

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 2348 / 18

In the matter between:

DEPARTMENT OF PUBLIC SERVICE AND

ADMINISTRATION

Applicant

and

M NAIDOO *N.O.* (AS ARBITRATOR)

First Respondent

PUBLIC SERVICE CO-ORDINATING

BARGAINING COUNCIL

Second Respondent

THABO MGOQI AND RESPONDENTS WHOSE

NAMES APPEAR AT ANNEXURE “A”

Third Respondent

DEPARTMENT OF WATER AFFAIRS AND

SANITATION

Fourth Respondent

Heard: 1 February 2024

Delivered: 7 March 2024

This judgment was handed down electronically by circulation to the parties and legal representatives by email. The date and time for hand-down is deemed to be 7 March 2024

Summary: Bargaining arbitration proceedings – review of arbitration award – test for review – s 145 of LRA 1995 – principles considered – error of law considered – material error of law justifying review where error leads to unreasonable outcome

Interpretation and application of Resolutions – Resolutions constituting collective agreements – principles relating to interpretation and application of collective agreements considered and discussed – interpretation of Resolutions by arbitrator constituting material errors of law – award reviewed and set aside

Interpretation and application of collective agreement – distinguished from enforcement of agreement – dispute in this case properly one of interpretation and application – dispute competently before arbitrator

Review application – application under s 145 of LRA – consideration of evidence by arbitrator – arbitrator misconstruing evidence relating to interpretation of Resolutions – outcome arrived at unreasonable

Review application – proper case for review made out – review application granted and award substituted

REASONS FOR COURT ORDER

SNYMAN, AJ

Introduction

- [1] The applicant has brought an application to review an arbitration award handed down by the first respondent in his capacity as an arbitrator of the Public Service Co-Ordinating Bargaining Council (PSCBC), being the second respondent. The application has been brought in terms of section 145, as read with section 158(1)(g), of the Labour Relations Act (LRA)¹. The dispute concerned the interpretation and application of collective agreements,² in the form of Resolutions adopted by the parties to the PSCBC. These Resolutions related to the issue of the grading of salary levels of the third respondent parties. The first respondent, in an arbitration award dated 30 May 2018, found in favour of the third respondent parties, and interpreted and then applied the aforesaid Resolutions in the manner as will be dealt with in detail later in this judgment.
- [2] The arbitration award of the first respondent was handed down on 30 May 2018. But that was not the end of the proceedings before the PSCBC. What followed were variation applications by the third respondent parties, the last one being brought on 7 September 2010. On 10 September 2018, the PSCBC advised the third respondent parties that the variation application was brought of time and condonation was required. It was stated further by the PSCBC that the matter would remain closed until the condonation application had been brought. After affording a reasonable time to the third respondent parties to file this condonation application, and nothing further being forthcoming, the applicant then brought the review application on 20 December 2018. The review application was thus timeously brought, properly placed before this Court for determination, and has been opposed by the third respondent parties on the merits thereof.
- [3] The review application came before me for argument on 1 February 2024. After hearing argument by both parties, I granted the following order:

¹ Act 66 of 1995 (as amended).

² Such a dispute is contemplated by section 24 of the LRA, which provides for the dispute to be resolved by way of arbitration.

- '1. The applicant's review application is granted.
2. The arbitration award of the first respondent, arbitrator M Naidoo, dated 30 May 2018 and issued under case number PSCB 847 – 14/15, is reviewed and set aside.
3. The arbitration of the first respondent is substituted with an award that clause 18.1 of PSCBC Resolution 1 of 2012 does not apply in this matter and that none of the individual third respondents are entitled to relief in terms thereof.
4. There is no order as to costs.
5. Written reasons for this order will be handed down on 24 February 2024.'

[4] Due to a number of unforeseen circumstances, the particulars of which need not burden this judgment, I was unable to finally complete the written reasons by 24 February 2024. I accordingly hereby amend the date as referred to in paragraph 5 of the aforesaid order by substituting the date of 24 February 2024 with 7 March 2024, the latter date being the date upon which these written reasons were finally completed. This judgment therefore constitutes the written reasons referred in paragraph 5 of my order, and must be considered to have been handed down on 7 March 2024.

[5] For ease of reference, I will refer to the applicant as the 'DPSA', the fourth respondent as the 'DWAS', and the individual third respondent parties as '*the employees*'.

The relevant background

[6] It is perhaps appropriate to start with the applicable regulatory framework at stake in the current case. Conditions of employment of all Government Departments resorting under the PSCBC are determined by collective

agreements concluded in the PSCBC, which are then publicised as 'Resolutions'. In this case, there are two Resolutions of relevance. The first is Resolution 3 of 2009 (*the 2009 Resolution*), and the second is Resolution 1 of 2012 (*the 2012 Resolution*).

- [7] Firstly at stake is Clause 3.6.3.2 of the 2009 Resolution, which came into operation on 1 April 2010, and reads:

'The commencing salary for all employees on the posts not covered by an OSD as per PSCBC Resolution 1 of 2007 and 3 of 2008 and appointed as Assistant Directors and Deputy Directors shall, with effect from the 1st July 2010 be on salary Level 9 and Salary Level 11 respectively.'

- [8] Next, clause 18.1 of the 2012 Resolution is up for consideration, which came into operation on 1 August 2012, and in turn reads:

'Clause 3.6.2.3 of PSCBC Resolution 3 of 2009 is hereby amended to allow employees whose posts are graded on Salary Level 10 and 12 to be appointed and remunerated on Salary Level 10 and 12 respectively.'

- [9] It was common cause that the employees were appointed by the DWAS in either Assistant Director (AD) posts or Deputy Director (DD) posts. All of them were appointed and commenced employment with the DWAS after 1 August 2012, being the date on which the 2012 Resolution came into effect.

