

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR2449/13 & J2080/16

In the matter between:

**MINISTER OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT**

Applicant

And

DS PANZA
Respondent

First

B MATSHELO

Second Respondent

P SUCHRAJ-ELLY

Third Respondent

J MATSHIDISO

Fourth Respondent

T BODIBA

Fifth Respondent

D PHAHLANE

Sixth Respondent

S DLWATHI

Seventh Respondent

S MDZEKE

Eight Respondent

D SEOPA

Ninth Respondent

M D MOTADI

Tenth Respondent

L C MQUSHULU

Eleventh Respondent

MSHORO JAMES MATHALA N.O

Twelfth Respondent

**GENERAL SERVICE SECTORAL
BARGAINING COUNCIL**

Thirteenth Respondent

L TSHIDZUMBA

Fourteen Respondent

S MTHIMUNYE

Fifteen Respondent

**MINISTER OF PUBLIC SERVICE
AND ADMINISTRATION**

Sixteen Respondent

**PUBLIC SERVANTS ASSOCIATION
OF SOUTH AFRICA**

Seventeen Respondent

**THE POLICE AND PRISONS
CIVIL RIGHTS UNION**

Eighteen Respondent

**THE NATIONAL EDUCATION AND HEALTH
ALLIED WORKERS UNION**

Nineteen Respondent

And

CASE NO. J 2080/16

In the matter between:

D S MPANZA

First Applicant

P MATSHELO

Second Applicant

P SUCHRAJ-ELLY

Third Applicant

J MATSHIDISO

Fourth Applicant

T BODIBA

Fifth Applicant

D PHAHLANE

Sixth Applicant

S DLWATHI

Seventh Applicant

S MDZEKE

Eight Applicant

D SEOPA

Ninth Applicant

M D MOTADI

Tenth Applicant

L C MQUSHULU

Eleventh Applicant

L TSHIDZUMBA

Twelve Applicant

S MTHIMUNYE

Thirteenth Applicant

And

**THE MINISTER OF JUSTICE &
CONSTITUTIONAL DEVELOPMENT**

Respondent

Heard: 30 June 2023

Delivered: 25 March 2024

JUDGMENT

SONO, AJ

Introduction

- [1] The matter before this court relates to three (3) interlinked applications being (i) a review application, (ii) a rescission application, both brought by the Minister of Justice and Constitutional Development (the Applicant), and (iii) a section 158(1)(c) application brought by the Respondents.¹
- [2] The dispute concerns the interpretation and application of a collective agreement,² more specifically Resolution 1 of the GPSSBC (the Resolution). Essentially the Respondents are seeking relief to be translated into the Occupational Specific Dispensation (OSD) in accordance with the Resolution.
- [3] The dispute was arbitrated upon by the twelfth respondent (the Arbitrator) under the auspices of the General Public Sectoral Bargaining Council (the GPSSBC), the thirteenth respondent in this matter. The Arbitrator rendered an award dated 10 September 2023 (the Award), which is the subject matter of this review application, concluding that the Respondents are to be translated into the OSD in accordance with the Resolution.

¹ In this Judgement Respondents means the First to Eleventh Respondents together with Fourteenth and Fifteenth Respondents.

² In *HOSPERSA obo Tshambi v Department of Health, KwaZulu-Natal* [2016] ZALAC 10; (2016) 37 ILJ 1839 (LAC) the Labour Appeal Court stated the following:

[17] What then, can possibly be the dispute about the application of the collective agreement?

...

[25] In my view, the phrase “interpretation or application” are not disjunctive terms, and ought to be read as being related; i.e., disputes about what the agreement means and what it is applicable to.’ (own emphasis)

- [4] Dissatisfied with the Award, the Applicant has brought the present review application seeking to have the Award reviewed and set aside. Before dealing with the merits of the review application, I must set out the circumstances under which this review application came before me.

