

SOUTH AFRICA / JUDGMENT

Yende v Public Service Coordinating Bargaining Council (PSCBC) and Others (C 690/2018) [2021] ZALCCT 36 (2 June 2021)

[2021] ZALCCT 36

COURT

Labour Court Cape Town

BEFORE

Lagrange

CASE / FILE NUMBER

C 690/2018

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The Labour Court of

South Africa,

held at CAPE TOWN

case

No: C 690/2018

In the matter

between:

Simpbiwe

yende

Applicant

and

Public

service coordinating bargaining Council (PSCBC)

First

Respondent

I

DE VLIET - SEYNHAEVE (N.O.)

Second

Respondent

Western

Cape provincial treasury

Third

Respondent

Date

of Set Down: 25 May 2021

Date

of Judgment: This judgment was handed down electronically

by circulation to the parties' legal representatives by email,
publication on
the Labour Court website and release to SAFLII. The
date and time for handing down judgment is deemed to be 14h00 on 2
June 2021

Summary: (Review – interpretation and application of a collective
agreement – applicable job grading - Condonation –
inordinate
delay and poor explanation – prospects of success
poor – condonation refused)

JUDGMENT

LAGRANGE J

Introduction

- [1] This is an application to review and set aside an arbitration award in which the arbitrator dismissed the claim by the applicant and others that their jobs as procurement specialists should be graded and remunerated at salary level grade 10 rather than salary level or grade 9. The claim was based on a dispute about the interpretation of two resolutions of the PSCBC, namely Resolution 1 of 2012 read together with Resolution 3 of 2009.
- [2] Originally the dispute was referred to arbitration by the union NUPSAW on behalf of eight applicants. By the time the arbitration commenced only five individual applicants remained. The only applicant in the review application is Mr S Yende ('Yende'), who was one of those five applicants. The review application was launched very late and the applicant has applied for condonation thereof.
- [3] The hearing of the application was conducted by means of Zoom in view of the prevailing Covid 19 pandemic.

Condonation application

The delay and explanation for the delay

- [4] The review application was launched at least 315 days late, approximately seven times later than it should have been. The delay is plainly very excessive.
- [5] Briefly, the narrative explaining the delay is that within about a fortnight of the award being issued the applicant, Mr S Yende ('Yende') approached his union, which needed time to consider the award. However, when no feedback was received after two weeks he contacted his legal insurers. The first appointment he got with an advisor was on 26 April 2018. By this stage, the review application should have been nearly ready for filing. In any event, he only saw his attorney at the end of April

2018. The attorney requested more documentation which he furnished on 7 May. By 11 May, his attorneys had given an opinion to the insurers,

and he waited for their approval to proceed. Approval was forthcoming on 24 May 2018. By this stage, the review application was about a month overdue. It took another fortnight to draft the application and the condonation application. The applicant forwarded a copy of the signed documents by email to the attorneys on 19 June. They then advised him to try and drop off the originals at the Johannesburg office “if possible”. He sent the originals by ordinary mail and consequently has no documentary proof of sending them. It appears they never arrived at his attorneys.

- [6] In any event, his attorneys were aware by early July that the original documents were still needed for filing. Another short pause was occasioned by doubts about whether the claim could be pursued given that the applicant had resigned by that time. Although there had been delays up till then and even though the pace was slower than it should have been given the expiry of the six week period, there had been progress,
- [7] However, from July 2018, matters slowed to a snail’s pace. It might be that this was a result of a lack of expedition on the part of the applicant’s attorneys, but his own claimed efforts to speed things up were not set out in anything like the necessary level of detail. The sole account the applicant gives of his own role during the entire post-July 2018 hold-up is that: “I continually followed up with my legal insurers to push the matter and that I did not merely sit back and wait for them to confirm cover for the attorney’s financial instructions, hence no blame should be attributed to me.” What is hinted at in this explanation is that there were delays occasioned by obtaining authorisation to release funds for further steps to be taken. However, the applicant does not disclose to the court what steps these were, or when glitches impeding progress arose. The absence of any tangible detail about the applicants own efforts over such a long period of the delay is wholly unsatisfactory as an explanation. It is also unclear what was holding up matters on the side of his attorneys. By July 2018, his attorneys knew that the original review application was significantly overdue. It is noteworthy that there is no further detail about what was happening during this time provided by his attorneys either.
- [8] It was only in November 2018 that the Cape Town branch of his attorneys advised the insurer that it still had not received the original documentation which the applicant claims he had posted. The end result was that the original documentation could not be obtained and the application had to be launched afresh. This was only done towards the end of February 2019. There is no explanation why the whole application had to be redrafted when his attorneys ought to have been in possession of the emailed copy of the founding papers which he forwarded to them in June 2018, or at very least their own draft which they forwarded to him for signature. Only

the condonation application would have required further drafting.

- [9] In short, even if the sluggish pace of the application until the end of June 2018 is capable of being condoned, the explanation for the delay from July 2018 onwards is extremely opaque and raises more questions than answers. It is not a satisfactory account of a very extensive holdup of nearly nine months before the application was finally filed at the end of March 2019. The application for condonation can be dismissed on this basis alone.

