sufficient information to have taken such steps earlier.

[36] In essence, Nell claims that there was no reason for him to have embarked on any investigation prior to 2013 as there was no reason for him to believe that he might be underpaid. According to him it was only when his suspicions were aroused in 2013 that he saw the need to take such steps.

[37] The respondent effectively argues that even if it failed to advise Nell that he had in fact been employed in a lower graded post, as it should have done when the grading had been determined by October 1998, it had provided him with sufficient documentary information on an annual basis that would have alerted him to any apparent discrepancy between what he believed he was entitled to by virtue of believing that he was on PC 12 and what he received. The information relied on by the University is threefold. Firstly, it consisted of annual cost of employment letters sent to staff after annual increases were determined. Attached to those letters were schedules indicating with varying degrees of detail the minimum and maximum scales for different pay classes for the forthcoming year. Secondly, there were personalised cost of employment letters sent to employees, attached to which was a schedule showing details of the composition of that employee's remuneration, which the employee was supposed to sign and return confirming that they accepted the composition

and structure of their salary package. The third type of document relied on by the University is the annual performance review forms completed by his superior and which he signed in acknowledgement that he had participated in the performance review assessment.

[38] To deal with the latter forms first, the respondent argues that because Nell's pay class was indicated as PC 11 on the performance assessment review forms in 2012, he would have been aware then that there might be a problem with his remuneration because it would indicate that he was not classified as PC 12. While I accept that the form did mention his pay class on more than one page, the primary purpose of that document was to set out an assessment of his performance and remedial action. The document was also produced in the context of a discussion about his performance and he was not been asked to confirm details relating to his remuneration. In my view it would be contrived to say that one of the steps he could reasonably have been expected to take was to take note of the pay class entry on that form, even if he had been given a copy for his future reference for his future conduct for performance evaluation purposes.

[39] The personalised cost of employment letters which employees had to scrutinise and confirm at the beginning of each year were self-evidently mainly for the purpose of confirming the internal composition of an employee's remuneration package for the coming year. That document was directly related to the individual employee's remuneration and advised the employee of their gross remuneration and the breakdown thereof for the coming year and would have included any salary improvements due to the employee from the beginning of the year. The earliest examples of these forms issued to Nell were the schedules showing his individual cost of employment for 2000, 2001, 2004 and 2006. Only the 2000 form actually identified the pay class by name and in that form his pay class was identified as PC 12. The forms issued to him in the remaining years not stipulate a pay class nor was any provision made for a pay class entry on the form.

[40] However, the 2001 and 2004 forms did contain an entry entitled "COE Range" followed by the minimum and maximum pay notches for the pay

class into which the employee fell but without identifying the pay class by number. An employee who believed they ought to be on a particular notch would have been able to get at least a rough indication whether their remuneration fell closer to the minimum notch, in the middle of the pay class band or near the top of the pay class. In Nell's case, a glance at the COE Range which appeared directly under his own cost of employment reveals that in 2001 his personnel cost of employment of 225,000 was not far from the middle of the range which was at approximately R 230,000. On his own estimates which he did in preparation for the trial he believed that if he retained the third highest notch in PC 12 that would place him at the middle of that pay class salary range. Similarly, in 2004 his cost of remuneration was approximately R 281,000 which was not very far off the middle of the cost of employment range stated on the form of approximately 290,000 bearing in mind that the bottom of the scale was approximately R 249,500 and the highest notch was approximately R 331,000. In the absence of the pay class range being identified as PC 11 on the form it would not have been unreasonable for Nell reading that form to believe that he was in the middle of the pay class range which applied to him as he expected to be. Consequently, if I accept that it is improbable that any employee, let alone someone of such seniority such as Nell, would have not been interested in where they fell in their pay class, a cursory assessment of the information provided on these forms would not have alerted him to any discrepancy requiring investigation. I agree that his personal cost of employment was always somewhat below the midpoint of the scale provided but the discrepancy was not so great that he would necessarily have felt he was on the incorrect notch. The 2006 form no longer contained information about the cost of employment range and did not provide sufficient information to alert Nell to any possible misalignment of his salary and pay scale.

[41] However, this was not the only form Nell received annually. He also received notifications about the annual increases which were accompanied with the new pay scales for each pay class. His explanation for not perusing the new pay scales was simply that he had no reason to suspect that anything was wrong with his pay. I find it very hard to accept