- [10] There was no evidence as to what the actual graded salary level was of the AD and DD posts to which the employees were appointed, as such grading may have existed prior to 1 July 2010 when the 2009 Resolution came into operation. What was in evidence was a schedule of individual posts and the graded salary level attached to those posts, but this was not linked to the specific individual employees. In particular, the employees presented no evidence as to whether the individual posts they had been appointed to was actually graded in the period prior to 1 July 2010, and if so, what these posts were graded at. It also appeared from the evidence that when grading a post,

it is done not only on the basis of the post grade in the approved occupational structure, but also involves an actual job evaluation (job weight).

- [11] The above being said, and in the past (prior to 1 July 2010), it appeared that there was there existed an inconsistency as to how the salary level of AD and DD posts would be determined. To illustrate, a particular DD post, even as graded, could competently resort under either a salary level 11, or a salary level 12. This led to difficulties where it came to ensuring that employees were being appointed to such posts at a consistent salary level. This state of affairs was the cause for the introduction of clause 3.6.3.2 of the 2009 Resolution, which made it compulsory for appointments to AD and DD posts to be made only at salary levels 9 and 11 respectively. However, clause 3.6.3.2 of the 2009 Resolution caused its own problems, in that AD and DD posts that were actually and properly graded at salary levels 10 and 12 were not being recognised as such, as employees would not be appointed at such salary levels, despite the specific grading. Clause 18.1 of the 2012 Resolution was introduced to resolve this. This entire situation will however be discussed in more detail later in this judgment.
- [12] On 5 August 2014, and after the implementation of clause 18.1 of the 2012 Resolution, the DPSA issued a directive to all other Departments, being Circular 4 of 2014 (*the 2014 Circular*). In the 2014 Circular, clause 18.1 of the 2012 Resolution was specifically dealt with. It was pointed out that all positions that were graded on salary levels 10 to 12 between 1 July 2010 and 31 July 2012 but where incumbents were appointed on salary levels 9 and 11, those incumbents would qualify for an automatic upgrade, subject to supporting job evaluation results being provided. Importantly, the 2014 Circular stipulated that any grading of positions can only be done with the approval of the DPSA and before that can be done, the DPSA must be provided with a job description, organizational structure, a completed job evaluation report, a service record and motivation in support of the request for approval,
- [13] As contemplated by the 2014 Circular, the DPSA then did conduct a grading exercise on all the positions that may have been affected by the application of

clause 18.1 of the 2012 Resolution. This included all the positions occupied by the employees. In a notification dated 15 December 2014 by the DPSA to the DWAS, it was determined that all these positions were graded at salary levels 9 and 11 respectively, being the grade at which the employees had actually been appointed. It was specifically recorded at the conclusion of the notification that *'Please be advised that the above grading decision is final and cannot be amended by the Department after consultation.'*

- [14] Turning then to the employees *per se*, they all came into the picture only after the 2012 Resolution had come into operation, in that they were all, as said, only appointed then. The posts to which the employees were appointed were advertised after such Resolution, as either salary level 9 (in the case of AD posts) or salary level 11 (in the case of DD posts). The employees applied for such posts, as advertised, and were appointed accordingly, at salary levels 9 and 11. There is no evidence of any of the positions the employees were appointed in having been graded in the period between 1 July 2010 and 31 July 2012, and no job evaluation results were presented in evidence. And then, and following the 2014 Circular, their positions were actually graded by the DPSA at salary levels 9 and 11 respectively, as a final grading.
- [15] The employees were not satisfied with this state of affairs. According to them, a proper interpretation and application of clause 18.1 of the 2012 Resolution meant that they were entitled to be graded at salary levels 10 and 12 and that such grading should apply retrospectively to the respective dates when they were first appointed to the AD and DD posts. As a result, a dispute was referred by the employees to the PSCBC on 19 March 2015. The dispute that was referred concerned the issue of the interpretation and application of clause 3.6.3.2 of the 2009 Resolution and clause 18.1 of the 2012 Resolution. This dispute was unsuccessfully conciliated on 19 May 2015, and then referred to arbitration on 4 June 2015.
- [16] But whilst this dispute was pending, the DWAS unfortunately bedevilled matters. It would appear that despite the clear directives given by the DPSA, the DWAS conducted its own internal audit on the implementation of clause 18.1 of the 2012 Resolution and the regrading of the positions of incumbents

appointed at salary levels 9 and 11. In a report finally signed by the Director General of the DWAS on 12 April 2015, it was recommended that the incumbents (which would include the employees) be upgraded from a salary level 9 and 11, to salary level 10 and 12, respectively. As a result of this report, the employees, with the exception of seven of them, were then upgraded by the DWAS to salary levels 10 and 12 respectively, with effect from 1 December 2015.

- [17] The DPSA has contended that the 1 December 2015 upgrade effected by the DWAS was invalid, but this issue need not concern this judgment, as such upgrade is not being challenged in this matter. It must however just be mentioned, in passing, that the first respondent himself, in his award, accepted the contention by the DPSA that this grading exercise by the DWAS would be a nullity, unless it was approved by the DPSA, which approval, on the facts, was never granted.
- [18] However, and now having been graded at salary levels 10 and 12 in terms of the grading exercise implemented by the DWAS on 1 December 2015, the interpretation and application dispute brought by the employees, and which was still pending before the PSCBC, shifted somewhat. The issue of whether the employees should be graded at salary levels 10 and 12 no longer needed to be decided, and the main focus of the dispute then was whether the employees that were so upgraded should have been graded at salary levels 10 and 12 from the dates of their first appointment, by virtue of the application of clause 18.1 of the 2012 Resolution. In essence, they sought the difference in their salaries at salary levels 9 and 11, as opposed to what they would have earned at salary levels 10 and 12, as from their dates of appointment and until they were upgraded on 1 December 2015 as aforesaid. The seven employees not upgraded at all, still sought relief that they also be upgraded to salary levels 10 and 12, and then the same difference in salary also be applied to them.
- [19] There were a number of intervening events in the pending arbitration proceedings in the PSCBC which delayed the conclusion of the matter. This included joinder applications, a dismissal ruling, rescission applications,

postponements, directives by arbitrators and the like. I will not delve into all of these details in this judgment. Suffice it say, the arbitration only finally commenced before the first respondent on 4 December 2017 and concluded on 24 May 2018.