Background fact

- [5] The Department of Justice and Constitutional Development (the Department) created the Civil Litigation Unit the purpose of which was to recruit and retain advocates to conduct civil litigation on behalf of the State. On 25 January 2008, the Department advertised 12 posts for the role of State Advocates. On 3 October 2008, the Department advertised a further 3 posts for Senior State Advocates.
- [6] It is common cause that the Respondents were employed in the aforementioned posts as either State Advocates or Senior State Advocates.
- [7] Prior to the Respondents employment with the Applicant, the Resolution was concluded between the State, the Department and the participating unions. Paragraph 1 of the Resolution provides that:

‘[t]his agreement gives effect to PSBC Resolution 1 of 2007 in providing for the development and implementation of Occupational Specific Dispensation ("OSD") for qualified legal professionals with effect from 01 July 2007

[and]

3. Scope

3.1 [t]his agreement binds -

3.1.1 the Employer

3.1.2 the Employees of the Employer who are members of trade union parties to this agreement; and the employees of the Employer who are not members of any trade union

party to this agreement, but who fall within the registered scope of [the Council]; and

3.1.3 who fall within the following categories:

- State Attorney
- Family Advocate
- State Law Advisor
- Legal Administration Office
- Master
- Registrar
- Maintenance Officer
- Estate Controller.'

[8] On or about 22 August 2012, aggrieved employees of the Department, cited herein as the first to twelve respondents, lodged a grievance contending that they should be included in the OSD. In essence, the Respondents contended that their exclusion from participating in the OSD amounted to an unfair labour practice, unfair discrimination and that their exclusion was unlawful and unconstitutional.

[9] On or about 16 October 2012, the Department responded to the grievance. The Department stated that it could not entertain the grievance because it is bound by the OSD, as a collective agreement. Essentially, the Department's argument was that the Respondents are not included in the OSD and including them would be tantamount to amending the collective agreement unilaterally but the Department would engage the Department of Public Service and Administration (the DPSA) with a view to including those who qualify.

- [10] On 9 November 2012, the aggrieved Respondents referred a dispute to the GPSSBC. The dispute related to the interpretation and/or application of the collective agreement. The matter remained unresolved as of 14 December 2012 and the Respondents referred the dispute for arbitration. The arbitration was held on 20 August 2013 and the Award was handed down on 10 September 2013.
- [11] The Respondents then brought the current review application. Since then the matter has travelled a long journey seeking to be resolved.

Labour Court proceedings

- [12] This review application first came before this court on 15 October 2015 before Basson J. Basson J ordered, by consent of the parties, that the matter be postponed *sine die* and directed that the Applicant approach the Minister of Public Service and Administration with a view to request the GPSSBC to convene a meeting of all interested parties to the collective agreement including the respondent. The purpose of that meeting was for all involved to discuss the inclusion of the Respondents in the Resolution.
- [13] Basson J's view was that setting aside the award and remitting the matter to the Thirteenth Respondent will not resolve the issue and the dispute between them will still remain, being, that the Respondents are not included in the Resolution and including them like the Twelfth Respondent did, will mean that the court has to read into the collective agreement entered into by the relevant trade unions that the First to Fifteenth Respondents are included in the Resolution.
- [14] The parties before court reached an agreement which was made an order of court.
- [15] On 2 August 2016, the matter came before Van Niekerk J. When there was a no show by the parties, Van Niekerk J "*dismissed*" the review application. I will return to the effect of the dismissal order by my brother, Van Niekerk J. Backed by the order dismissing the review application, the Respondents filed the section 158 (1)(c) application seeking to make the Award an order of the

court. The merits of this application will also be dealt with later on in this judgement.

[16] On 2 June 2017, the review application and the section 158 application came before Le Grange J who ordered that the Applicant file a rescission application and seek condonation for the late filing thereof. Further, Le Grange J ordered that the Applicant has to file a condonation application for the late filing of the rescission application. It is common cause that the Applicant failed to file the condonation application as ordered.

