IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NUMBER: C 98/2017

Not reportable

Of interest to other judges

In the matter between:

THE NATIONAL COMMISSIONER

OF CORRECTIONAL SERVICES First Applicant

THE MINISTER OF CORRECTIONAL SERVICES Second Applicant

and

PSA obo SNYMAN First Respondent

PIERRE SNYMAN Second Respondent

GPSSBC Third Respondent

J P HANEKOM *N.O.* Fourth Respondent

Heard: 1 February 2018

Delivered: 28 February 2018

SUMMARY: Review – interpretation and application of collective agreement – LRA ss 145 and 24.

JUDGMENT

STEENKAMP J:

Introduction

[1] This is the third round of a series of applications that have served before this Court, all relating to a long-running dispute between Mr Pierre Snyman and his employer, the Department of Correctional Services.[1]

[2] Snyman migrated from one post to another in terms of a collective agreement referred to as an Occupation Specific Dispensation (OSD).[2] A dispute ensued about his new post. Two settlement agreements were made orders of this Court. Still his salary was disputed. The PSA referred a dispute to the Bargaining Council on his behalf. The Arbitrator, Adv J P Hanekom[3], found that the Department did not correctly apply and interpret the OSD. He ordered the Department to place Snyman on the OSD salary band CB5 and to pay him accordingly. The applicants seek to have that award reviewed and set aside in terms of s 145 of the LRA.[4]

Background

[3] Snyman started working for the Department in 1991 as a correctional officer on salary level 8. He was promoted to senior correctional officer in 2004.

[4] On 24 June 2004 the Department concluded a collective agreement with NEHAWU and POPCRU. Although the PSA is not a party to the agreement, its members are bound by it. The OSD is contained in the agreement. Its objectives are to create an occupational specific dispensation for “centre based” and “non-centre based” correctional officials that provides for a unique salary structure; career-pathing opportunities based on competencies, experience, performance and

[1] Mr Snyman is cited, it seems superfluously, as the second respondent in this application. The first respondent is his trade union, the Public Servants’ Association (PSA), acting on his behalf. The applicants are the National Commissioner and the Minister of Correctional Services. I shall refer to them as “the applicants” or, in shorthand, as the Department.

[2] The OSD was contained in Resolution 2 of 2009 of the General Public Service Sectoral Bargaining Council (GPSSBC), the third respondent.

[3] The fourth respondent.

[4] Labour Relations Act 66 of 1995.

scope of work; pay progression; grade progression based on performance; recognition of appropriate experience; and differentiated salary scales for different categories of correctional officials.

[5] Snyman, who was at the time employed as a non-centre based correctional services official at salary level 8, applied unsuccessfully in terms of the OSD to migrate to a centre-based post, viz Divisional Head: Security at Mossel Bay. He applied in this Court[5] to have that decision reviewed and set aside.

[6] The parties signed a settlement agreement on 25 November 2011. The pertinent terms were:

6.1 The Department would place ("migrate") Snyman in the vacant post of Centre Coordinator: Operational; Support at Mossel Bay Youth Centre with effect from 1 October 2011.

6.2 The Department would pay Snyman on the salary scale of R230 136 "in accordance with all the applicable provisions of the OSD agreement, GPSSBC resolution 2 of 2009."

6.3 "Disputes concerning the applicable OSD band with regard to the post of Centre Co-ordinator Mossel Bay Youth Centre may be pursued through arbitration or other legal institution, depending on the nature of such dispute."

[7] On 30 May 2013 an application by the PSA and Snyman to have that agreement made an order of Court came before Lagrange J. The Department brought a counter-application to rectify the settlement amount. Lagrange J gave judgment on 3 March 2014. He made the settlement agreement an order of court in terms of s 158(1)(c) of the LRA and dismissed the counter-application.

[8] Lagrange J found that the Mossel Bay Youth Centre was a medium centre. As Snyman's legal representatives pointed out, that is important because the job of centre co-ordinator at a medium centre – as opposed to a small centre – attracts the OSD band of CB5, with the commensurate salary.

[5] Under case number C 382/2011.

[9] The Court further found that the parties had agreed to place Snyman in the post of Centre Coordinator: Operational Support and that such a post exits. “Accordingly, there is no good reason not to make the arbitration award and order of Court and ordering the respondents to comply with its terms. Insofar as there is a real dispute about the correct OSD salary band applicable to Snyman, that is a matter which does not have to be resolved to enforce the settlement agreement and appears to be a matter for the dispute resolution mechanisms of the OSD agreement.”

