

SOUTH AFRICA / JUDGMENT

HOSPERSA obo Naidoo and Others v MEC Department of Health KZN and Others (DA 8/23) [2024] ZALAC 69; (2025) 46 ILJ 933 (LAC); [2025] 5 BLLR 445 (LAC) (23 December 2024) [2024] ZALAC 69

COURT

Labour Appeal Court

BEFORE

Savage, Van Niekerk, Jolwana

CASE / FILE NUMBER

DA 8/23

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IN THE LABOUR APPEAL
COURT OF SOUTH AFRICA, DURBAN
Reportable
Case No: DA 8/23

In the matter between:

HOSPERSA obo MG NAIDOO
& OTHERS
Appellant
and
MEC DEPARTMENT OF
HEALTH KZN
First Respondent
DEPARTMENT OF
HEALTH
Second Respondent
PSCBC
Third Respondent
COMMISSIONER N. MKHIZE
N.O.
Fourth Respondent

Heard:

17 September 2024

Delivered:

23 December 2024

Coram:

Savage ADJP, Van Niekerk JA and Jolwana AJA

JUDGMENT

JOLWANA, AJA

Background

[1] This appeal concerns the proper interpretation of a specific clause of a collective agreement in respect of employees in the public sector who are members of the appellant. The appeal is with the leave of this Court.

[2] The five employees on whose behalf the appellant acts are all employees of the first respondent whose career trajectory included their promotion to various positions. Mr Nair is employed as a systems manager at the Newton Community Health Clinic and was, on 1 July 2014, promoted to salary level 9. He seeks to be upgraded to salary level 10. Mr Nxasana is employed as a finance manager at Tongaat Community Health Center. On 5 November 2013, he was promoted to salary level 9. He now seeks to be upgraded to salary

level 10. Mr Naidoo is a systems manager at Edendale Hospital. On 1 November 2012, he was promoted to salary level 11. He now seeks to be upgraded to salary level 12. Mr Green is employed as deputy director, district planning, monitoring and evaluation at uMgungundlovu Health District Office. On 1 December 2012, he was promoted to salary level

11. He seeks to be upgraded to salary level 12. Ms Sahadeo is the deputy director, district planning, monitoring and evaluation at iLembe Health District Office. On 1 December 2012, she was promoted to salary level 11 and now seeks to be upgraded to salary level 12.

[3] The genesis of the demand for promotion and therefore the dispute between the parties is the interpretation of clause 3.6.3.2 of the Public Service Coordinating Bargaining Council (PSCBC) Resolution 3 of 2009 which reads thus:

‘The commencing salary for all employees on posts not covered by any OSD [Occupation Specific Dispensation] as per PSCBC Resolutions 1 of 2007 and 3 of 2008, and appointed as Assistant Directors and Deputy Directors shall, with effect from 1 July 2010, be on salary level 9 and 11 respectively.’

[4] Resolution 3 of 2009 was amended in terms of Resolution 1 of 2012 on 31 July 2012 as per clause 18(1) and in its amended version it reads as follows:

‘Clause 3.6.3.2 of PSCBC Resolution 3 of 2009 is hereby amended to allow employees whose posts are graded on salary levels 10 and 12 to be appointed and remunerated on salary levels 10 and 12 respectively.’

- [5] The appellant contends that these five employees had their posts upgraded to salary levels 10 and 12 on coming into effect of Resolution 1 of 2012 on 31 July 2012. However, due to directives issued by the Department of Public Service and Administration the upgrades were made subject to the approval of the Minister and after a process of evaluation by the Department of Public Service and Administration. Their salary levels were, as a result, not upgraded to levels 10 and 12 respectively.

