



Of interest to other judges

**THE LABOUR COURT OF SOUTH AFRICA,**

**HELD AT CAPE TOWN**

**Case : C 160/2020**

In the matter between:

**GAIL SWANEPOEL**

**First Applicant**

and

**JUDICIAL INSPECTORATE FOR  
CORRECTIONAL SERVICES**

**First Respondent**

**Date of Hearing:** 5 and 6 August 2021, 9 September 2021 and 16 March 2022

**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 12h00 on 27 June 2023

**Summary:** (Claim for specific performance for payment of remuneration - Notch increase – Increase awarded contrary to Public Service Act and Regulations – Increase awarded despite lack of statutory authority – alternative claims based on ostensible authority and estoppel unable to impute non-existent authority to a state functionary – Reduction of remuneration to correct salary level lawful in terms of s 38(1) of PSA )

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## JUDGMENT

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LAGRANGE J

### Introduction

- [1] This is a contractual claim for specific performance, namely the payment of the full salary she alleges is due to her, which the applicant, Ms G Swanepoel ('Swanepoel') believes the respondent ('JICS' or 'the inspectorate') unlawfully reduced and in respect of which it is attempting to cover alleged overpayments it made to her before it reduced it. JICS argues that Swanepoel's salary was restored to the correct level, and seeks a declaration to that effect.
- [2] Swanepoel's contention is that an eight notch salary increase she was 1 August 2011, was lawfully awarded and once implemented was a contractual entitlement she is entitled to enforce in these proceedings. JICS downward adjustment of her remuneration in May 2018 to what it would have been without that adjustment was unlawful and amounted to a breach of contract. She seeks a restoration of her remuneration to its previous level and payment of the difference between what she ought to have continued earning and the reduced salary from May 2018. JICS opposes her claim and seeks a declaration that her reduced salary is her correct salary.
- [3] JICS was established under s 85 of the Correctional Service Act 111 of 1998 ('the CSA'), as an independent office with the Department of Correctional Services, under the control of the Inspecting Judge, with the object of enabling the inspecting Judge to report on the treatment of inmates and conditions in correctional centres.
- [4] Both parties led evidence and extensive legal argument. For the most part, the material factual issues are common cause.
- [5] Evidence was led by both parties on 5 and 6 August 2021 and enrolled for argument on 9 September 2021. Evidence was heard virtually owing to COVID-19 restrictions. Before argument could be heard the respondent filed an application to amend its statement of response to include a new defence.

Leave to amend the statement was granted on 9 September 2021 and parties were ordered to advise the court if any further evidence needed to be led arising from the belated amendment. If not, the matter was to be enrolled for argument. In the end no further evidence was adduced, but the parties reached an agreement that certain additional documents referred to in Swanepoel's replication to the amended statement of response could be relied on in argument. Argument was then heard in court in 2022.

### Chronology of events

- [6] Swanepoel was employed by JICS on 4 August 2008, and from 1 August 2009 was appointed as the personal assistant (PA) to the inspecting judge and director of the inspectorate at salary level 5. This appointment was motivated on the basis that the respondent had one vacant position on salary level 5 on the fixed establishment. It had become vacant when another employee, Ms J Jacobs, transferred to the Human Resources Department. The applicant had been assisting in the vacant position since Ms Jacobs' transfer. On or about 16 July 2009, the Inspecting Judge approved Swanepoel's appointment.
- [7] On 1 October 2009, the CSA was amended by the Correctional Services Amendment Act, 25 of 2008. Prior to the amendments, the appointment of staff was dealt with under s 89:

"Section 89 - Inspectors and staff

(1) The staff complement of the Judicial Inspectorate must be determined by the Inspecting Judge in consultation with the Commissioner.

(2) The Inspecting Judge must appoint within this complement inspectors and such other staff, including a secretary, as are required.

(3) Such employees are deemed for administrative purposes to be correctional officials seconded to the Judicial Inspectorate, but are under the control and authority of the Inspecting Judge.

(4) The Inspecting Judge has the same powers and duties as the Commissioner for the purposes of administrative management and control of employees under his or her authority and may delegate any such power and assign any such duty to an employee of a post level of Deputy-Director or higher.

(5) The conditions of service of such employees are regulated by this Act, but the salaries and allowances of such employees are regulated by the Public Service Act."

- [8] After the 2008 amendments provision was made for the appointment of a chief executive officer ('CEO') who was tasked with the appointment of JICS staff:

"88A Appointment of the Chief Executive Officer

(1) The Inspecting Judge must identify a suitably qualified and experienced person as Chief Executive Officer, who-

(a) is responsible for all administrative, financial and clerical functions of the Judicial Inspectorate;

(b) is accountable to the National Commissioner for all the monies received by the Judicial Inspectorate; and

(c) is under control and authority of the Inspecting Judge.

(2) The person contemplated in subsection (1) must be appointed by the National Commissioner.

(3) The appointment and other conditions of service, including salary and allowances of the Chief Executive Officer are regulated by the Public Service Act.