Prospects of success

- [10] Do Yende's prospects of success nonetheless outweigh the inadequacy of the explanation for a very substantial delay?

- [11] Clause 3.6.3.2 of resolution 3 of 2009, which took effect on 1 April 2010, reads:

'The commencing salary for all employees in posts not covered by any OSD as per PSCBC Resolution 1 of 2007 and 3 of 2008, and appointed as assistant directors and deputy director shall, with effect from 1 July 2010, be on salary levels 9 and 11 respectively.'

(emphasis added)

- [12] Clause 18.1 of resolution 1 of 2012, which took effect on 1 August 2012, reads:

'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.'

- [13] The arbitrator identified that the crux of the difference between the parties related to whether clause the applicants, who were not yet employed in the position of procurement specialists by 1 August 2012, could rely on clause 18.1. The arbitrator found that the amendment was introduced so that employees would not be negatively affected by clause 3.6.3.2 in the sense that if anyone occupied a post graded at level 10 or 12 before 31 July 2012, even if that position had been subsequently downgraded to level 9 or level 11.
- [14] The arbitrator understood that the reference to 'employees' in clause 18.1 concerned persons already employed in such posts, which disqualified the applicants who were only appointed after that date. She was aware that certain procurement specialists were upgraded to level 10 during 2009 and 2010 (prior to the applicants' employment), but it found it was unclear whether those upgrades applied to all procurement specialists posts or whether they were ad hoc. In any event, Resolution 3 of 2009 'did away with that' and personnel in jobs graded on level 10 were appointed on level 9.
- [15] Subsequently, Resolution 1 of 2012 was passed and directives were issued by the Minister as to the proper implementation of clause 18.1. In particular, a determination issued in a circular dated 25 February 2013 stated that employees serving in posts that were graded on salary levels 10 and 12 since the implementation of Resolution 3 of 2009 on 1 April 2020 up to and including 31 July 2012, they would be automatically absorbed into those regraded posts with effect from 1 August 2012.

- [16] A subsequent circular 4 of 2014 stated that posts graded on salary levels 10 and 12 between 1 July 2010 and 31 July 2012, whose incumbents were appointed at salary levels 9 and 11 would be automatically upgraded to levels 10 and 12 from 1 August 2012 provided there were 'supporting job evaluation results'. Once again this measure was not applicable to employees appointed after 1 August 2012.
- [17] Furthermore, the directive determined that where a job weighting for a particular job fell in the "discretionary area between two consecutive salary ranges in levels 1 to 12, an executive authority was required to grade the post at the grade attached to the lower job weight range.
- [18] It was not disputed that on the basis of the 2009 job evaluation the job weighting value for the post of procurement specialist was 556. A ministerial directive issued under on 12 September 2011, stated that:

"Following the conclusion of Resolution 3 of 2009 the Minister approved an implementation Directive that was communicated to departments under cover of Circular 2 of 2009. Paragraph 7.12.3 of the Circular determines as follows: 'the Minister for the Public Service and Administration directed that where the job score or a specific job falls in the discretionary area between two consecutive salary ranges from levels 1 to 12, an executive authority must grade the post at the grade attached to the lower job weight range.'"

- [19] In passing it must be noted that this meant that there was an overlap, over a certain range of job weights, between two salary ranges. The arbitrator notes that 'a more flexible approach was adopted' and job salary levels had to be determined according to Annexure A, which was attached to the directive of 12 September 2011. Her reference to the more flexible approach was a direct reference to paragraph 2 of that directive which read:

"The above mentioned directive in effect made the job weight ranges distinct. However, as a result of, inter alia, the impact of the directive under certain circumstances it became clear that a more flexible approach with regard to the utilisation of the discretionary area was required. The above mentioned directive was therefore reconsidered and the conclusion was reached that the impact could be reduced by adopting the current mean as a cut-off point to make the job weight ranges distinct to promote consistency in the grading of similar jobs."

- [20] Applying this approach, the overlap between job weightings was eliminated and each salary level would correspond to a job weighting range unique to that salary level. The effect of eliminating the former overlaps between job weightings for salary levels 9 and 10, meant that the new exclusive weight range for level 9 posts was a minimum of 507 and a maximum of 559. The job weight rating of 556 (derived from the 2009 job evaluation of the post) meant that the job of procurement specialist would be rated at salary

level 9 in terms of Annexure A, which set out the weightings allocated on the new approach to each salary level. Salary level 10 job weightings began at 560. The directive of 12 September 2011 also stated the amended implementation directive would be implemented with effect from 1 October 2011.

- [21] Apart from insisting that the clauses of the resolutions in question were not confined to incumbents in the posts prior to 1 August 2012, Yende had maintained during the arbitration that the directives issued by the minister derogated from the resolutions in question insofar as they resulted in altering the grading of the position in 2009.