At arbitration

- [6] The dispute between the appellant and the first and second respondents (employer) was referred to the PSCBC for arbitration. The arbitrator correctly identified the issue as being whether the employer correctly interpreted and applied PSCBC Resolution 3 of 2009 and whether the employees qualified for salary upgrades from salary levels 9 and 10 to salary levels 11 and 12 respectively.
- [7] What was before the arbitrator and key to the interpretative exercise was Resolution 3 of 2009 and various circulars and other documents in particular, a circular issued by the Director General for the Department of Public Service and Administration (DPSA) which was addressed to all heads of the national and provincial government departments as well as provincial administrators. It was intended to guide the implementation of PSCBC Resolution 3 of 2009. The relevant clause is clause 5 from which I quote almost in full for context. It reads:

‘5. ... [T]he Minister for Public Service and Administration determined the following for the specific posts categories:

- (a) Posts graded salary levels 10 and 12 since the implementation of PSCBC, Resolution 3 of 2009.
- (i) The salary levels of such posts will have to be reconsidered in terms of the revised job weight ranges determined by the for the Minister for the Public Services and Administration (MPSA) which came into effect from 1 October 2011, under cover of Circular 16/P dated 12 September 2011. This means that this circular removed any job weight range overlap between salary levels 9 and 10, as well as salary levels 11 and 12.
- (ii) This effectively means that the grade of the jobs will have to be reconsidered in terms of the revised job weight ranges. For example, a job obtained a job weight score of 540. Under the pre-revised job weight ranges applicable before 1 October 2011 this score falls in the overlap between the job weight ranges applicable to salary levels 9 and 10. As there was discretion to allocate a salary grade, the job could have been graded at salary level 10. However, under he revised the job weight ranges applicable from 1 October 2011 the score falls in the job weight range attached to salary level 9 and the job will therefore have to be graded at salary level 9.
- (iii) However, no retrospective implementation of regrades must be done prior to 1 August 2012.

(iv) To ensure that the implementation of Clause 18.1 of the Resolution is done in a uniform manner, the MPSA directed in terms of PSR Chapter 1, Part 1G – “that only employees serving in posts that were graded on salary levels 10 and 12 since the implementation of Resolution 3 of 2009 up to and including 31 July 2012, be automatically absorbed into the regraded posts with effect from 1 August 2012, on condition that such posts were previously job evaluated and graded at salary levels 10 or 12 in terms of the revised job weight ranges as specified in terms of Circular 16/P dated 12 September 2011”.

(v) With the consideration of the grading of existing posts, either prior to 1 October 2011 or subsequent to 1 August 2012, it should be ensured that due job evaluation processes are followed and that there is compliance with Circular 16/P dated 12 September 2011, to prevent any unnecessary queries, grievances or disputes.

(b) Grading of posts on salary levels 9/10 and 11/12 NOT covered by paragraph (a) above

(i) The grading or regrading of all other posts either at salary levels 9/10/11 or 12 not covered by paragraph (a) above, as well as, the absorption of employees into regraded posts, will have to be done in terms of the relevant Public Service Regulations and Provisions.

(ii) The grading of all posts already advertised must be amended in terms of the measures of this Circular.

Core business (the line function) posts

(iii) Departments must still grade new posts and regrade existing posts in the core business (line function) with the job evaluation processes if the posts are not covered by an OSD.

· Salary levels 10 and 12 can be utilized as separate organizational levels in the core business (line function) environment to assist departments with the recruitment and retention of employees if supported by job evaluation process.

· This approach should however only be followed if justifiable from an organization and job evaluation perspective and should be applied with circumspect.

Corporate services (Program 1) posts

(iv) Jobs within the corporate services functional area are generic and transversal in all departments in the Public Service and such jobs that are the same or similar must be graded the same. Generic functional structures were developed to assist departments with the determination of their organization structures on a justifiable basis. Benchmark job weights need to be used where available.

(v) Considering the aforementioned the MPSA directed in terms of Section 3(1)(c) and 3(2) of the Public Service Act that: “Should executive authorities grade new jobs/posts or regrade existing jobs/posts within the corporate services environment at salary levels 9, 10, 11 or 12 grades of such jobs/posts must be consulted with and recommended by the MPSA before a final decision on the grade of the post is taken so as to ensure contemporaneous consistency.”

(vi) The authority vested in executive authorities to grade jobs is established in terms of the Public Service Regulations, Chapter 1, Part V C 1. However, the MPSA may establish norms and standards in terms of Section 3 of the Public Service Act. This authority is established in terms of the aforesaid legislation that supersedes the authority established in terms of subordinate legislation.’