[10] The applicants’ reading of the judgment is that Snyman had to be placed on salary level CB5, as that is the commensurate salary for the post at a medium centre. Yet the Department did not place him in that salary level. The applicants then brought contempt proceedings under case no C110/2012, alleging that the Department had not complied with the order issued by Lagrange J. That dispute was also settled on 23 October 2015. The relevant terms are that:

10.1 Notwithstanding the Department’s PERSAL salary system reflecting Snyman’s job title as security manager, it confirmed his placement as Centre Coordinator at Mossel Bay Youth Centre from 1 October 2011.

10.2 Snyman’s salary was commensurate with OSD band CB4, notwithstanding that the OSD reflects the post of Centre Coordinator at a medium centre at salary level CB5.

[11] Snyman contends that he had still reserved the right to challenge his salary in terms of the first settlement agreement. The second agreement merely recorded the status of his salary at the time; it did not detract from his right to challenge it.

[12] The second agreement was also made an order of court on 23 October 2015. However, paragraph 2 of the agreement – relating to the CB4 salary band – was not included in the court order.

[13] Consequent upon the Court making the second agreement an order of court, the PSA referred a dispute to the Bargaining Council in terms of s 24 of the LRA to interpret the collective agreement (the OSD) in order to determine what his salary should be.

The arbitration award

[14] The arbitrator found that the Department had not correctly applied and interpreted the OSD when it appointed Snyman in the Centre Coordinator post on OSD salary band CB4 instead of CB5. He ordered the Department to place Snyman on OSD salary band CB5 with effect from 1 October 2011.

Relief sought

[15] The applicants seek to have the award reviewed and set aside on three grounds. But before I deal with those grounds, I need to rule on the union's application to strike out certain paragraphs in the founding affidavit.

Application to strike out

[16] The application to strike out was brought on the basis that the offending paragraphs and sub-paragraphs constitute evidence that did not serve before the arbitrator. Those are paragraphs 33 (and the sub-paragraphs thereunder); 34; and sub-paragraphs 37.1 and 37.3.

[17] The offending portions comprise references to affidavits filed in previous proceedings before this Court. But only the judgments and orders in those proceedings served before the arbitrator. Snyman never had the opportunity to deal with the evidence that the Department now seeks to introduce before the arbitrator. This is a review application. New evidence pertaining to the reasonableness of the arbitrator's conclusion cannot be introduced after the fact.

[18] The application to strike out the offending portions is granted.

Review grounds

[19] The Department raises three grounds of review:

19.1 The arbitrator did not have jurisdiction to decide a dispute in terms of s 24 of the LRA;

19.2 Alternatively, the award was not one that a reasonable decision-maker could make;

19.3 The award was improperly obtained.

Evaluation

[20] I shall consider each of the three review grounds in turn.

Jurisdiction

[21] The Department argued that the Bargaining Council did not have jurisdiction over the dispute that the PSA referred because Snyman's salary had been fixed by agreement. The salary dispute, it maintains, is a contractual one. It is not a dispute over the interpretation or application of a collective agreement.

[22] Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in *Chirwa*[6], and not the substantive merits of the case.[7]

[23] Although there are no pleadings in the bargaining council, the referral must be the starting point. And the union referred a dispute over the interpretation and application to the bargaining council on behalf of Snyman. The union's representative, Ms Aileen Mosetic, reiterated that characterisation of the dispute in her opening statement. And the Department's representative, Mr Luphondo[8], did not take issue with jurisdiction; instead, he called upon the arbitrator to favour his interpretation of the OSD and argued that Snyman could not be promoted in accordance with its terms.

[24] It is so, as Mr *De Villiers-Jansen* argued, that the arbitrator must determine the true dispute between the parties.[9] But that is what the arbitrator did in this case, using as his starting point the characterisation of the dispute by

[6] *Chirwa v Transnet Limited and Others* [2007] ZACC 23; 2008 (3) BCLR 251 (CC); 2008 (4) SA 367 (CC).

[7] *Gcaba v Minister for Safety and Security and Others* (CCT64/08) [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC) ; (2010) 31 ILJ 296 (CC) ; [2009] 12 BLLR 1145 (CC).

[8] Spelt as Lepondo in the transcript.