(4) Any matters relating to misconduct and incapacity of the Chief Executive Officer must be referred to the National Commissioner by the Inspecting Judge.

89 Appointment of staff and assistants

(1) The Chief Executive Officer must appoint staff as may be necessary to enable the Judicial Inspectorate for Correctional Services to perform its functions in terms of this Act.

(2) The staff component must be established in accordance with the Public Service Act.

(3) The conditions of service including salaries and allowances of such staff are regulated in terms of the Public Service Act.

..."

- [9] Despite s 88A, nobody was appointed as CEO, even in an acting capacity, until late in 2011, despite steps taken to do so. Thus, on 8 December 2009, the inspecting judge, and officials of the Department of Correctional Services and the Department of Public Service and Administration (DPSA) met to address the structure of the office of the Inspecting Judge, and to consider the draft job description for the new position of the Chief Executive Officer. At the meeting, the participants agreed that:

- 9.1 the Directorate: Human Resources Planning (within the Department of Correctional Services) would amend the structure of the office of the Inspecting Judge;
- 9.2 the Inspecting Judge would forward certain input on the draft job description for the new position of the Chief Executive Officer; and
- 9.3 the Directorate: Human Resources Planning would ensure that all necessary documents are prepared and finalised.

- [10] The Inspecting Judge further indicated that he was looking to fill the position of the Chief Executive Officer by the end of March 2010. However, in his annual report to the President and Minister for Correctional Services for the year ending 31 March 2010 the inspecting judge recorded that he understood that the post had not yet been created or financed on the fixed establishment of JICS so nobody had been appointed as CEO.
- [11] On 8 February 2010, another approval to fill two vacant posts was sought, this time on salary levels 6 and 7. A post on salary level 7 had become vacant when an employee, Ms Suliman, vacated the post on 1 October 2009. A recommendation was made that Swanepoel be advanced to salary level 6 on the basis of career pathing. On or about 8 February 2010, the Inspecting Judge approved her appointment to salary level 6.
- [12] Bezuidenhout testified that there are twelve notches within each job level. A job level which ranges from Level 1 to 16 is established for a post after a job evaluation is done. Pay progression from one salary notch to the next is based upon annual performance appraisals, a point which Swanepoel could not dispute. Bezuidenhout testified that each salary level has 12 notches and the maximum number of notches any employee could be awarded, is three, which was rare and only happened in exceptional circumstances. It was common cause that salary notches in the Department are awarded every two years. Bezuidenhout testified that even if a salary notch could be awarded, the applicant could not be awarded four notches. One notch is awarded for satisfactory performance, and up to three notches for outstanding performance. Accordingly, neither a jump from notch 2 to notch 6 (4 notches), let alone a jump from notch 2 to notch 10 (8 notches) would be ordinarily be permitted. A three notch jump might occur if an

employee took on additional responsibilities or performed a particularly important task above and beyond that person's normal duties.

- [13] In any event, from 1 March 2010, Swanepoel was appointed to a salary level 6 post. Despite its claims about the inspecting judges' lack of authority, JICS accepted that Swanepoel's remuneration on salary level 6, notch 2 was what she was entitled to.
- [14] The absence of a CEO had not even been resolved by the time the inspecting judge submitted his next annual report for the year ending 31 March 2011. Between the inception of the amended CSA and the appointment of an acting CEO, Swanepoel argues that the inspecting judge continued to appoint and manager JICS staff as he had done previously, without any objections being raised.
- [15] On 24 and 25 June 2011 a strategic planning meeting for the Inspectorate was held, attended by 17 persons engaged in the Inspectorate, including the inspecting judge, the director and Swanepoel. After the planning meeting, memorandum was drawn up and certain recommendations were made by the director and approved by the inspecting judge on 27 June 2011.
- [16] On 29 July 2011, Swanepoel submitted a request for an increase in her current salary notch to the director, which read:

"At the strategic session held 24-25 June 2011 all posts and post levels were discussed. I noticed that my current post that I am occupying as a personal assistant is nine [9]. On my letter of appointment and job description my post title are Personal Assistant but on level six [6].

Currently, I am fulfilling the duties of a personal assistant to the director and the inspecting judge to the best of my ability and take pleasure in duty doing it. I am aware of all the admin that still needs to take place in order for the post to be advertised on a level nine. Thus I humbly request the possibility of my salary notch be increased to compensate for the duties performed as a Personal Assistant."

(emphasis added)

Swanepoel claimed that the DPSA had evaluated the post of a PA and benchmarked it at level 9, though she agreed that the determination of an individual employee's salary had to be in accordance with the PSA

regulations. The proposed organogram of the JICS directorate at the time showed two administrative support positions at the most senior level: PA to the inspecting Judge (LS 9 -New: Vacant) and Secretary to CEO & Directors (LS 6 – Filled). JICS claimed, as a matter of fact, that Swanepoel's own evidence was that her functions and duties were essentially secretarial, whereas a person occupying the PA position was a senior one, which would entail, amongst other things, dealing with budgets. Moreover, the post of PA on the proposed structure had not even been approved, as Swanepoel's letter itself indicated, whereas the LS 6 post was also described as 'filled', which the respondent contended could only have been a reference to the post she currently occupied at the time. Swanepoel did concede that the inspecting judge himself did not have authority to approve the proposed restructured organogram which was discussed at the strategic planning meeting in June 2011, and that it had to be approved by the National Commissioner.