[8] The arbitrator embarked on the interpretation exercise on the basis that the appellant accepted that its case was based on paragraph 5(b) of the above circular. Furthermore, the Minister had authority to issue directives that he issued including job evaluation and implementation directives in respect of Resolution 3 of 2009. He then concluded that in terms of paragraph 5(b)(v) of the above circular, it was mandatory that all job upgrades for the support service employees in the corporate services environment must be done in consultation with and approval by the Minister. While there was no dispute that the job evaluations for the posts were approved by the provincial head of department, in terms of paragraph 5(b)(v), that was not enough absent consultation with and approval by the Minister. In light of the fact that there was no evidence that the Minister had been consulted and that he recommended the job evaluation levels and job weights, it was not in conflict with the resolution to ensure that there were no conflicts and inconsistencies in the implementation of job grades for generic and transversal jobs as the employees’ jobs were generic and

transversal. The job grading for generic and transversal jobs could not be finalized without consultation with the Minister and obtaining his approval. The arbitrator thereupon dismissed the application.

Before the Labour Court

The condonation application

[9] In launching the review application, the appellant also applied for the condonation of its late filing of the review application. In its affidavit deposed to by its manager for legal services, it is stated that the appellant received the arbitration award on 18 January 2018 and that the degree of lateness was five months and two weeks. The explanation was that after the appellant received the award, it engaged the second respondent seeking documents regarding the grading of the posts of its members on whose behalf it was acting. It submitted an access to information request to the second respondent. The response it received did not include information concerning the posts of two of its members, Mr Green and Ms Sahadeo. This necessitated a further request to which there was no response by the

second respondent. This was the only explanation tendered for the delay in the original founding affidavit.

- [10] The appellant later filed a supplementary affidavit after receiving the arbitration records from the PSCBC. In its supplementary affidavit, the appellant indicated that it was instituting the review application in terms of section 145 of the Labour Relations Act[1] (LRA) and that its application was lodged outside of the time limit of six weeks from the time it got knowledge of the award. It

confirmed that it received the award on 18 January 2018 and asserted that there was a delay of about four months from the time the award was received. This was more or less the sum total of the appellant's case in seeking condonation for its late filing of the review application beyond contending that it had good prospects of success and that its case was of some significance.

- [11] The Labour Court dealt extensively with the appellant's condonation application. It concluded that the appellant adopted an insouciant approach in dealing with the issue of condonation. It concluded that the basis for the application was not properly dealt with and that the appellant's reasons for being non-compliant with the prescribed six weeks upper limit provided for in section 145 of the LRA[2] were less than convincing. The Labour Court then concluded that the application for condonation must fail. Evidently, the application for condonation was not only unconvincing in the sense that the reasons for the delay were unsatisfactory. It would be no exaggeration to say that there was no explanation for the delay as the little explanation given was woefully inadequate. All that the applicant said was that it received the award on 18 January 2018. The application was issued on 4 July 2018 just over five months reckoned from the 18 January 2018 which is a period way over the prescribed six weeks' period. It then says that it asked for certain information regarding the dragging of its members and had to make an access to information request. Details of this information were not stated, its relevance and why the application could not be instituted without it were not addressed. The long period of delay was not properly accounted for. This excessive delay called for a detailed explanation which the appellant failed to give. In the absence of a reasonable explanation for the delay, that is the end of the matter.

- [12] In Council for Mineral Technology[3] this Court was very clear that in the absence of a reasonable explanation, considerations such as the prospects of success become

irrelevant. It said:

'The approach is that the court has a discretion, to be exercised judicially upon a consideration of all the facts and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success and the importance of the case. These facts are interrelated; they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay,

the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused.’