[9] *Wardlaw v Supreme Mouldings (Pty) Ltd* (2007) 28 *ILJ* 1042 (LAC); *CUSA v Tao Ying Metal Industries* 2009 (2) SA 204 (CC) par 66.

the parties. The remaining dispute between the parties flows directly from their interpretation of the OSD and its application. And, as the union pointed out, the Department argued in this Court before Lagrange J that "the essence of the dispute is whether the agreement of settlement contradicting the objectives and provisions of Resolution 2 of 2009 which cannot be implemented because the PERSAL system can be held to reflect the true intention of the parties".

[25] As the arbitrator noted in his interaction with the Department's representative, Mr Luphondo: "But the court order also says that if there is a dispute about the salary that is something that can be arbitrated". And Mr Luphondo agreed.

[26] The characterisation of the dispute is also in line with the judgment of Lagrange J when he concludes:[10]

> "It seems if there is a dispute about the applicability of a particular OSD band to an employee that is essentially a matter concerning the interpretation and application of the OSD agreement, which is a collective agreement, and should be resolved through the dispute resolution procedures applicable under that agreement".

[27] That dispute resolution process – concerning, as it does, the interpretation and application of the OSD agreement – is, of course, a referral to the Bargaining Council.

[28] The union's legal team also had regard to the useful guideline offered by the LAC in *Tshambi*[11]:

> "What is a 'dispute' per se, and how one is to recognise it, demands scrutiny. Logically, a dispute requires, at minimum, a difference of opinion about a question. A dispute about the interpretation of a collective agreement requires, at minimum, a difference of opinion about what a provision of the agreement means. A dispute about the application of a collective agreement requires, at minimum, a difference of opinion about whether it can be invoked."

[10] In par [18] of his judgment.

[11] *HOSPERSA obo Tshambi v Department of Health, KwaZulu-Natal* (2016) 37 *ILJ* 1839 (LAC) par [17].

[29] In this case, there is a difference of opinion between the Department and the union about the salary band applicable to Snyman, now that it is beyond dispute that he has been placed in the post of Centre Coordinator in a medium centre. The difference arises from the parties' interpretation of the OSD concerning the "migration" of posts and the salary band applicable to the new post that Snyman now occupies. And there is a difference of opinion about its application: applied to Snyman, does his placement in terms of the OSD entitle him to a salary at the higher CB5 band?

[30] The arbitrator did have jurisdiction to decide the question before him. This ground of review fails.

Reasonableness

[31] Having decided that the bargaining council did have jurisdiction, it remains to be considered whether the remaining review grounds have merit.

[32] The first two review grounds – reasonableness, i.e. the *Sidumo*[12] test, and the allegation of a gross irregularity – can conveniently be dealt with together.

[33] Mr *De Villiers-Jansen* argued that the arbitrator did not consider the aim, purpose and all the terms of the agreement; the primary objects of the LRA; a practical approach to the interpretation of the agreement; and what would be fair to the parties, as he was enjoined to do by *Department of Health v Van Wyk & Others.*[13] The Department complained that the arbitrator considered only one subclause – clause 6.1 – of the OSD. But that is not correct. As appears from the award, the arbitrator also considered clauses 7 and 16.5 relating to promotion; and clause 16.2 relating to migration. He further had regard to the general principles relating to promotion and the annexure setting out the entry requirements for salary levels CB4 and CB5.

[34] The approach followed by the arbitrator was a reasonable one. It is in line with the guideline of the LAC to follow a practical approach rather than

[12] *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC).

[13] (2014) 35 *ILJ* 3078 (LAC) par 22.

applying purely contractual principles[14]; and that fairness may also be taken into account.[15] He interpreted the OSD and applied it to the facts of this dispute; and he found that the post of Centre Coordinator attracted a CB5 salary, and that it was fair to pay Snyman that salary. That is a conclusion that a reasonable arbitrator could reach in interpreting and applying the OSD.

[35] Turning to the allegation of a gross irregularity, this overlaps to a large extent with the reasonableness test. As Mr *De Villiers-Jansen* pointed out in his argument, the SCA held in *Herholdt*[16] that, for a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated in s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result (i.e. the *Sidumo* test).