- [20] In his arbitration award issued on 30 May 2018, the first respondent held that clause 18.1 of the 2012 Resolution in fact found application in this case. He then proceeded to interpret the clause as meaning that the employees would be entitled to be graded at salary levels 10 and 12 from the date when they were first appointed to the posts. It followed that they were entitled to be paid the difference on salary from such dates and until they were actually upgraded to such salary levels in the 2015 gradings conducted by the DWAS. The reasons why the first respondent came to this conclusion, and the assessment of such reasons, will be dealt with later in this judgment.

Test for review

- [21] Where it comes to the review application by the applicant, the test for review to be applied is trite. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,³ the Court held that ‘*the reasonableness standard should now suffuse s 145 of the LRA*’, and that the threshold test for the reasonableness of an award was: ‘*... Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?...*’⁴. This means that the award in question is tested against all the facts before the arbitrator to ascertain if it meets the requirement of reasonableness.⁵ In conducting this test it is always necessary and important for the Court to enquire into and consider the merits of the matter and the entire evidence on record in deciding what is reasonable.⁶ In *Herholdt v Nedbank Ltd and Another*⁷ the Court said:

³ (2007) 28 ILJ 2405 (CC).

⁴ Id at para 110. See also *CUSA v Tao Ying Metal Industries and Others* (2008) 29 ILJ 2461 (CC) at para 134; *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 964 (LAC) at para 96.

⁵ See *Duncanmec (Pty) Ltd v Gaylard NO and Others* (2018) 39 ILJ 2633 (CC) at para 43.

⁶ Id at para 41.

⁷ (2013) 34 ILJ 2795 (SCA) at para 25. See also *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others* (2014) 35 ILJ 943 (LAC) at para 14; *Monare v SA Tourism and Others* (2016) 37 ILJ 394 (LAC) at para 59; *Quest Flexible*

‘A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable. ...’

- [22] Based on the aforesaid, the first enquiry is to establish if there a failure or error on the part of the arbitrator. Second, and where there is such a failure or error, it must be shown that the outcome arrived at by the arbitrator was unreasonable as a result. It would only be if the consideration of the evidence and issues before the arbitrator shows that the outcome arrived at by the arbitrator cannot be sustained on any grounds, and the irregularity, failure or error concerned is the only basis to sustain the outcome the arbitrator arrived at, that the review application would succeed.⁸ As said in *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others*⁹:

‘... the reviewing court must consider the totality of evidence with a view to determining whether the result is capable of justification. Unless the evidence viewed as a whole causes the result to be unreasonable, errors of fact and the like are of no consequence and do not serve as a basis for a review ...’

- [23] The above being said as constituting the general test for review, what is at stake in this case is nothing else but a review based on a case that the first respondent committed material errors of law in interpreting and applying clause 18.1 of the 2012 Resolution. If an error of law is committed by an arbitrator, and that error of law is material, it would render the award arrived at to be unreasonable, and thus subject to being reviewed and set aside.¹⁰ In

Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate (2015) 36 ILJ 968 (LAC) at paras 15 – 17; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2015) 36 ILJ 2038 (LAC) at para 16.

⁸ See *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* (2016) 37 ILJ 116 (LAC) at para 32.

⁹ (2015) 36 ILJ 1453 (LAC) at para 12.

¹⁰ See *Head of Department of Education v Mofokeng and Others* (2015) 36 ILJ 2802 (LAC) at paras 32 – 33; *Democratic Nursing Organisation of SA on behalf of Du Toit and Another v Western Cape Department of Health and Others* (2016) 37 ILJ 1819 (LAC) at paras 21 – 22; *Civil and Power*

fact, an award based on a material error of law can be legitimately challenged not only on the basis of it being unreasonable, but also on the basis that the award would be incorrect.¹¹ The simple point is that a reasonable arbitrator will not commit a material error of law. The Court in *Herbert v Head of Education: Western Cape Education Department and Others*¹² articulated the following apposite summary:

‘In *MacDonald’s Transport* it was found that the LRA did not contemplate that a CCMA or bargaining council arbitrator, both statutory roles, would have the last word on the proper interpretation of an instrument as this would mean that a patently wrong interpretation would be left intact, which ‘would be absurd’. The wrong interpretation of an instrument by an arbitrator could therefore constitute a reviewable irregularity as envisaged by s 145 of the LRA, in the sense that a reasonable arbitrator does not get a legal point wrong. The court concluded that either ‘the reasonableness test is appropriate to both value judgments and legal interpretations. If not, “correctness” as a distinct test is necessary to address such matters’. This view was echoed in *NUMSA*, in which it was stated that an incorrect interpretation of the law by a commissioner constitutes a material error of law which ‘will result in both an incorrect and unreasonable award’, which ‘can either be attacked on the basis of its correctness or for being unreasonable’.¹³

[24] As against the above principles and test, I will now turn to deciding the merits of the review application by the DPSA.

Generation Projects (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others (2019) 40 ILJ 2055 (LC) at para 33.

¹¹ In *National Union of Metalworkers of SA v Assign Services and Others* (2017) 38 ILJ 1978 (LAC) at para 32, it was held: ‘... An incorrect interpretation of the law by a commissioner is, logically, a material error of law which will result in both an incorrect and unreasonable award. Such an award can either be attacked on the basis of its correctness or for being unreasonable ...’. This judgment of the LAC was upheld by the Constitutional Court in *Assign Services (Pty) Ltd v National Union of Metalworkers of SA and Others (Casual Workers Advice Office as Amicus Curiae)* (2018) 39 ILJ 1911 (CC).

¹² (2022) 43 ILJ 1618 (LAC) at para 24.

¹³ The Court was referring to *MacDonald’s Transport Upington (Pty) Ltd v Association of Mineworkers and Construction Union and Others* (2016) 37 ILJ 2593 (LAC) at para 29, and *Assign Services* (*supra*).