- [17] Swanepoel also agreed that she was the person filling the position of secretary at salary level 7 on the proposed organogram and that the new salary level 9 post of PA still had to be created and advertised. It was common cause that a level 9 post was on the same level as deputy director. Bezuidenhout confirmed that a support post like a PA post would be regarded as a transverse position because it occurred throughout the public service. In such cases it would be the DPSA that would conduct a job evaluation to ensure uniformity across the public service and would be approved by the Minister for Public Administration. Swanepoel insisted that even though she was occupying the secretarial post at level 6, her job title and functions she fulfilled at the time were those of a PA. Swanepoel confirmed that the new structure was only approved in 2012. She also testified that the post was graded as a level 9 post by the DPSA, which was not disputed, though no documentary evidence of the DPSA evaluation *per se* was provided. The level 9 status of the post was only mentioned in the memorandum discussed below.
- [18] On the same day Swanepoel made her request, a memorandum was issued by the National Manager: Support Services, Ms M van der Walt, which recommended that approval be granted for Swanepoel to have her salary

notch increased from notch 2 to notch 6 with effect from 1 August 2011. The material portions of the memorandum read:

“RE: REVIEW IMPLEMENTATION OF NEW SALARY NOTCH – MS GAIL SWANEPOEL; PERSONAL ASSISTANT TO THE INSPECTING JUDGE (PERSAL NO ...)

#### 1. PURPOSE

To obtain approval for implementation of a new salary notch for MS G Swanepoel personal assistant to the Inspecting Judge.

#### 2. BACKGROUND

- 2.1 According to the strategic planning session held on 24-25 June 2011, it was decided to change the structure of the office.
- 2.2 Ms Gail Swanepoel is currently occupying the position of a Personal Assistant, which is level 9 as reflected at the strategic management session and is currently filling a level 6 post.
- 2.3 She is fulfilling the duties of a Personal Assistant to the Director and the Inspecting Judge.
- 2.4 The Director advised Ms Swanepoel to put her request in writing. See attached letter.

#### 3. MOTIVATION/STATUTORY PROVISIONS

- 3.1 With reference to appointing staff on a higher notch than the entry-level, the Public Service Regulation (Government Notice No. R, 785 of 28 June 2004 with effect from 1 July 2004); Part V; section C6: “Grading & Remuneration” authorises the executing authority, in which case the Inspecting Judge may “... Increase the salary of a post ...”

#### 4. RECOMMENDATION

- 4.1 It is recommended that approval be granted that Ms Gail Swanepoel salary notch be increased from salary notch 2 to salary notch 6 as from 1 August 2011.

...”

The director of JICS, Mr A Carelse (‘Carelse’) endorsed the recommendation and the inspecting judge approved it on 15 August 2011, subject to adding a handwritten proviso in which he “recommended” Swanepoel’s salary be adjusted to notch 10. In terms of Regulation V.C3 of the Public Service regulations an executing authority could set a salary for a post above the minimum notch of the salary range indicated by the job weight if the job had been evaluated if nobody with those competencies could be recruited or retained at the minimum rate. Swanepoel did not claim that this applied in her case, but rather that the PA post which had been proposed was at a higher salary level and the notch increase proposed for her was effectively to recognise that she was already performing functions



at that level. She conceded the motivation for the notch increase was not for a normal notch increase and that the post of PA had not been approved at the time. The department contended that the reference in the memorandum to Regulation V.C6 was misleading because that regulation provided for increasing the salary attached to a post only if a job evaluation result demonstrated that the post was incorrectly graded. If that pre-condition is met, Regulation V.C6 permits an executing authority to continue to employ an incumbent at the higher grade without readvertising the post if the incumbent had received a satisfactory rating at their last performance assessment. Swanepoel did not rely on this provision and did not establish that any of the pre-requisites for awarding the increase under V.C6 were met. The memorandum mistakenly describes Regulation V.C6 as mandating notch increases. Bezuidenhout confirmed that V.C6 had nothing to do with notch increases.