[13] As I said earlier, no reasonable explanation was proffered for this doubtlessly lengthy delay. The principle set above has further been expatiated on in quite some detail recently by the Constitutional Court in NEHAWU[4] which fortifies my view that once the court a quo found, as it correctly did, that there was no reasonable explanation for the delay, that was the end of the matter. Of course, it could not complete that process and determine the condonation application without also considering the prospects of success and whether there could be no other compelling reason militating against its refusal, inadequate explanation notwithstanding. This is essential, if not indispensable, for the proper exercise of the judicial discretion. The Constitutional Court aptly expressed itself as follows in NEHAWU.

‘[97] This Court in Khumalo carefully considered the question of delay and said:

‘it is a long-standing rule that a legality review must be initiated without undue delay and that courts have the power (as part of the inherent jurisdiction to regulate their own proceedings) to refuse a review application in the face of an undue delay in initiating proceedings or to overlook the delay. This discretion is not open-ended and must be informed by the values of the Constitution.’

In the present case, the State was required to explain its delay in challenging the legality of the impugned collective agreement proactively. To date, it has not proffered any plausible explanation for its delay for such a lengthy period. The Minister was made aware that no additional funds would be made available to fund a collective agreement that exceeded the fiscal envelope by R30.2 billion. The State committed itself to addressing the shortfall and that was not successful either. Instead of instituting proceedings reviewing the legality of the impugned collective agreement, it performed in terms of clauses 3.1 and 3.2 of the collective agreement.

‘[98] After finding that the delay by the State was unreasonable, the Labour Appeal Court correctly went on to determine whether in the circumstances of this case there was a basis for overlooking the delay. In Gijima, this Court stated that there must be a basis for the exercise of a discretion to overlook the inordinate delay and held:

‘From this, we see that no discretion can be exercised in the air. If we are to exercise a discretion to overlook the inordinate delay in this matter, there must be a basis for us to do so. That basis may be gleaned from the facts placed before us by the parties or objectively available factors. We see no possible basis for the exercise of the discretion here.’ ”

[14] There was no basis set out by the appellant for the Labour Court to exercise its discretion and overlook the delay. This is in addition to the fact that the delay itself was simply not explained. There were no facts placed before the court a quo beyond the terse averments already captured above. For example, it remains unknown how long the appellant took to ask for the information it alleged it needed. How long it took for the employer to respond? What the appellant did for months is simply unexplained when it knew that its upper limit

was six weeks. There is no doubt that there was an inordinate delay that needed, at the very least, a serious attempt to take the court in its confidence about the whole period from the 18 January 2018 until 4 July 2018 when the appellant eventually issued the review application. That is a period in excess of five months which was therefore an unreasonable delay. The Labour Court went on to consider the prospects of success on the merits.

- [15] In looking at the prospects of success, the Labour Court considered the fact that the positions in the corporate services environment are transversal across all government departments. The departments were therefore required to consult with the Minister on the grading of assistant director and deputy director posts which were on salary levels 9, 10, 11 and 12 with effect from 1 August 2012. In terms of paragraph 5(a) of the ministerial circular, all posts that were graded on salary levels 10 and 12 between 1 July 2010 and 31 July 2012 in respect of which the incumbents were appointed on salary levels 9 and 11 were to be automatically upgraded to salary levels 10 and 12 with effect from 1 August 2012. The court then considered paragraph 5(b) of the circular and section 3(1)(c) of the PSA. It stated that in terms of paragraph 5(b) read with section 3(1)(c) of the PSA, executive authorities, be they Ministers, Members of Executive Councils or Premiers were required to consult the Minister in respect of the grading or regrading of jobs or posts within the corporate services environment for salary levels 9, 10, 11 and 12. Such consultation must take place and ministerial approval sought and obtained before a final decision was taken. This, the court said, applied to all jobs or posts and employees who were appointed to such posts on or after 1 August 2012. In terms of paragraph 5(c) of the circular, where job evaluations and grading were never conducted and where there were no records of job evaluations having been done in the past, such posts should be evaluated and full motivation provided for regrading in consultation with the Minister.
- [16] The Labour Court then looked at the Public Service Regulations, 2016, in particular, Chapter 1, Part VI.I, sub-regulation 43(2). In terms of these Regulations, an executive authority is empowered to determine the grade of a post to correspond with its job weight and determine the salary of the employees on the minimum notch of the salary range attached to the relevant grade.
- [17] The appellant's case at the Labour Court was, inter alia, the following. The arbitrator regarded the ministerial directives as decisive, trumping the provisions of Resolutions 3 of 2009 and 1 of
2012. In doing so, the arbitrator undermined these resolutions which were a product of collective bargaining processes. The appellant contended that the resolutions, contextually interpreted, their effect was that all employees on salary levels 9 and 11 where posts were graded on salary levels 10 and 12 were to be appointed on salary levels 10 and 12 respectively. The very purpose of clause 18.1 of Resolution 1 of 2012 was to allow employees whose posts were graded at salary levels 10 and 12 to be appointed and remunerated at salary levels 10 and 12 respectively. Therefore, the arbitrator's decision was not one which a reasonable decision maker could make. He failed to apply his mind judiciously in