[17] On 25 April 2018 the 3 interlinked applications came before Nkhutha-Nkontwana who remitted the matter back to the GPSSBC. She further directed that parties were to convene at the GPSSBC chambers to discuss the possible inclusion of the Respondents in the Resolution. The parties to this discussion were directed to report the decision emanating from the directed sitting.

[18] On 10 July 2018, and in compliance with order of Nkutha-Nkontwana J's order *supra*³, Ms Oodit (the secretary to the GPSSBC) reported to this court that a meeting was held on 18 June 2018. The nub of her "*report*" was that the matter would need to be tabled before the GPSSBC's Council for consideration.

[19] On 29 August 2018, the Respondents instituted contempt proceedings against Ms Oodit. On 30 November 2018 the parties entered into a settlement agreement which was made an order of court in terms of which -

18.1 The Respondents withdrew the contempt proceedings against Ms Oodit;

18.2 The GPSSBC would use its best endeavours to convene a meeting before the end of February between all parties including the trade

³ The GPSSBC was "*directed to report the decision emanating from the sitting referred to in paragraph 2 [of the relevant order]*" wherein the court ordered that "*[t]he parties... are directed to sit at the Bargaining Chamber of the thirteenth respondent with a view to discuss, consider and decide the inclusion of the [Respondents] in the collective agreement (GPSSBC Resolution 1 of 2008)*".

unions and the DPSA. The meeting would be convened outside the provisions of the GPSSBC constitution and its objective would be to resolve the dispute between the Department and the Respondents by identifying a process that will allow the dispute between the Department and the Respondents to get on the agenda of the GPSSBC.

- [20] Following the above order, Ms Oodit reported to this court that a meeting on 25 February 2019 was convened pursuant to the aforementioned order. Further, that the issue of placing the dispute between the Respondents and the Applicant on the GPSSBC agenda was discussed however no consensus could be reached. Moreover, it was agreed that the Respondents would approach the PSCBC.
- [21] The Respondents approached the PSCBC. Commissioner Minnette Van der Merwe ruled that the PSCBC does not have jurisdiction to resolve the dispute before it as a party to the PSCBC resolution 3 of 2010 did not refer this dispute for interpretation and application.
- [22] Unresolved, this matter has since come back to this court. On 30 June 2023, the matter came before me.

The award

- [23] The Arbitrator identified that the main issue before him was "*whether the [Respondents] are entitled to be translated to OSD in terms of [the Resolution]*". Before he could make a conclusion on this main question, the Arbitrator was of the view that he first had to determine whether or not the Applicants and the Respondents were bound by the collective agreement. The Arbitrator found that the parties are bound by the collective agreement. He found that the Resolution makes provision for three categories of employees who are bound by it. In his analysis of clause 3 of the Resolution, the Respondents fit into the second category of employees.
- [24] Having found that the Applicant and the Respondents were bound by the Resolution, in approaching the main issue before him the Arbitrator relied

primarily on the case law in *National Commissioner for the South African Police Service v Mokoena and Others*⁴ particularly paragraph 11 of that judgement. On that basis, the Arbitrator concluded that the Respondents were entitled to be translated in the OSD and therefore by implication, that they are entitled to benefit in terms of the Resolution.

Grounds of review

[25] The Applicant contends that the Arbitrator committed a gross irregularity in the conduct of the proceedings and/or failed to apply his mind which, according to the Applicant, is evinced by the lack of rationality between the Award and the reasons. As a further ground the Applicant contends that the Award is so unreasonable that no reasonable Arbitrator would have reached as he misinterpreted paragraph 3 of the Resolution in that the Arbitrator applied the clauses therein disjunctively instead of conjunctively, that parties with a substantial and direct interest in the matter were not cited and that when the Resolution came about, the Respondents were not even employed at that time.

Condonation and rescission

[26] The Applicant was ordered to file a rescission application together with a condonation application by Le Grange J. This was to rescind the order of Van Niekerk J.