- [19] In any event, following the steps set out above, Swanepoel's remuneration was raised on 1 August 2011, from salary level 6 notch 2, to salary level 6 notch 10, an advance of eight notches.
- [20] It was only on 1 November 2011 that an acting CEO was finally appointed, nearly three years after the 2008 amendments which had created the post. In her own evidence in chief, Swanepoel stated that her understanding was that before the CSA was amended, the inspecting judge was authorised to approve and appoint all staff at JICS and determine their salary levels.
- [21] Around April 2018 Mr M Mentoer, an official in the department of correctional services, was mandated to investigate several individual salary increases which were considered irregular. He found that Carelse had made a misrepresentation when motivating Swanepoel's adjustment by not drawing the inspecting judge's attention to the job evaluation provisions of Chapter IV of the PSA regulations.
- [22] Following on Mentoer's report, on 13 April 2017 Swanepoel was advised by the state attorney that she had been overpaid and invited her to make representations regarding her liability for the overpayment and terms of repayment. Initially, the Public Servants Association ('the union') made representations to JICS on behalf of Swanepoel and two other members,

whom the JICS claimed had been overpaid, on the strength of Carelse's representations. Swanepoel agreed that the union had acted on her behalf as well but was reluctant to agree that it had done so on her instructions. She claimed that, in her case, the increase had been approved by the inspecting judge and not Carelse, but the union representative had said it would be better to make a joint representation. She conceded she had allowed the union to make the representations made in the letter. The written representations of the union essentially conceded that remuneration had been wrongly paid, through no fault of the individual employees themselves, but argued either that the debt had prescribed or requested that it be written off. Even though a debt of R 305,108-84 owing by Swanepoel was still expressly acknowledged in the union's letter of 2 February 2018, which requested the writing off of the debt of all three members, Swanepoel strenuously sought to dispute that the union had acted on her instructions in acknowledging the debt was owing. She alleged she had disputed the representation made on her behalf in the letter with the union but no documentary evidence in support of this was forthcoming.

- [23] Be that as it may, in April 2018, the CEO responded to the discussions between JICS, the union and Swanepoel, and insisted that her salary would be corrected with immediate effect. A grievance filed by Swanepoel in response did not alter the respondent's stance.
- [24] JICS claims that the inspecting judge had no authority at that time to authorize the increase and, in any event, the requirements of the Public Service Act, Proclamation 103 of 1994 ('the PSA') and Public Service Regulations ('the regulations') to permit the lawful award of such an increase had not been complied with. This was a new plea introduced by way of an amendment to JICS's statement of response in September 2021. More particularly, it alleged that the inspecting judge did not have the authority contemplated in sections 88A and 89 of the Correctional Services Act 111 of 1998.
- [25] Swanepoel's reply to this new defence was that:
- 25.1 the Inspecting Judge had actual authority;

25.2 in the alternative, that the Inspecting Judge had ostensible authority, and

25.3 in the further alternative, the respondent is estopped from asserting that the Inspecting Judge did not have authority.

[26] Ultimately, the crux of the case rests on the determination of these issues, even if Swanepoel could have been able to establish objectively that she ought to have been recognised as performing job functions of a PA rather than a secretary. In passing, it must be said that Swanepoel was unable to describe any job functions she claimed to perform in the capacity of a PA that, on the face of it, would appear to describe a job with more responsibilities than secretarial ones.

### Evaluation

#### *The determination of remuneration in the public service*

[27] S37 of the Public Service Act states:

##### **‘37. Remuneration of employees.—**

- (1) Employees shall be paid the salaries and allowances in accordance with the salary scale and salary level determined by the Minister in terms of section 3 (5).
- (2) An executive authority may, only if it is allowed by regulation and to the extent prescribed—
  - (a) grant employees or classes of employees of the relevant department on appointment or transfer salaries higher than the minimum amounts of the appropriate salary levels of the applicable salary scales;
  - (b) grant employees or classes of employees of the relevant department special advancement in salaries within the salary level of the salary scale applicable to them; and
  - (c) grant an employee of the relevant department special advancement in salary within the salary level of the salary scale applicable to him or her or grant him or her a salary in accordance with a higher salary level or any other reward, if he

or she has exceptional ability or special qualifications or has rendered meritorious service and it is in the public interest.'

(emphasis added)

[28] Part V:C of the regulations states:

'C. GRADING AND REMUNERATION

C.1 An executing authority shall determine the grade of a post to correspond with its job weight and set the commencing salary of an employee on the minimum notch of the salary range attached to the relevant grade, unless the salary proves inadequate under the criteria in regulation V C.3.

C.2 If a job has a weight that applies to more than one salary range, the executing authority shall determine which of the relevant salary ranges to use.

C.3 An executing authority may set the salary for a post or an employee above the minimum notch of the salary range indicated by the job weight-

(a) if she or he has evaluated the job, but cannot recruit or retain an employee with the necessary competencies at the salary indicated by the job weight; and

(b) she or he shall record the reason why the salary indicated by the job weight was insufficient.

C.4 If the job weight demonstrates that a filled post is overgraded or undergraded, an executing authority shall either effect changes to the work organisation or regrade the post according to the job weight and the relevant collective agreements, as provided in regulation V C.5 to C.7

C.5 An executing authority may increase the salary of a post to a higher salary range in order to accord with the job weight, if-

(a) the job weight as measured by the job evaluation system indicates that the post was graded incorrectly; and

(b) the department's budget and the medium-term expenditure framework provide sufficient funds.