interpreting and determining a proper implementation of the resolutions.

[18] The court concluded that the circular created two dispensations, one before 1 August 2012 and one after 1 August 2012. It determined that consultation with the Minister was required in respect of salary levels 9, 10, 11 and 12 in the corporate services environment for salary upgrades with effect from 1 August 2012 with supporting documents for the grading of the incumbents of those posts.

[19] As the employees were all appointed after 1 August 2012 their grading needed to comply with the procedure set out in paragraph 5(b) of the circular. It was mandatory for the Minister to be consulted and his or her approval sought and obtained. The job evaluations conducted by the head of department were not enough as compliance with Circular 16/P and were not enough to comply with paragraph 5(b)(v) of the circular as employees appointed on or after 1 August 2012 needed ministerial approval. He then concluded that the

arbitrator committed no irregularity that could have led to an unreasonable decision. This was because the arbitrator had considered

all the material that was placed before him and gave an interpretation that gave effect to the purpose of the resolutions and the circular. It concluded that the arbitrator's decision was therefore within the band of reasonableness. On these bases the court dismissed the review application.

Submissions on appeal

The appellant's case

[20] There are four grounds of appeal raised by the appellant. The first one is that the Labour Court should have found that the arbitrator did not interpret clause 3.6.3.2 of Resolution 3 of 2009 as amended by Resolution 1 of 2012. On a proper interpretation thereof the arbitrator would have found that the employees were entitled to be remunerated at the salary levels applicable to grades 10 and 12 to which they were appointed. The second ground of appeal was that the court a quo should have found that the posts to which the employees were promoted were graded at levels 10 and 12 at the time they were promoted.

Therefore, the amended clause 3.6.3.2 allowed employees whose posts were graded at levels 10 and 12 to be appointed and remunerated on salary levels 10 and 12 respectively. Thirdly, the court a quo should have found that the arbitrator misunderstood the law, did not apply the correct facts to the law and failed to apply his mind to the issues before him. Therefore, he committed a gross irregularity in the arbitration proceedings. Fourthly, this resulted in the arbitrator delivering an unreasonable award and one that no reasonable decision maker could have arrived at applying the law correctly.

[21] It was submitted that the issue is a question of law. That is the proper interpretation of clause 3.6.3.2 of Resolution 3 of 2009 as amended. The appellant places reliance on section 5(4)(b) of the Public Service Act (PSA) which provides that any act of a functionary in terms

of the PSA may not be contrary to the provisions of any collective agreement concluded by a bargaining council established for the public service as a whole or for a particular sector in the public service. In terms of section 5(1) of the PSA the term “act” means the making of any regulation, determination, the issuing of any directive or the taking of any decision for the purposes of section 5. It was contended that many of the assistant director and deputy director posts were graded at levels 10 and 12. Therefore, clause 3.6.3.2 of the resolution meant that an incumbent of a grade 10 or 12 post, would be paid the salary of grade 9 or 11 for posts graded at 10 and 12 respectively. This was unfair hence the amendment effected in terms of clause 18.1

of Resolution 1 of 2012. These employees have been denied payment on salary levels 10 or 12. This denial was based on the DPSA’s

interpretation of the ministerial directive which was issued as Circular 4 of 2014.