Analysis

[25] In this instance, it must be appreciated that the case has nothing to do with the unfair labour practice disputes one often finds in the case of grading of positions in the Public Service. The employees' case was never founded on an unfair labour practice in terms of section 186(2)(a) of the LRA,¹⁴ nor was any such dispute ever pursued to the PSCBC. It must follow that any decisions taken, or discretions exercised by the DPSA and / or the DWAS, relating to how the AD and DD positions should be and are actually graded in particular circumstances, is not open for consideration, and stand. This matter, at the heart of it, concerns one thing only, being whether the employees have the right, *ex contractu*, by virtue of the application of clause 18.1 of the 2012 Resolution, to have their positions automatically graded at salary levels 10 and 12 respectively, and that this be done retrospectively to the date of their first appointment to their AD and DD positions.

[26] DPSA has contended that the dispute brought by the employees does not concern the interpretation or application of a collective agreement, as referred by the employees to the PSCBC, but is rather a dispute about enforcement of a collective agreement or an attempt to review the terms of the 2009 and 2012 Resolutions. I do not think there is any merit in this argument. In *Health and Other Services Personnel Trade Union of SA on Behalf of Tshambi v Department of Health, KwaZulu-Natal*¹⁵ the Court held:

'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

¹⁴ The section reads: 'Unfair labour practice' means any unfair act or omission that arises between an employer and an employee involving (a) unfair conduct by the employer relating to the promotion, demotion, probation or training of an employee or relating to the provision of benefits to an employee'.

¹⁵ (2016) 37 ILJ 1839 (LAC) at para 17. See also *MEC for Economic Development, Environment and Tourism, Limpopo v Leboho* (2022) 43 ILJ 2695 (SCA) at paras 15 – 16; *Member of the Executive Council: Police, Roads and Transport, Free State Provincial Government v Public Service Co-Ordinating Bargaining Council and Others* (2022) 43 ILJ 1628 (LAC) at para 61.

about the application of a collective agreement requires, at minimum, a difference of opinion about whether it can be invoked. ...'

[27] *In casu*, there was clearly such a difference in opinion where it came to how clause 18.1 of the 2012 Resolution should be interpreted, and then applied. According to the employees, clause 18.1 meant that they were entitled to an automatic upgrade to salary levels 10 and 12, and that this upgrade applied from the date when they were first appointed. According to the DPSA on the other hand, clause 18.1 would find no application in this case, because the employees were all appointed after 31 July 2012 and the clause required an actual grading of the posts at salary levels 10 and 12 in order to apply, which did not exist. It is these differences of opinion that lie at the heart of deciding this matter, and it thus clearly concerns a dispute about the interpretation and application of the Resolutions concerned.¹⁶

[28] Because the 2009 and 2012 Resolutions are legal instruments, in the form of collective agreements, the ordinary principles applicable to interpreting and applying such legal instruments are to be utilized. These principles were enunciated in *Natal Joint Municipal Pension Fund v Endumeni Municipality*¹⁷ as follows:

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its

¹⁶ Compare *Passenger Rail Agency of SA v Commission for Conciliation, Mediation and Arbitration and Others* (2020) 41 ILJ 961 (LC) at para 44.

¹⁷ 2012 (4) SA 593 (SCA) at para 18. See also *Bothma-Batho Transport (Edms) Bpk v S Bothma en Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) at para 12; *Democratic Nursing Organisation of SA on behalf of Du Toit and Another v Western Cape Department of Health and Others* (2016) 37 ILJ 1819 (LAC) at para 33.

production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document ...'

- [29] There has been some debate about what the aforesaid dictum in *Endumeni supra* actually means. In *University of Johannesburg v Auckland Park Theological Seminary and Another*¹⁸ the Court clarified the position as thus:

'This approach to interpretation requires that 'from the outset one considers the context and the language together, with neither predominating over the other'. In *Chisuse*, although speaking in the context of statutory interpretation, this court held that this 'now settled' approach to interpretation, is a 'unitary' exercise.^[45] This means that interpretation is to be approached holistically: simultaneously considering the text, context and purpose.

The approach in *Endumeni* 'updated' the previous position, which was that context could be resorted to if there was ambiguity or lack of clarity in the text. The Supreme Court of Appeal has explicitly pointed out in cases subsequent to *Endumeni* that context and purpose must be taken into account as a matter of course, whether or not the words used in the contract are ambiguous. A court interpreting a contract has to, from the onset, consider the contract's factual matrix, its purpose, the circumstances leading up to its conclusion, and the knowledge at the time of those who negotiated and produced the contract.

This means that parties will invariably have to adduce evidence to establish the context and purpose of the relevant contractual provisions. That evidence could include the pre-contractual exchanges between the parties leading up to the conclusion of the contract and evidence of the context in which a contract was concluded. ...'

¹⁸ 2021 (6) SA 1 (CC) at paras 65 – 67.

[30] And more recently, in *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others*¹⁹, the Court had the following to say:

'*Endumeni* simply gives expression to the view that the words and concepts used in a contract and their relationship to the external world are not self-defining. The case and its progeny emphasise that the meaning of a contested term of a contract (or provision in a statute) is properly understood not simply by selecting standard definitions of particular words, often taken from dictionaries, but also by understanding the words and sentences that comprise the contested term as they fit into the larger structure of the agreement, its context and purpose. Meaning is ultimately the most compelling and coherent account the interpreter can provide, making use of these sources of interpretation. It is not a partial selection of interpretational materials directed at a predetermined result.

Most contracts, and particularly commercial contracts, are constructed with a design in mind, and their architects choose words and concepts to give effect to that design. For this reason, interpretation begins with the text and its structure. They have a gravitational pull that is important. The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text.'

[31] A final reference is to *Association of Mineworkers and Construction Union and Others v Chamber of Mines of SA and Others*²⁰, where the Court applied the aforesaid *dictum* in *Endumeni supra* specifically in the context of interpreting a collective agreement, and said:

'All interpretations of law are themselves in a sense 'factual': certain textual and other sources (for example, statutes, common and customary law) are excavated and marked out as factually 'law', in contradiction to non-law. But this process itself involves a contextual

¹⁹ 2022 (1) SA 100 (SCA) at paras 50 – 51.