C.6 If an executing authority increases the salary of a post as provided under regulation V C.5, she or he may continue to employ the incumbent

employee in the higher-graded post without advertising the post if the incumbent-

- (a) already performs the duties of the post;
- (b) has received a satisfactory rating in her or his most recent performance assessment; and
- (c) starts employment at the minimum notch of the higher salary range.

C.7 The absorption of the incumbent employee in the higher-graded post as provided under regulation V C.6 shall take effect on the first day of the month following the month during which the executing authority approves that absorption”

(emphasis added)

[29] JICS argued that regulation V.C.5 deals with salary level adjustments and not salary notch adjustments and Swanepoel conceded this under cross-examination. C.3 deals with salary notch adjustments. In effect, it authorises an ‘executing authority’ to increase the salary notch of an employee if certain requirements are met.

[30] Irrespective of whether the requirements in question were met, the question arises is whether the inspecting judge was in fact the executing authority at the relevant time. Part I of the regulations defines executing authority as follows:

“**executing authority**” means the executing authority as defined in section 1(1) of the Act, except with regard to the appointment and other career incidents of a head of department, in which case it means the executing authority as contemplated in section 3B of the Act;’

[31] Section 1 of the PSA defines executive authority as follows:

“**executive authority**”, in relation to—

- (a) the Presidency or a national government component within the President’s portfolio, means the President;
- (b) a national department or national government component within a Cabinet portfolio, means the Minister responsible for such portfolio;

- (c) the Office of the Commission, means the Chairperson of the Commission;
- (d) the Office of a Premier or a provincial government component within a Premier's portfolio, means the Premier of that province; and
- (e) a provincial department or a provincial government component within an Executive Council portfolio, means the member of the Executive Council responsible for such portfolio;'

(emphasis added)

[32] Another provision Swanepoel sought to place reliance on for the first time only in argument is Regulation V.A2. Reliance on this provision was not foreshadowed in the pleadings or pre-trial minute. It reads:

"A.2 In determining an employee's salary, an executing authority shall take into account-

- (a) relevant collective agreements;
- (b) available funding;
- (c) the results of job evaluation, if available;
- (d) the employee's performance; and
- (e) the need to recruit and retain personnel with appropriate competencies."

#### *JICS staffing and remuneration*

[33] The Judicial Inspectorate was established under s 85 of the CSA as 'an independent office under the control of the Inspecting Judge'<sup>1</sup>. The status of the inspectorate remains unchanged.

[34] However, the provisions governing the determination of the staff complement of JICS and their appointment changed significantly when the CSA was amended in 2008. Prior to the 2008 amendments, s 89 of the CSA read:

"Section 89 - Inspectors and staff

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<sup>1</sup> S85(1)

(1) The staff complement of the Judicial Inspectorate must be determined by the Inspecting Judge in consultation with the Commissioner.

(2) The Inspecting Judge must appoint within this complement inspectors and such other staff, including a secretary, as are required.

(3) Such employees are deemed for administrative purposes to be correctional officials seconded to the Judicial Inspectorate, but are under the control and authority of the Inspecting Judge.

(4) The Inspecting Judge has the same powers and duties as the Commissioner for the purposes of administrative management and control of employees under his or her authority and may delegate any such power and assign any such duty to an employee of a post level of Deputy-Director or higher.

(5) The conditions of service of such employees are regulated by this Act, but the salaries and allowances of such employees are regulated by the Public Service Act.

(emphasis added)

Prior to amendment by Act 32 of 2001, section 89(4) of the CSA was more explicit in the attribution of powers to the inspecting judge. It read:

“Section 89 (4)

The salary and conditions of service of any such employee must be determined by the Inspecting Judge in accordance with the Public Service Act, and after consultation with the Director-General of the Department of Public Service and Administration.”

(emphasis added)

[35] A comparison of the pre and post 2008 amendment situations reveals that:

35.1 The determination of the JICS staff establishment was previously a matter for the inspecting judge in consultation with the National Commissioner, but after the 2008 amendments had to be determined in accordance with the PSA and the relevant regulations, like any other public service establishment.

35.2 The determination of staff remuneration has been regulated by the PSA throughout, but prior to the 2001 amendment the inspecting judge

was responsible for deciding this after consulting with the department's director-general.

35.3 The task of making appointments was removed from the functions of the inspecting judge and placed in the hands of the CEO.

[36] Regulation Part III B.2 of the regulations states<sup>2</sup>:

B.2 Based on the strategic plan of the department, an executing authority shall-

(a) determine the department's organisational structure in terms of its core and support functions;

(b) grade proposed new jobs according to the job evaluation system referred to in Part IV;

(c) define the posts necessary to perform the relevant functions while remaining within the current budget and medium-term expenditure framework of her or his department,

and the posts so defined shall constitute the department's approved establishment;

and

(d) engage in the human resource planning in accordance with regulation III D with a view to meeting the resulting human resource needs."

Thus, any change in the JICS staff establishment after 2008, such as the creation of the new PA position as part of the proposed restructuring could not have been finalised until the provisions of III.B2 of the PSA regulations had been complied with.