[22] The appellant contends that the posts to which the employees were appointed were graded at 10 or 12 before 1 August 2012 in the period between 1 July 2010 and 31 July 2012. Therefore, the part of paragraph 5(b) of the directive that deals with newly graded posts which needed to have ministerial consultation and approval did not apply to them. They were automatically upgraded from 9 or 11 to 10 or 12 with effect from 1 August 2012 because they could not be appointed to the lower grade 9 or 11 in terms of the

amended resolution. It was argued that the respondent was wrongly relying on the part of paragraph 5(b) which deals with the grading of new posts and the regrading of existing posts. This is the basis on which the respondent was contending that employees appointed on or after 1 August 2012 were not entitled to be paid as provided for in the collective agreement and were to be paid salaries that were below the posts they occupied. Their posts were neither new posts nor regraded posts but posts that were graded 10 and 12 to which the collective agreement applied and were not impacted by the ministerial directive. Had the directive been intended to deprive public servants that were appointed to a grade 10 or 12 post from earning a salary applicable to such post if they were appointed after 1 August 2012, it would be in conflict with the collective agreement. The collective agreement did not discriminate based on the date of appointment to the posts. Such an interpretation would be in conflict with section 5(6)(b) of the PSA.

[23] It was argued that the interpretation that even if a post was graded at 10 or 12 before 1 August 2012 a new person employed in it would not be entitled to be paid the salary attached to that grade was incorrect. The ministerial directive was being incorrectly interpreted by the employer and its interpretation was in conflict with the collective agreement. It was a non sequitur that because the employees were employed after the 1 August 2012, they were not entitled to be paid at the grade 10 or 12 posts to which they were promoted. It was further argued that the implicit interpretation placed on clause 3.6.3.2 that employees employed after 1 August 2012 should be treated less favorably than those appointed prior to 1 August 2012 was not an interpretation that was in accord with the constitutional imperative of achieving equality and fair labour practices. The interpretation placed on the

collective agreement read with the directive that a person appointed to a post graded 10 or 12 after the 1 August 2012 was not entitled to be paid the salary of that post until it was regraded was not based on any provision of the collective agreement

as neither it nor the directive makes such a provision. The directive, correctly interpreted, applies only to new posts or regraded posts. On a proper interpretation of the collective agreement as amended, the employees are entitled to be remunerated at the level of their posts at levels 10 and 12 from the date of their appointment.

The respondents' case

[24] The respondents contend that the positions in the corporate services transverse all government departments. Therefore, the departments were required to consult with the Minister on the grading of assistant director and deputy director posts on salary levels 9, 10, 11 and 12 in the corporate services environment from 1 August 2012. Supporting documents were required for the grading of these posts. In terms of paragraph 5(a) of the circular, it was directed that all posts that were graded on salary levels 10 and 12 between 1 July 2010 and 31 July 2012 in respect of which the incumbents were appointed on salary levels 9 and 11 respectively were to be automatically upgraded to salary levels 10 and 12 respectively with immediate effect from 1 August 2012. However, paragraph 5(b) of the circular was to the effect that in terms of section 3(1) (c) and section 3(2) of the PSA, should the Ministers, Premiers or MECs grade new posts or regrade existing posts in the corporate services environment at salary levels 9, 10, 11 and 12, the grading of such posts would have to be subject to consultation with and approval by the Minister before a final decision was taken. In terms of paragraph 5(c) of the circular where job evaluation and grading processes had never been conducted and there were no records of any job evaluation being conducted in the past, such posts should be evaluated and full motivation provided and the Minister consulted.