[36] The Department accepts that it – and Snyman – is bound by the OSD. But, it argues, Snyman has been accorded greater rights by the arbitration award than he is entitled to under the OSD; and that amounts to a gross irregularity. But there is nothing in the OSD that states that an employee may not be promoted or placed in a higher position, as Lagrange J pointed out in his judgment[17]:

> "On the affidavits there is sufficient reason to accept that the Mossel Bay Centre is a medium centre and that the post to which Snyman was appointed under the settlement agreement does exist. As such the salary of Snyman would be commensurate with the OSD salary band and the payroll anomaly relied upon by the [Department] should disappear."

[37] .And the Department agreed to place Snyman in the Centre Co-ordinator post – a higher post that attracts a CB5 salary. And lastly, as the union pointed out, s 199(1)(b) of the LRA states that an employee may not be treated in a manner less favourable than that prescribed by the collective agreement; there is no provision to the contrary.

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[14] *North East Cape Forests v SAAPAWU (2)* [1997] 6 BLLR 711 (LAC) 718 [per Froneman JA].

[15] *SAMWU v SALGBC* [2012] 4 BLLR 334 (LAC).

[16] *Herholdt v Nedbank Ltd* 2013 (6) SA 224 (SCA) par [25].

[17] Paras {27] – [28].

[38] The arbitrator did not misconceive the nature of the enquiry. He decided exactly the question before him, as contemplated in *Kloof.*[18] And the result, as I have already found, is not so unreasonable that no other arbitrator could have come to the same result.

[39] The award is not reviewable on these grounds.

Award improperly obtained?

[40] Mr *De Villiers-Jansen* readily and properly conceded that this is not a clear-cut case of an award having been improperly obtained such as, for example, where the successful party bribed the arbitrator or stole a march on its opponent by proceeding with an arbitration knowing that the other party is not aware of it.[19] Instead, he relied on correspondence between the parties, as well as affidavits culled from other litigation, both annexed to the founding affidavit, purporting to show that Snyman did not dispute the salary scale.

[41] The problem with this submission is that the evidence on which it purports to rely did not serve before the arbitrator. It is for that reason that it was struck out. And the award was not otherwise improperly obtained.

Conclusion

[42] The arbitrator did have jurisdiction to determine the dispute; and the award is not reviewable.

[43] With regard to costs, the Constitutional Court in *Zungu v Premier of the Province of KwaZulu-Natal and Others*[20] very recently reiterated:

> "The rule of practice that costs follow the result does not apply in Labour Court matters. In *Dorkin*, Zondo JP explained the reason for the departure as follows:
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> 'The rule of practice that costs follow the result does not govern the making of orders of costs in this Court. The relevant statutory provision is to the effect that orders of costs in this Court are to be made in accordance with

[18] *Gold Fields Mining SA Ltd (Kloof Gold Mine) v CCMA* [2014] 1 BLLR 20 (LAC).

[19] Cf *Stars Away International Airlines (Pty) Ltd v Thee NO* (2013) 34 *ILJ* 1272 (LC) par [29].

[20] [2018] ZACC 1 par 24-26.

> the requirements of the law and fairness. And the norm ought to be that costs orders are not made unless the requirements are met. In making decisions on costs orders this Court should seek to strike a fair balance between on the one hand, not unduly discouraging workers, employers, unions and employers' organisations from approaching the Labour Court and this Court to have their disputes dealt with, and, on the other, allowing those parties to bring to the Labour Court and this Court frivolous cases that should not be brought to Court.'
>
> In this matter, there is nothing on the record indicating why the Labour Court and Labour Appeal Court awarded costs against the applicant. Neither court gave reasons for doing so. It seems that both courts simply followed the rule that costs follow the result. This is not correct."

[44] In this case, I take into account that Snyman is still employed by the Department; that there is an ongoing relationship between the PSA and the Department; that the matter has a long history; and that the ensuing litigation may have clarified, to an extent, some issues concerning the collective agreement. Taking into account the considerations of both law and fairness, I do not consider a costs award to be appropriate.

Order

[45] I therefore make the following order:

45.1 Paragraphs 33 (and the sub-paragraphs thereunder); 34; and sub-paragraphs 37.1 and 37.3 of the applicants' founding affidavit is struck out.

45.2 The application is dismissed with costs.

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Anton J Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANTS:	Ewald de Villiers-Jansen Instructed by the State Attorney.
FIRST RESPONDENT:	Randall van Voore of Bowman Gilfillan Inc. (Heads of argument drafted by Adv Lourens Ackermann).