²⁰ (2017) 38 ILJ 831 (CC) at fn 28.

analysis of those sources. See in this regard *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) at para 18. Indeed, interpretation and application are simultaneous and intricate. The most imaginative exponent of this insight is Ronald Dworkin. See Dworkin *Law's Empire* (Harvard University Press Cambridge 1986) at vii: 'legal reasoning is an exercise in constructive interpretation', in which we advance 'the best justification of our legal practices as a whole'.

- [32] I will start the exercise contemplated by the principles summarized above by first considering the background facts leading to adoption of clause 3.6.3.2 of the 2009 Resolution and clause 18.1 of the 2012 Resolution. Prior to the 2009 Resolution, the AD and DD positions often sat in what was called an 'overlap', being that the post as it existed could be at either a salary level 9 or 10, in the case ADs, or salary level 11 or 12 in the case of DDs. This would obviously cause consistency problems. Clause 3.6.3.2 of the 2009 Resolution sought to correct this anomaly. What the clause brought about was that no matter at what salary level the particular individual AD or DD post had been determined to be at in the past, any appointment of employees as ADs or DDs after 1 July 2010 could only be at salary level 9 in the case of ADs, or salary level 11 in the case of DDs. However, and with the aforesaid anomaly being resolved, another was created. What about those AD or DD positions that had actually been properly graded, by way of job evaluations, and had turned out, based on these job evaluation results, to be a salary level 10 or salary level 12 position. It would in effect mean in the case of any appointments after 1 July 2010 in such instances, the employee would be under graded. That is where clause 18.1 of the 2012 Resolution then came in to correct this anomaly. It would permit, despite the prescripts of clause 3.6.3.2 of the 2009 Resolution, and where an employee's position that was actually graded and that grading came out at a salary level 10 or 12, that that employee could be appointed at that salary level.
- [33] When one considers the award of the first respondent, it appears that he was more or less alive to the aforesaid background. He referred to the fact that

prior to the introduction of clause 3.6.3.2 of the 2009 Resolution, the AD posts could either be graded at a salary level 9 or 10, and the DD posts at a salary level 11 or 12. He also found that clause 3.6.3.2 and its introduction in effect '*abolished*' grading at salary levels 10 and 12 for the AD and DD posts. Save for the issue of whether there was an actual abolishment of gradings, this reasoning is in mostly line with the above facts.

- [34] Against this background, and then considering the wording of clauses 3.6.3.2 of the 2009 Resolution and clause 18.1 of the 2012 Resolution, what do these clauses then mean? From the outset, the clauses must be read together, because the very purpose of clause 18.1 was to amend clause 3.6.3.2, and not substitute it. The text of clause 3.6.3.2 is in my view clear and unambiguous. As I have said, it contemplated that as from 1 July 2010, all ADs shall be appointed at salary level 9 and DDs shall be appointed at salary level 11, and no other salary level of appointment is allowed, no matter what the grading of the post. It is as simple as that. That being so, how does clause 18.1 of the 2012 Resolution then amend clause 3.6.3.2? In my view, by adding a proviso, to the effect that where an AD or DD post has actually been graded on salary level 10 and 12, it is allowed that an employee may be appointed and remunerated at salary level 10 and 12, as the case may be. So, in simple terms, and for all practical purposes, the combined version of clause 3.6.3.2 and clause 18.1, would read something like this:

'The commencing salary for all employees on the posts not covered by an OSD as per PSCBC Resolution 1 of 2007 and 3 of 2008 and appointed as Assistant Directors and Deputy Directors shall, with effect from the 1st July 2010 be on salary Level 9 and Salary Level 11 respectively, provided that it is allowed that employees whose posts are graded on Salary Level 10 and 12 to be appointed and remunerated on Salary Level 10 and 12 respectively.'

I must emphasize that I am not re-writing the clauses, but am simply providing a practical illustration how the texts of the two clauses, as they stand, would be properly and competently married, as they should be.

- [35] The first respondent found that only job gradings that were done (existed) prior to 31 March 2010 would be of any relevance to the application of clause 18.1. But this finding would be patently wrong, not only based on the interpretation I have set out above, but also for several other reasons. First, the date of 31 March 2020 is wrong. Although the 2009 Resolution became operative on 1 April 2010, clause 3.6.3.2 itself only became applicable as from 1 July 2010. Secondly, and more importantly, it is not only gradings of salary levels made prior to 1 July 2010 that would be relevant to the application of clause 18.1. To describe it as simply as possible, where employees had already been appointed prior to 1 July 2010 in either salary levels 9 or 10 in the case of ADs, or salary levels 11 and 12 in the case of DDs, nothing would change for them after 1 July 2010. There is no suggestion, indication, or evidence, that the effect of clause 3.6.3.2 would mean that already appointed employees (employees actually appointed prior to 1 July 2010) at salary levels 10 and 12 would be downgraded to salary levels 9 and 11. Clause 3.6.3.2 clearly only contemplated first time appointments made after 1 July 2010, which could then only be at salary levels 9 and 11. This remained the case until the introduction of the amendment by way of clause 18.1 on 31 July 2012. So what would happen after clause 18.1 came into effect is that any appointment of an employee made after 1 July 2010 into a post that had been actually graded, at any time prior to the appointment of the employee being made, at salary levels 10 or 12, would entitle (allow) a Department to upgrade such an employee to salary level 10 or 12. The initial approach adopted by the first respondent in interpreting clause 18.1 was thus entirely incorrect.
- [36] The first respondent found that clause 18.1 '*anticipated*' that an employee could occupy a post at either salary level 9 or 10 in the case of an AD, or either a salary level 11 or 12 in the case of a DD. That would be correct. The first respondent further found that it was not intended that clause 18.1 would substitute all employees having salary levels 9 and 11, with salary levels 10 and 12. Again, this is correct. But having made these findings, the first respondent's reasoning then goes awry.