[25] There were therefore two dispensations for job evaluations in the public service. There is a period before 1 August 2012 and the period after 1 August 2012. It was argued that irrespective of whether a post was graded at salary level 10 or 12, employees in those positions had to be appointed and remunerated at salary levels 9 and 11 if they were not covered by any OSD dispensation. This effectively suspended the appointment of employees into salary levels 10 and 12. Resolution 1 of 2012 amended Resolution 3 of 2009 so that a post graded at salary level 10 or 12, incumbents of such posts would be appointed and remunerated at salary levels 10 and 12 respectively. This was done to cure the mischief created by clause 3.6.3.2 of Resolution 3 of 2009. The circular titled

Implementation of Amendment of Resolution 3 of 2009 provided for grading measures for salary levels 9/10 and 11/12. The circular

provided for consultation with the Minister for salary levels 9, 10, 11 and 12 in the corporate services environment together with

supporting documents for the objective and appropriate grading of the incumbent. The employees were appointed after 1 August 2012 and as such their grading had to comply with the above requirements. In terms of section 6A of the PSA, the Minister is empowered to issue directives for the proper implementation of the collective agreement.

Discussion

[26] It is common cause that all the employees were appointed to their posts after 1 August 2012. It is further common cause that the posts to which they were appointed had been upgraded to salary levels 10 and 12 at the provincial level by the provincial department of health. There is no dispute that the posts relevant to this matter are in their very nature transversal across government departments and across provinces. Section 5(6) of the Public Service Act reads:

‘(a) Any provision of a collective agreement contemplated in subsection (4), concluded on or after the commencement of the Public Service Amendment Act, 2007, shall, in respect of conditions of service of employees appointed in terms of this Act, be deemed to be a determination made by the Minister in terms of section 3(5).

(b) The Minister may, for the proper implementation of the collective agreement, elucidate or supplement such determination by means of a directive, provided that the directive is not in conflict with or does not derogate from the terms of the agreement.’

[27] Section 3(5) of the Act is also relevant. It reads:

‘(a) Subject to the Labour Relations Act and any collective agreement, the Minister may make determinations regarding any conditions of service of employees generally or categories of employees, including determinations regarding a salary scale for all employees or salary scales for particular categories of employees and allowances for particular categories of employees.

(b) A determination involving expenditure from revenue shall be made in consultation with the Minister of Finance.’

[28] As I understand it, the case sought to be made by the appellant is that the posts to which its members had been promoted had been graded to salary levels 10 and 12 respectively. For that reason, the grading by the provincial department of health entitled them to be remunerated at the applicable salary levels. The difficulty with the appellant’s case in this regard is that it is not its case that the Minister was not empowered to issue the directive that he or she issued. This is not even a case in which the directive is sought to be set aside. I do not see how the circular dated 5 February 2014 is not aligned with or conflicts with the collective agreement or the resolution as amended. It seems to me that the appellant’s members’ posts being transversal

across the public service, a regulatory mechanism for the implementation of the resolution is absolutely necessary and in fact

rational to ensure consistency. This is not only so that all employees occupying similar posts and appointed on or after the 1

August 2012 are remunerated equally or at least equitably across all national and provincial government departments for generic and transversal jobs. There is also section 3(5)(b) which requires consultation with the Minister of Finance for determinations that involve expenditure from the fiscus. It is not difficult to imagine varying weights for the exact same jobs or posts being given by the different national and provincial government departments for posts that are generic and transversal. This surely is undesirable as one would expect that to the extent that the Minister is empowered in terms of the PSA, job weighting and the evaluation of the personnel appointed to transversal jobs or posts should have some measure of consistency to achieve, not necessarily equality, but certainly equitability. The principle of equal pay for equal jobs is of some relevance in my view.

[29] There is another logical reason for the need for ministerial approval. The job grading for Mr Naidoo's post was done in 2010 and confirmed in 2014. Mr Green's post was last graded in 2007 and confirmed in 2009 and 2013. Ms Sahadeo's post was last graded in 2007 and confirmed in 2009 and 2013. Mr Nxasana's post was graded in 2011 and evaluated again in 2014. Mr Nair's post was graded in 2011 and confirmed in 2014. It is unclear what has been happening in other provincial government

departments for similar posts. It is not even certain if all the posts were correctly weighted across all government departments. The statutory power bestowed on the Minister to oversee these processes appear to have been exercised very rationally and justifiably.

[30] In MEC Van Wyk[5], this Court explained what is required of an arbitrator interpreting a collective agreement as follows:

'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 his/her powers from the Act he/she must at all times take into account the primary objects of the Act. The primary objects of the Act are better served by an approach that is practical to the interpretation and application 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.'