*Did the inspecting judge have actual authority to appoint Swanepoel to the post of PA at salary level 9?*

[37] To succeed in her claim, Swanepoel must establish both that the inspecting judge had the authority to approve her being elevated to notch level 10 and that the jump from notch 2 to 10 complied with the regulations.

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<sup>2</sup> R no 1, gg 21951, dd 5 January 2001



*Authority of the inspecting judge (Actual)*

[38] When Swanepoel lodged a grievance around May 2018 against the readjustment of her salary to notch 6 in April that year, she argued that the CSA amendments introducing s88A and varying s 89 only came into effect on 31 March 2012. The grievance was dismissed. It did not deal with the issue of the inspecting judge's authority, but rejected Swanepoel's complaint on the basis that none of the provisions of Part V: C3 to C7 of the PSA regulations<sup>3</sup> had been complied with. When confronted under cross-examination with the problem that the amendments were effected on 1 October 2009, her answer was that the inspecting judge continued to act in the stead of the CEO in the absence of anyone being appointed in that capacity. When pressed on this, Swanepoel speculated that there might have been a delegation of authority to the inspecting judge to perform that function during that time.

[39] The following is not in dispute:

39.1 At the time the Inspecting Judge approved the disputed increase, a Chief Executive Officer had not yet been appointed.

39.2 The appointment of a Chief Executive Officer was delayed while the post was being created, funded and filled.

39.3 An acting Chief Executive Officer was appointed with effect from 1 November 2011.

39.4 Until that time, the Inspecting Judge continued to appoint and manage the respondent's staff as he had previously done. This he did to the knowledge of, and with apparent support from, the relevant national departments.

[40] Swanepoel rightly points out that no transitional provisions were contained in the 2008 amendments to cover any delayed transition in the transfer of statutory responsibility for appointing JICS staff from inspecting judge to the CEO. Accordingly, it was argued that the legislature could not have intended JICS to continue operating without the ability to appoint staff

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<sup>3</sup> See paragraph [26] above.

pending the appointment of a CEO: it must have intended that the inspecting judge would continue to perform that function until that time. It was contended that the consequences of holding otherwise would be absurd because all appointments and remuneration decisions made in the interregnum would be a nullity, not just Swanepoel's increase. JICS had taken no steps to challenge all the other decisions made by the inspecting judge regarding remuneration and appointments during that time. S1 submitted that a reasonable and business-like interpretation of the statute would abhor the absence of authority during the transition period, by acknowledging that the inspecting judge would continue to perform the function.

- [41] JICS argued that there is nothing to support this contention. Insofar as the inspecting judge previously had the authority to perform functions of the Commissioner in respect of the staff under his control, the amendments removed that power, which was to be exercised by the CEO. In the absence of a transitional provision it could not just be inferred that the inspecting judge would simply continue to retain it.
- [42] I agree with Swanepoel that a pragmatic legislative approach would have been for the inspecting judge to retain his powers over staff appointments and remuneration until the CEO was appointed, but I was not pointed to any authority on comparable situations where such an interpretation had been applied to implicitly extend a statutory power which had clearly been removed from one office bearer and was to be exercised by another.
- [43] There are limits to how far a court can go in the course of applying a business-like interpretation. I do not understand the principle of a pragmatic contextual approach to interpretation as enunciated in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) (at para [18]), which Swanepoel relied on, to extend to the point that a court may interpose an implied transitional provision where no explicit provision exists, simply because the executive was tardy in appointing the CEO to give effect to the re-allocation of functions intended by the legislature. It is true that the validity of other decisions pertaining to appointments and remuneration made by the inspecting judge during the transition might also be open to

being set aside as invalid. However, in terms of the principle laid down in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) at para [26], such acts are presumed valid until set aside by a court of law. In conclusion, I am not satisfied the inspecting judge had actual authority to make any decision on an appointment or remuneration pertaining to Swanepoel after the 2008 amendments to the CSA came into effect.

[44] Even if I am wrong in this conclusion, and assuming the inspecting judge did retain actual authority to continue to decide questions of staff appointments and remuneration, he still had to do so within the strictures of the PSA and the regulations. Swanepoel did not demonstrate that any of the provisions of Regulations V: C3, or C5 read with C6 were met, which might have permitted the inspecting judge to approve an eight notch salary adjustment. Consequently, it appears the inspecting judge could not have lawfully approved Swanepoel's salary increase even if he had the authority to do because it would not have been in compliance with the PSA regulations. In fact in argument, Swanepoel contended that her 2011 increase involved none of these regulations.

[45] Taking a new tack, she argued that the applicable regulation is Regulation V A.2 which states:

"A.2 In determining an employee's salary, an executing authority shall take into account-

- (a) relevant collective agreements;
- (b) available funding;
- (c) the results of job evaluation, if available;
- (d) the employee's performance; and
- (e) the need to recruit and retain personnel with appropriate competencies."