- [37] As said, the first respondent reasons that the employees occupying the AD or DD posts must be paid according to the job gradings in existence prior to 2010 when the posts were last graded. This reasoning is not sustainable, for the reason already given. It is not about when the job was graded. It is about whether the job was actually graded at a specific salary level. Clause 18.1 also does not provide that an employee '*must*' be appointed to salary level 10 or 12 in such circumstances. The clause simply allows for it, in circumstances where, between 1 July 2010 and 31 July 2012, no appointment other than on a salary level 9 or 11 was allowed. In fact, the first respondent's own reasoning as set out above implies that there is no compulsory and prescribed upgrade. So, it is difficult to understand why only a salary level 10 and 12 grading done prior to 1 July 2010 would result in an upgrade, which is what the first respondent's finding contemplates.
- [38] An illustration by example is perhaps appropriate. An employee is appointed to a DD position on 1 January 2012. Because of clause 3.6.3.2, he can only be appointed at salary level 11. However, the DD post to which the employee was appointed was actually graded pursuant to a job evaluation and outcome done on 1 February 2011, at a salary level 12. Does this now mean that this employee does not qualify for an upgrade just because the grading was not done prior to 1 July 2010? Surely not. This is where the real intention of clause 18.1 becomes evident. It was intended to resolve a specific problem. That problem only existed in the period between 1 July 2010 and 31 July 2012, when ADs and DDs could only be appointed at salary levels 9 and 11, even if the post they had been appointed to had actually been graded higher. Prior to 1 July 2010 there would be no such problem, as ADs and DDs could be (and was) appointed to salary levels 10 and 12 respectively. So, what clause 18.1 did was to empower any Department to upgrade the salary level of such an employee only in the case where such post, at any time prior to the appointment of the employee, had actually been graded at salary levels 10 and 12. This further means that for any appointments after 31 July 2012, it is competent for any Department to appoint an AD at either salary level 9 or 10, or a DD at either salary level 11 or 12, depending on actual job grade

outcomes. In failing to properly appreciate this, the first respondent committed a gross and reviewable irregularity.

- [39] When one turns to the employees, it is difficult to understand why they should derive any benefit from a measure intended to correct a problem that only applied until 31 July 2012, prior to them being appointed. Considering they were appointed after 31 July 2012 to AD and DD posts at salary levels 9 and 11, this resorted well within the competence of DWAS to do. There is simply no basis, in my view, upon which clause 18.1 can then be applied to these appointments to generate some or other automatic upgrade to salary levels 10 and 12.
- [40] But on the facts, and despite clause 18.1 of the 2012 Resolution not specifically providing and stipulating to this effect, the DPSA had adopted the view in the 2014 Circular that where it can be shown that there was an actual job evaluation as evidenced by a job evaluation report prior to the appointment of the employee concerned, showing the salary level as being either 10 or 12 as the case may be, the employee concerned would be automatically upgraded. But importantly, this view of the DPSA was not open ended, and according to it, automatic upgrades would only apply to jobs that were actually graded at salary levels 10 and 12 in the period between 1 July 2010 and 31 July 2012. If that is how the DPSA wished to apply the clause, then so be it, and there would be nothing wrong with it, as it would fall within the parameters of what the clause allowed. This manner of application would mean that none of the employees would qualify for an automatic upgrade, as there was no evidence of their posts being graded in the period between 1 July 2010 and 31 July 2012. This approach of the DPSA does not change the meaning of clause 18.1 as I have discussed above. It can in fact be said that what the DPSA did was empowered by clause 18.1. As I have explained, clause 18.1 allows the DPSA to effect an upgrade, provided there was an actual job grading as evidenced by a proper job evaluation outcome, as nothing in clause 18.1 says the DPSA must upgrade. What the DPSA has done is to simply exercise this power given to it, and stipulated that an automatic upgrade would follow where there was an actual job grading done

between 1 July 2010 and 31 July 2012 as supported by actual job evaluation results.

- [41] Where the first respondent also gets it wrong is where he concludes that clause 3.6.3.2 '*abolished*' salary levels 10 and 12 for AD and DD positions. That is simply not correct. What the clause did was to provide, effectively, that no matter what graded salary level existed, appointments to AD or DD positions could only be done at salary levels 9 and 11. But it never abolished the actual job gradings that may be associated with those positions, whenever those may have been made. The fact that these gradings continued to exist is why clause 18.1 could work. The point simply is that if an employee lost out on an appointment at a higher salary level supported by an actual job grading done, between 1 July 2010 to 31 July 2012, because of clause 3.6.3.2 of the 2009 Resolution, that could be remedied.
- [42] In my view, it is incomprehensible that clause 18.1 could come to the assistance of the employees, because they were appointed after the problem sought to be resolved by clause 18.1, had already been resolved. There was no prohibition on the employees being appointed, at the very outset of their appointments, to salary levels 10 or 12. The DWAS advertised the positions at salary levels 9 and 11. The employees applied for these positions on such basis, and were appointed on such basis. It must follow that there was no actual alternative grading of their positions, because if there was, they would have been appointed at salary levels 10 and 12, as clause 3.6.3.2 no longer prohibited it. It is only if there was no actual job gradings that clause 3.6.3.2 would compel an appointment at salary level 9 or 11. But more importantly, if the employees believed that they were wrongly graded when they were appointed at salary levels 9 and 11, they should have pursued an unfair labour practice dispute relating to benefits to the PSCBC.²¹

²¹ In *National Union of Mineworkers on Behalf of Coetzee and Others v Eskom Holdings SOC Ltd* (2020) 41 ILJ 391 (LAC) at para 66, it was held: '*The failure to properly grade an employee is related to the provision of benefits for the simple reasons that benefits (including status, remuneration, eligibility for promotion etc) are normally determined by grade. As Ms Harvey, on behalf of NUM, correctly submitted, an employee who complains that his or her job is wrongly graded does not seek promotion to a new, higher or different job. Any re-grade of the job to coincide with the actual work*