this evidence as plausible. He was not disinterested in his level of remuneration nor was he disinterested in where he stood in the notch rankings of his pay class. The information in the general notices gave him ready access to quickly confirm where he stood in the pay scale rankings. It may not have been enough to make him think that something was amiss because his cost of employment was always a bit lower than the midpoint of the salary range where he expected to be, but it is difficult to believe he would not even have been curious to confirm that he still remained on the third highest notch, despite being consistently slightly below the middle of the range. Even if that discrepancy had not worried him overmuch it is difficult to accept on a balance of probabilities that over several years he would not have once tried to see where his own remuneration fitted in the salary bands. What Nell would have the court accept is that he did not do this once from 2005. Had he done so in that year it would have been obvious that his salary barely fell within the PC 12 range and that in all subsequent years it fell below the minimum notch for PC 12. In any event, he had more than sufficient information at his disposal to identify if there was something amiss with his remuneration at the time his new annual remuneration took effect each year and his new monthly salary fell due. It is reasonable to expect that with that information and given his level of seniority he would have identified that something might have been amiss at the very least by the beginning of 2012, based on his perception that he was contractually entitled to be regarded as a PC 12 employee and remunerated as such, more particularly at the third highest notch of that scale. In my view, even this is still a very generous time allowance because it assumes an extended period of disinterest on his part in verifying his remuneration status relative to the pay scales over an extended period during which his own remuneration fell below the PC 12 minima he believed he was more than entitled to.

[42] Proceedings were launched on 28 August 2015 more than three years after even the outer limit of the time period in which he had access to the information that would have made it possible for him to launch his claim for specific performance, based on his own view of his personal pay class. A reasonable person in his position with that information would have realised

that his remuneration did not correspond with the pay class he believed he belonged to and would have taken steps prior to 2013. Consequently, I am satisfied that the applicant must be deemed to have had sufficient knowledge based on the information which had been provided to him in the ordinary correspondence relating to his remuneration and salary scales to launch proceedings more than three years before he initiated these proceedings. He is deemed to have had the knowledge of the facts from which the debt (which includes the specific performance of his contract) arose in terms of s 12(3) of the Prescription Act and accordingly the debt has prescribed.

[43] The above conclusion is reached on the assumption that Nell could have had no reason to doubt his continued PC 12 classification after his post at that level was disestablished. I should add that in the circumstances of this matter that I am sceptical he would not have been more wary about ascertaining and confirming the status of his remuneration and therefore more assiduous in checking that he had not been downgraded. He knew that the disestablishment of his first post and his appointment to the Maintenance Manager position was a demotion. He relied heavily on the wording of a memorandum which he attached inordinate weight to the wording of the memo that his “remuneration package remains unaltered”. In his mind the phrase “remuneration package” embraced not only the current remuneration package he was receiving but the pay class he was previously in which was linked to the grading of the disestablished post. At the very least he ought to have considered more limited interpretations were possible, such as simply interpreting it to mean his current remuneration package would not be affected.

[44] He assumed, without any factual basis for doing so, that the University necessarily had the same ‘personal to holder’ remuneration policy as his previous employer, Spoornet. He was expressly advised that the grading of the new post was yet to be done and never received any formal notice of what it was. He was not concerned that he never received a new contract and despite the HR formalities of the university the memo and circumstantial factors were enough to assure him that he and the

university had agreed that he had now acquired a personal pay class status irrespective of the grade of job he occupied.

[45] I accept that the administrative bungles of the university, particularly the omissions of the HR department to properly formalise Nell's new appointment and to correct documentation to reflect the correct pay class of his new job might have encouraged Nell to believe that his pay class and not merely his current remuneration package remained unchanged, even though that circumstantial evidence might not necessarily be interpreted as evidence of an agreement. Increasingly though, the remuneration increase information provided to him annually ought reasonably to have raised concerns in his mind whether he and the university were genuinely in agreement as regards his pay class.

Costs

[46] In the ordinary course of litigation, the applicant ought to pay the respondent's costs. However, I accept that his contention his claim had not prescribed was not frivolously made and that the university was also unable over a considerable time to provide any unequivocal evidence that his PC 11 remuneration scale had been agreed to. In parenthesis, I do not wish to suggest by so saying that it implies conversely he would have retained entitlement to a pay class rather than simply retaining his current employment package in monetary terms based on the memo and in the absence of a new contract. Nevertheless, the failure of the university to complete the formalities in relation to his new position materially contributed to the contractual fog governing his employment relationship with the university and understandably would have lent support to Nell's belief he might have had a legitimate contractual claim for breach of contract.

[47] I am also concerned about how long it took the university despite repeated requests from Nell and his legal representatives over a considerable time to provide the full details of the scales governing remuneration, even if Nell did receive these over the years. I believe there is good reason to think that if the material had been made available timeously before trial, instead of on the eve of trial, the trial might have been avoided.

[48] In the circumstances, an equitable cost order considering the outcome, the conduct of the respondent in dealing with the applicant's requests for information and belated confirmation of pay scales requires the respondent to pay half the applicant's costs.

Order

[1] The applicant's claim has prescribed.

[2] The respondent must pay half the applicant's costs including the costs of counsel.

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Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	S Harvey instructed by Machanik Attorneys
RESPONDENT:	D Bosch instructed by Bowman Gillfillan Inc.