Grounds of review and evaluation

Grounds of review

- [22] The applicant contends that the arbitrator failed to deal with evidence materially affecting the outcome of the case. There was evidence that the post of procurement specialist had been graded at salary level 10 in 2009 and this version was not disputed and was in fact confirmed by the department's witness, Mr. Dippenaar ('Dippenaar').
- [23] Further, the arbitrator failed to consider evidence of Dippenaar that the HOD was entitled to grade the post at salary level 10, and that even if the discretion to grade jobs had been subsequently limited, it did not affect the validity of the 2009 grading of the job, which was the only evaluation done to date.
- [24] It did not mean that previous decisions taken by the HOD at the time he was empowered to do so fell away. Moreover, this was the only job evaluation done to date.
- [25] In short, Yende maintains that the arbitrator did not appreciate the consequences of the 2009 grading of the post. No subsequent grading exercise took place and accordingly it remained unaltered. More particularly, no regrading of the post occurred before he and the other applicants were employed. As such the grading should have remained unchanged and therefore he should have been employed at salary level 10, which corresponded to the post grading. His interpretation of the effect of clause 18.1 of resolution 1 of 2012 supported this approach.

Evaluation

- [26] The test of review which is applied to the interpretation and application of collective agreements has been expressed in the following terms:
- [15] In *North East Cape Forests v SA Agricultural Plantation & Allied Workers Union & others*, 17 Froneman DJP (as he then was) stated that a collective agreement is unlike other ordinary contracts and that the primary objects of the Act are better served by an approach that is practical to the interpretation and application of such agreements. This, it was stated, was better suited to promote the 'effective, fair and speedy resolution of labour disputes'. 18 In *Ceramic Industries Ltd t/a Betta Sanitary Ware v NCBAWU (2)*¹⁹ this court remarked, *inter alia*, that:

'Where constitutional validity is not an issue it seems that an interpretation that accords best with the general purpose of the Act (as set out in s 1) and the more specific purpose of a particular section, should be followed.'

In *National Education Health & Allied Workers Union v University of Cape Town & others*, the Constitutional Court stated:

'The declared purpose of the LRA "is to advance economic development, social justice, labour peace and the democratisation of the workplace". This is to be achieved by fulfilling its primary objects, which include giving effect to s 23 of the Constitution. It lays down the parameters of its interpretation by enjoining those responsible for its application to interpret it in compliance with the Constitution and South Africa's international obligations. The LRA must therefore be purposively construed in order to give effect to the Constitution.'

^[1]

- [27] The dispute concerned the interpretation of collective agreements in the form of bargaining council resolutions, and their application to Yende's position as a procurement specialist employed after 1 August 2012.
- [28] Collective agreements are not the only source of conditions of employment in the public service. Section 5(6) of the Public Service Act, Proclamation 102 of 1994 ('the PSA') states:
- (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.
- [29] The arbitrator firstly considered the text of the clauses of the resolutions and implementation directives. Effectively, she found that clause 18.1 was clause having a transitional impact. To contextualize matters, it is important to note that resolution 3 of 2009 introduced a significantly revised salary level and grading structure.
- [30] The directive contained in circular 2 of 2009 (issued on 11 September 2009) specifically dealt with the operationalisation of the resolution. Paragraph 7.12 of the directive noted that the commencement salary for posts of assistant directors and deputy director or equivalent salary levels had been set at levels 9 and 11 respectively. The same paragraph made it clear that the discretion previously exercised by executive authorities to grade such jobs at salary related ranges 10 and 12 was suspended. Instead, executive authorities were required to grade the post at the lower job weight range. This was made more explicit when the overlap of job weightings between different grades was eliminated in with effect from 1 October 2011.
- [31] Given that backdrop, it was not unreasonable for the arbitrator to interpret the purpose of clause 18.1 to have been the amelioration of the negative impact clause 3.6.3.2 would have had upon existing incumbents of posts graded at salary level 10 during the period when an executive authority still had the discretion to grade the job at either level 9 or level 10. It meant that as existing incumbents of those posts, they would not be prejudicially affected by

the restructuring of the salary levels and grades. Grammatical interpretation of the clauses of the resolution aside, there is nothing unreasonable about the arbitrator interpreting the clauses in this way. It is also worth noting that the 2009 job evaluation, which allocated a job weight of 556 to the post of procurement specialist, was still relied on when the overlaps between job weightings corresponding to different grades was eliminated. The weighting remained unchanged but the grading altered after 1 October 2011.

- [32] In the circumstances, it cannot be said with any confidence that there is a prospect that the arbitrator's interpretation of the resolutions were ones that no reasonable arbitrator could have arrived at on what was before her. Consequently, I am satisfied that the applicant's prospects of success on the merits of the review are poor. Accordingly, even if the lengthy and poorly explained delay was not sufficient reason to dismiss the condonation application, when the prospects of success are also brought into consideration there is even more justification for dismissing the application.

Order

- [1] The condonation application for the late filing of the review application is dismissed and consequently the review application is also dismissed.
- [2] No order is made as to costs.

Lagrange J

Judge of the Labour Court of South Africa

Representatives For the Applicant N Zulu of Ismail and Dayha Attorneys For the Third Respondent C Bosch instructed by the State Attorney

- [1] SA Municipal Workers Union v SA Local Government Bargaining Council & others
(2012) 33 ILJ 353 (LAC) at 360-361.

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