Conclusion

[31] I do not see any misconduct by the arbitrator in interpreting the collective agreement read with the determination by the Minister which is contained in the directive nor is there any irregularity in the arbitrator determining the matter in the manner he did. In fact, the arbitrator correctly interpreted the resolution read with the circular. The suggestion that the

arbitrator never interpreted the resolution is difficult to understand. When one looks at the whole Resolution 3 of 2009 together with the relevant provisions of the PSA and the 2016 Regulations, it is almost difficult to understand how it could be correct for any collective agreement to be interpreted and applied totally independently of ministerial circulars when issued. Therefore, the arbitrator did not commit any misconduct or misdirection in dealing with this matter and reaching the conclusion she did.

[32] It is so that the appellant's members' posts were evaluated by the head of department. It follows that the evaluation process must be completed as required by getting the ministerial approval for the upgrades. Once the ministerial approval is sought but refused for no legally sound reason, it may very well be that the appellant, on behalf of these employees may have a relief against the Minister. I may comment in passing that I find it very strange that the Minister of Public Service and Administration was not joined in these review proceedings as it would seem to me that he has a substantial interest regard being had to the fact that the relevant posts are transversal and he/she issued the impugned circulars. But that is not the reason why the appeal must fail. The insurmountable problem for the appellant is its failure to make a proper application for condonation. The failure to make a proper application for condonation as indicated earlier in this judgment, must lead to the ineluctable conclusion that the

appeal is dismissed. The court a quo, having reached that conclusion, the appellant has not explained the basis on which the discretion could have been and should have been exercised differently absent a proper explanation for the delay being made in the condonation application. The authorities in this regard are clear. There is nothing special about the appellant's case that would make a compelling case for all the short comings in the condonation application to be overlooked in the interests of justice. After all, all the employees were promoted in 2012, 2013 and 2014, some five, four or three years respectively after their promotion and after the resolution was amended. Nobody knows if similar employees' gradings and regradings were subjected to ministerial approvals in other government departments or other provinces in compliance with the impugned directive after it was issued as part of the rationalization and standardization process that seems to have been intended. They only started taking the matter to the PSCBC in 2017 for conciliation. In any event, the arbitrator correctly interpreted Resolution 3 of 2009 as amended in terms of clause 18.1 of Resolution 1 of 2012 read with the ministerial circular and for that reason too, the appeal stands to be dismissed.

[33] With due consideration to law and fairness, it would be inappropriate to award costs in this matter.

The result

[34] In the result the following order is issued:

Order

1. The appeal is dismissed with no order as to costs.

M.S. Jolwana

Savage ADJP and Van Niekerk J concur.

APPEARANCES:

FOR THE APPELLANT:

Adv M Pillemer SC

INSTRUCTED BY:

Purdon & Munsamy Attorneys, Durban

FOR THE FIRST RESPONDENT: Adv R Athmaran

INSTRUCTED BY:

The State Attorney, Durban

[1] Act 66 of 1995, as amended.

[2] Section 145(1) provides that: Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award – (a) Within six weeks of the date that the award was served on the applicant, unless the alleged defect involves corruption, or (b) If the alleged defect involves corruption, within six weeks of the date that the applicant discovers corruption.

[2] Section 145(1) provides that: Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award –

(a) Within six weeks of the date that the award was served on the applicant, unless the alleged defect involves corruption, or

(b) If the alleged defect involves corruption, within six weeks of the date that the applicant discovers corruption.

[3] NUM v Council for Mineral Technology

[1999] 3 BLLR 209 (LAC); [1998] ZALAC 22 at para 10.

[4] National Education Health and Allied Workers' Union v Minister of Public Service and others and related matters [2022] 5 BLLR 407 (CC); (2022) 43 ILJ 1032 (CC).

[5] Western Cape Department of Health v MEC Van Wyk and others [2014] 11 BLLR 1122 (LAC); (2014) 35 ILJ 3078 (LAC) at para 22.

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