[46] Swanepoel asserts that the memorandum dealt with the job evaluation of the PA post (though yet to be created), her performance (she was fulfilling the duties of a PA), and the valuation of her performance by the inspecting judge, as evidenced by his recommendation and approval of her jumping eight notches. She takes as given that funding was available.

[47] Apart from the fact that this was a novel argument not canvassed in the evidence, it is a strained interpretation of the regulation in my view. Assuming for the sake of argument that the considerations in paragraphs (a), (b), and possibly even (c) were satisfied, there was no evidence that there was any risk Swanepoel's services would not be retained if she did not get the singularly large increase the inspecting judge recommended and approved. There was no evidence of any performance appraisal being conducted in accordance with the regulations that rated her performance as outstanding. She insisted that the word 'performance' related to her performing a PA's functions. However, the regulations do not use this term to describe job content. Thus, the definition of a 'job' in Regulation B.2 (h), for the purpose of interpretation of the regulations is defined thus:

“(h) “job” means the basic duties, tasks, functions, competency requirements and responsibilities according to which one or more posts of the same grade are established;...”

The term 'performance' in the regulations is essentially used to describe the extent and manner in which employees fulfill their duties<sup>4</sup>. It is therefore difficult to see how Swanepoel can claim that the requirements of paragraphs (d) and (e) were met. Moreover, these are clearly the most critical considerations of all the criteria in Regulation V. A.2, for the purposes of determining if a particular individual should receive an increase. In the circumstances, Swanepoel's belated reliance on V.A.2 does not provide a sound basis for validating the eight notch increase she was awarded.

### *Ostensible authority and Estoppel*

[48] Swanepoel advanced two alternative bases for arguing that JICS must be held to be liable for the notch increase awarded by the inspecting judge and that it cannot lawfully reduce the salary she received.

[49] The first alternative ground is that JICS represented to her by its conduct that the inspecting judge had the authority to take the decision. Firstly, she had approached the director for a salary increase and the increase was approved and implemented from 1 August 2011. The process followed was

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<sup>4</sup> See e.g., Regulation VIII. Performance Management and Development.

the same as that which preceded when she was appointed to salary level 6 from 1 March 2010. The memorandum approving her increase was signed by four officials before being implemented. Accordingly, she argues that a representation was effectively made to her that her increase had been duly approved by someone with the authority to do so, namely the inspecting judge.

- [50] The second argument is that JICS is estopped from disputing that the increase was properly authorised because the inspecting judge's approval of the increase was implemented and put into effect by it. JICS thereby represented to her that the increase was duly approved. She accepted this and acted on the basis that her income had improved and adjusted her financial life accordingly, to her detriment. It is not clear to me how she acted to her detriment by accepting and receiving the increase at the time, but be that as it may, both these alternative grounds of establishing an enforceable contractual right to the increase awarded by the inspecting judge, suffer the from the same flaw in my view.
- [51] Even if the normal pre-requisites of estoppel or ostensible authority were established, giving effect to either principle would have the effect of validating an unlawful act. More particularly, giving effect to either principle would have the effect of imbuing a statutory agency with a power it does not have. Neither of these principles can operate to give lawful effect to the inspecting judge's action of approving her increase and JICS's conduct in implementing it, when the authority of both can only flow from the statutes which empower them to act.
- [52] With respect to an attempt to invoke estoppel where a municipality repudiated a contract because it had not been varied in accordance with statutory procedures and formalities, the Supreme Court of Appeal in *City of Tshwane Metropolitan Municipality v RPM Bricks Proprietary Ltd* 2008 (3) SA 1 (SCA) reaffirmed the principle that:

"[13] .... failure by a statutory body to comply with provisions which the legislature has prescribed for the validity of a specified transaction cannot be remedied by estoppel because that would give validity to a transaction which is unlawful and therefore ultra vires. (See for example *Strydom v Die Land- en Landboubank van Suid-Afrika* 1972 (1) SA 801 (A); *Abrahamse v*

Connock's Pension Fund 1963 (2) SA 76 (W); and Hauptfleisch v Caledon Divisional Council 1963 (4) SA 53 (C)."

[53] Consequently, I am not persuaded that the alternative arguments for imputing authority to the inspecting judge can succeed.

Was the reduction of Swanepoel's salary permissible?

[54] Irrespective of the merits of the arguments against the lawfulness of the increase awarded to Swanepoel, she contends that s38(1) of the PSA did not permit the respondent to reduce her salary. The section states:

"38. Wrongly granted remuneration

(a) If an incorrect salary, salary level, salary scale or reward is awarded to an employee, the relevant executive authority shall correct it with effect from the date on which it commenced.

(b) Paragraph (a) shall apply notwithstanding the fact that the employee concerned was unaware that an error had been made in the case where the correction amounts to a reduction of his or her salary."