- [43] In my view, what is clear from a proper and common-sense consideration of clause 18.1, is that there are three requirements that must be fulfilled in order for an employee to qualify for the automatic upgrade in terms of the clause, as applied by the DPSA in the 2014 Circular. The first is that the post must be actually graded and a job evaluation outcome provided. The second is that the grading must have happened between 1 July 2010 and 31 July 2012. The third is that this job evaluation outcome must reflect a salary level 10 or 12. If any one of these requirements are not met, then the employee cannot qualify for an automatic upgrade in terms of the clause. *In casu*, there was no evidence of an actual job evaluation being done on any of the posts the employees were appointed to, in the period 1 July 2010 and 31 July 2012. As such, they would not qualify for an automatic upgrade. The first respondent acted unreasonably in failing to appreciate this.
- [44] But even considering the position without having any regard to the manner in which the DPSA sought to apply clause 18.1, then the employees would still have the problem that clause 18.1 does not compel the DPSA or the DWAS to upgrade the employees. The clause simply allows for it to happen. To describe it as simply as possible, clause 18.1 does not read that employees whose posts were graded on salary levels 10 and 12 ‘*shall*’ be appointed and remunerated on salary levels 10 and 12 respectively. It reads that such an appointment is ‘*allowed*’ in such circumstances. It must follow that the employees have no right to demand an upgrade. It still remains the prerogative (discretion) of the DPSA to effect such an upgrade. This leaves the employees with one of two choices if they want to challenge their salary levels. They can either say that they were wrongly appointed at salary levels 9 and 11, because their posts are actually graded at salary level 10 and 12, which would be an unfair labour practice relating to benefits.²² Or they could say that it was unfair for the DPSA to decide not to upgrade them to salary

done does not change the job contents. A re-grade does not promote an employee into a new position — it merely recognises the correct value to be attached to what the employee, in fact, is already doing. A promotion gives an employee a different or revised task. A dispute about an unfair incorrect grading is thus an unfair labour practice dispute relating to the provision of benefits ...’.

²² Compare *Aucamp v SA Revenue Service* (2014) 35 ILJ 1217 (LC) at para 30.

levels 10 and 12 as it was entitled to do, which would be an unfair labour practice relating to promotion.²³ No unfair labour practice dispute was ever pursued by the employees. The point is that a dispute concerning the interpretation or application of a collective agreement cannot be used to circumvent this, as this the PSCBC cannot decide an unfair labour practice dispute under the auspices of a dispute concerning the interpretation or application of a collective agreement.²⁴

- [45] The DPSA, which is the Department responsible to finally approve gradings, would of course be free to at any time, in consultation with the DWAS, to conduct a new salary level grading of some or all of the posts in the DWAS. The first respondent correctly appreciated this in his award. However, and according to the first respondent, any such grading exercise would have ‘*no bearing*’ on the application of clause 18.1. This reasoning is in my view completely wrong. Clause 18.1 is not some or other form of immunity protecting the employees from any actual lower grading of their positions being conducted at any time after their appointment, and going forward. *In casu*, there was an actual grading exercise conducted by the DPSA in 2014 which set the employees’ posts at salary levels 9 and 11. That means that the actual grading that would apply to the employees’ AD and DD positions would be at this salary level, and this was already the position before the dispute was referred to the PSCBC. Clause 18.1 cannot change this.
- [46] Another difficulty is that the employees simply failed to prove their case to the effect that they were appointed in positions that were actually graded by way of job evaluation results, that would bring clause 18.1 into play. Whilst it is true that in the arbitration an undisputed list of AD and DD positions was produced, that were graded according to such list at salary levels 10 and 12, there was no evidence by each individual employee that such employee was

²³ As the Court said in *Apollo Tyres SA (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 1120 (LAC) at para 51: ‘... An employee who wants to use the unfair labour practice jurisdiction in s 186(2)(a) relating to promotion or training does not have to show that he or she has a right to promotion or training in order to have a remedy when the fairness of the employer’s conduct relating to such promotion (or non-promotion) or training is challenged ...’. See also *Passenger Rail Agency* (*supra*) at paras 69 – 70.

²⁴ See *Tshambi* (*supra*) at paras 14 – 15; *Passenger Rail Agency* (*supra*) at para 45.

actually appointed to any of such listed graded positions. In simple terms, the employees did not produce evidence that their specific individual appointments, with job descriptions, key performance areas, responsibilities, and the like, matched the listed salary level 10 and 12 graded positions. I point this out as an aside, because, as I have said, there is nothing in clause 18.1 that entitles the employees to an automatic upgrade as they demanded, and which the first respondent clearly wrongly awarded.

[47] This then only leaves the upgrading done by the DWAS on 1 December 2015. According to a report compiled by the DWAS in March 2015, such Department considered the provisions of clause 18.1, as well as various background facts and alleged arbitration awards (the details of which need not burden this judgment) and came to the conclusion that a proper interpretation of clause 18.1 required an ‘*upgrade*’ of the AD and DD positions to salary levels 10 and 12. According to the DPSA, this grading done by the DWAS was irregular. As stated above, even the first respondent accepted that it was a nullity. But in the end, and fortunately, little turns on this, because even accepting that when the DWAS of its own accord decided to upgrade these same positions with effect from 1 December 2015, whether rightly or wrongly, it could only be a new salary level grading, that would seek to change the earlier salary level grading by the DPSA in 2014. As such, it cannot apply retrospectively, and can only apply going forward. It therefore cannot serve to justify a retrospective upgrade of the employees’ salary levels.

[48] In the end, the case *in casu* has many similarities with the judgment in *Herbert supra*.²⁵ In that case,²⁶ it was about whether only the experience gained by a psychologist (employed in employed by the Western Cape Education department) after registration with the HPCSA should be taken into account where it came to an upward translation under an OSD agreement, and not also prior experience. The OSD agreement did not specifically provide to this effect, and only referred to ‘*relevant experience*’. The arbitrator, in interpreting the agreement, found that since the functions performed by the employee

²⁵ Id at fn 12.