[55] Swanepoel submits that the term 'incorrect salary' must be narrowly interpreted to apply only to situations where, for example, a clerical mistake causes the wrong salary to be recorded on the payroll system. It does not include a case like hers, in which the 'incorrect' salary was determined by mutual agreement between herself and the employer. In this regard, Swanepoel places reliance on the LAC judgment in *Minister of Justice & Correctional Services & others v Tshifhango & another* (2019) 40 ILJICS773 (LAC), in which the court held:

"[19] Section 38(1)(a)-(b) is narrowly focused on the correction of an incorrect salary, salary level, salary scale or reward awarded to an employee. The language used in s 38(1)(a) is clear and the intention plain: insofar as an incorrect salary, salary level, salary scale or reward is awarded to an employee, the relevant executive authority is bound to make the correction with effect from the date on which it commenced. This much is unambiguous. A plain reading of the provision says nothing about any consultation or hearing that ought to be afforded to an employee prior to the correction of the incorrect salary level. There could be no reason for reading in words to qualify the unambiguous text. Apparent from s 38(1)(b)

the correction shall be effected notwithstanding the fact that the employee concerned was unaware that an error had been made in the case where the correction amounts to a reduction of his or her salary. Seen in this context, no amount of representations the respondents could have made would have had any impact on the decision to be taken. In my view, s38(1)(a) ought not to be interpreted in a manner that restricts the state's right to correct an incorrect salary level. Section 38(1)(a) was designed to remove any discretion that the executing authority may otherwise have enjoyed. His or her obligation to correct an incorrect salary level or salary scale, with effect from the date when it commenced, arises by operation of law."

(emphasis added)

- [56] Swanepoel asserts that a narrow interpretive approach is necessary because the principle of sanctity of contract has been acknowledged as a means of giving effect to the constitutional values of 'freedom and dignity'<sup>5</sup>. The provision should also be interpreted in the context of the constitutional right to fair labour practices in s 23 of the Constitution. Lastly, she contends that a proper interpretation of S 38(1) should take account that the previous version of the clause included 'an incorrect advancement of salary within the limits of the scale' as being capable of correction, and its omission from the amended provision indicates an intention by the legislature to exclude such errors from the corrective scope of the clause.
- [57] The previous version of s38(1) was more extensive and convoluted than the present one, viz:

"38 (1) if an incorrect salary or scale of salary on appointment, transfer or promotion, or an incorrect advancement of salary within the limits of the scale of salary applicable to his or her grading, was awarded or granted to an officer or employee, or was awarded or granted at the correct not sure scale but at a time when or in circumstances under which it should not have been awarded a granted to him or her, the head of department in which that officer or employee is employed, shall correct his or her salary or scale of salary with effect from the date on which the incorrect salary, scale of salary or salary advancement commenced,...."

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<sup>5</sup> *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 (5) SA 247 (CC), para [83].

- [58] Contrary to Swanepoel's contention, the LAC held in *Tshifhango* that the provision should not be interpreted in a way that restricts the state's right to correct an incorrect salary level. It is true that the phrase referring to advancement within a salary scale was omitted in the amended version of s 38(1), but I do not interpret that to mean that it was intended that errors relating to notch advancements which were not lawful in terms of the PSA or the regulations could not be corrected by the employer. It is clear that the previous version of the clause was poorly drafted and was overburdened with verbiage in an attempt to cover every possible instance of erroneous remuneration. The more broadly amended version of the clause eliminates the convoluted elaboration. If Swanepoel was incorrectly advanced to a notch she was not entitled to, then her salary was incorrect and falls within the ambit of the provision. The legislature chose not to itemise every possible instance in which a salary might be incorrect. In respect of the contractual argument, it does not get to grips with the problem discussed above that any contractual agreement on Swanepoel's salary was flawed for want of such an agreement being lawful.
- [59] It must also be mentioned that, on 13 April 2017, Swanepoel was expressly invited to make representations on the correctness of her salary and on recovering the overpayment of R 249,927.25. It was a full year later after entertaining representations from the PSA, that the CEO announced that JICS would proceed to adjust Swanepoel's salary to the correct amount, which by the time of the trial stage was R 213,518.00 (4NCB-notch 5).
- [60] I satisfied in light of the above, that the eight notch salary advance awarded to Swanepoel was not lawful and the resulting salary she received was incorrect and fell within the ambit of s38(1) of the PSA.

### Conclusion

- [61] In summary, Swanepoel was not entitled to the eight notch salary increase she was awarded, and JICS was entitled to correct it. It is understandable that Swanepoel did not want to forfeit her improved salary and reimburse the employer for the overpayment when it appeared that it had been duly authorised. Given also that the respondent is not pressing for its costs, I do not think considerations of law and fairness warrant a cost award.



Order

- [1] The Applicant's claim that her salary was unlawfully reduced by the Respondent in May 2018 is dismissed.
- [2] The Respondent's reduction of the Applicant's salary in May 2018 to the correct level was lawful in terms of s 38(1) of the Public Service Act, Proclamation 103 of 1994.
- [3] No order is made as to costs.

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**Lagrange J**  
**Judge of the Labour Court of South Africa**

**Appearances/Representatives**

For the Applicant

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Attorneys

For the First and Second  
Respondents

De Villiers-Jansen SC, instructed by  
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