²⁶ See paras 8 and 9 of the judgment.

before registration were the same as those performed after registration, his relevant earlier experience had to be considered, as this was what was meant by the OSD agreement. On that basis, the arbitrator determined that the employee should have been translated into the role of grade 3 education psychologist and that he be remunerated on the grade 3 scale, with retrospective pay. The Court, in considering this reasoning by the arbitrator, held as follows:²⁷

‘In interpreting the collective agreement in this matter, the arbitrator was required to have regard to the aim and purpose of the collective agreement, the words and language used in it, having regard to ordinary rules of grammar and syntax, and the context in which the disputed terms appear in the agreement.’

Having so held, the Court then concluded:²⁸

‘Having regard to the plain meaning of the words, the language used in the light of the ordinary rules of grammar and syntax and the context in which the words are used, it is apparent that the ‘relevant experience’ required for the role of grade 2 and 3 education psychologist was that gained ‘after registration with the [HPCSA] in respect of RSA qualified psychologist’. The registration required for appointment into both grades was ‘[r]egistration with the [HPCSA] as psychologist’. It follows that the relevant experience referred to is that obtained ‘after registration’ as a psychologist and not in any different role. As much is supported by the reference to relevant experience, after registration, in respect of ‘a RSA qualified psychologist’. It is therefore years of experience as a registered psychologist that is required and which is ‘relevant’ for purposes of the provision. A different finding does not accord with the plain meaning of the OSD agreement, nor with its aim

²⁷ Id at para 16.

²⁸ Id at para 18 – 19.

and purpose, which expressly sought to retain and attract specialist skills in particular identified roles in public education.

Had it been intended that relevant experience prior to registration as a psychologist was permissible, the provision would have stated as much expressly. ...'

- [49] Based on what I have summarized above, this same kind of considerations would equally apply *in casu*. Clause 18.1 of the 2012 Resolution does not prescribe an automatic upgrade of salary level, considering the plain text thereof. This clause was also intended to correct an anomaly applicable only to a specific period, and cannot serve as some kind of licence to demand an automatic upgrade later. It is clear that clause 3.6.3.2 of the 2009 Resolution read together with clause 18.1 of the 2012 Resolution provides that in the ordinary course, appointments of ADs and DDs take place at salary levels 9 and 11, however where there exists a proper job evaluation and outcome actually grading a particular position at salary level 10 or 12, the appointment may (and not must) be made at that level.
- [50] In summary, I therefore conclude that the employees cannot rely on clause 18.1 of the 2012 Resolution to effect what is nothing else but an automatic retrospective upgrade of their positions. This clause does not provide for such an eventuality. It only allows for an upgrade to happen, but does not prescribe that an upgrade must happen. If clause 18.1 contemplated an automatic upgrade based on job evaluations, it would have provided for it. The clause simply intended to remedy a past anomaly, which only existed for a specific period in time. It was never intended to serve as a licence to claim upgrades for future appointments after this period of anomaly ended. If employees appointed after 31 July 2012 believed that there were problems, anomalies or difficulties with regard to the salary levels at which they were appointed, these can only be dealt with and resolved under the unfair labour practice jurisdiction of the LRA, and not by way of an interpretation and application of a collective agreement dispute.

[51] In his award, the first respondent concluded that clause 18.1 of the 2012 Resolution is '*interpreted*' to mean that public service officials who occupy the posts of ADs and DDs, as '*covered*' by clause 3.6.3.2 of the 2009 Resolution, must be appointed and remunerated at salary levels 10 and 12 with effect from their dates of appointment, if the posts were graded at such levels prior to 31 March 2010, and that they must be paid at such salary levels from the date of their appointment. Considering all I have set out above, this interpretation is plainly materially wrong. The following conclusion in *Herbet supra* is apposite *in casu*:²⁹

'The arbitrator in this matter incorrectly interpreted the relevant appointment provisions contained in annexure C3 to the OSD agreement insofar as they related to the appellant. This error was of such a material nature that it resulted in a decision which, on a proper interpretation of the OSD agreement, was one that a reasonable arbitrator on the material before them could not reach. The Labour Court was correct in finding that the arbitration award fell to be set aside on review.'

Conclusion

[52] Therefore, and based on all the reasons set out above, I conclude that the first respondent's arbitration award constitutes a material error of law to the extent that the determination he arrived at is unreasonable and thus cannot be sustained. The arbitration award thus falls to be reviewed and set aside.

[53] Having reviewed and set aside the award of the first respondent, I see no reason to remit this matter back to the second respondent again for determination *de novo* before another arbitrator. In terms of section 145(4), I have the power to finally determine the matter. As stated above, the factual matrix in this matter was undisputed and in fact to a large extent common cause. The interpretation of the 2009 Resolution and the 2012 Resolution is in

²⁹ Id at para 25.

essence a legal conclusion, and need not be considered and then decided all over again in another forum. The matter also dates back to 2015, and must be finished off. I therefore consider it appropriate to finally determine this matter, once and for all. As a result, I consider it appropriate that the arbitration award of the first respondent be substituted with an award that the provisions of section 18.1 of the 2012 Resolution does not find application in this case, and cannot serve as a basis for the employees to be entitled to an automatic retrospective application of an upgrade of their salaries to salary levels 10 and 12.

Costs

[54] This only leaves the issue of costs. In terms of section 162(1) of the LRA, I have a wide discretion where it comes to the issue of costs. Even though the applicant was successful, I do not intend to make a costs award against the third respondent parties, as they at least had an arguable case. I also do not think any of the parties acted unreasonably in seeking to pursue this matter to finality, and in any event, it is an issue that called for final determination by this Court. I also consider the *dictum* of the Constitutional Court in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*³⁰ where it comes to costs awards in employment disputes before this Court, and in this case there certainly exists no reason to depart from the principle set out therein. Therefore, I consider it to be in the interest of fairness that no costs order should be made.

[55] It is for all the reasons as set out above that I made the order that I did, as reflected in paragraph 3 of this judgment, *supra*.

S Snyman

Acting Judge of the Labour Court of South Africa

³⁰ (2018) 39 ILJ 523 (CC) at para 25. See also *Union for Police Security and Corrections Organisation v SA Custodial Management (Pty) Ltd and Others* (2021) 42 ILJ 2371 (CC) at para 35.

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LABOUR COURT