[27] It is common cause that the rescission application was filed with this court however the condonation application which had to accompany it was not filed. Before I pronounce on the merits of the rescission application I will first have to deal with the condonation application.

[28] It is trite that condonation is not for the taking. A litigant seeking condonation has to request this court for indulgence and show good cause for his/her or its failure to comply with any prescribed time frames. The discretion to grant or

⁴ [2013] ZALCJHB 142 at para 11.

refuse the condonation (as the case may be) lies solely with the presiding officer and is a discretion that must be exercised judiciously.

- [29] The Constitutional Court confirmed that granting a party condonation for failure to comply with the prescribed time frames must be in the interest of justice.⁵ The standard I am called upon to apply is therefore the interest of justice standard. In other words, I have to determine whether or not it will be in the interest of justice that the condonation be granted or refused.
- [30] It is unacceptable that having been ordered by this court to file a condonation application the Applicant has not even bothered to do so. There is simply no excuse whatsoever for not complying with a court order. This is strictly contemptuous conduct. The court normally would therefore lack jurisdiction to deal with this matter in the absence of the condonation application
- [31] Nonetheless looking at the facts of this case, the importance of the issue at hand, the parties involved and the fact that this dispute, primarily the review application, has been so protracted, the interests of justice dictate that the Applicant's non-compliance be condoned in the first place and secondly condone the late filing of the rescission application.
- [32] Dismissing the matter on the basis that the court has no jurisdiction at this stage, will not be in the interest of justice. This is so in that the matter served before my sister Nkhutha-Nkontwana J before coming before me. Nkhutha-Nkontwana J dealt with the matter and in so doing, made orders which were complied with by the parties. Accordingly, the issue of non-compliance has become moot before me having been overtaken by events.
- [33] Furthermore, the Applicant has reasonable prospects of success in this review as will be shown later. In considering the matter and remitting it to the GPSSCBC, my sister Nkhutha-Nkontwana J had, in my opinion, effectively condoned the Applicant's failure to file a condonation application as the matter moved forward, this court granted the parties a hearing and made an order. It

⁵ See *Brummer v Gorfil Brother Investments (Pty) Ltd and Others* [2000] ZACC 3; 2000 (2) SA 837 (CC); *Steenkamp and Others v Edcon Limited* [2019] ZACC 17; [2019] 11 BLLR 1189 (CC).

will be unfair and illogical that now being saddled with this matter again the court goes and revisits the Applicant's non-compliance with the rules of this court.

[34] Moreover, it goes without saying that labour matters have to be resolved expeditiously. This is one of the primary objectives of the Labour Relations Act⁶ (the LRA).⁷ Striking this matter off the roll (or even dismissing it) will mean this matter will in future be back before this court. The same issue(s) will be before this court again. This course of action is certainly not in keeping with the spirit and purport of the LRA nor will it be in any of the parties' interest. It will however be a factor I will consider in determining whether to grant an order as to costs.

[35] This should however not mean that litigants are at liberty to elect whether or not to file condonation applications when there is a need to do so. The decision to grant condonation, in this instance when no application for condonation was even filed, must be understood within the context of this matter. The Respondents have moved post to pillar seeking the resolution of their dispute. They deserve finality.

[36] I now turn to dealing with the rescission application. The Applicant's case is that the order of Van Niekerk J was erroneously granted in that he ought to have struck the matter from the roll instead of dismissing it. Furthermore, so contends the Applicant, Van Niekerk J's order is tantamount to a striking off order and should be regarded as such. In support of this submission, the Applicant relies on Rule 15 of this court's rules⁸ read with clause 14.4 of this court's practice manual⁹ which provide that in the case of non-appearance by both parties the matter ought to have been struck off the roll.

⁶ Act 66 of 1995, as amended.

⁷ See *Steenkamp and Others v Edcon Limited Limited* [2019] ZACC 17; [2019] 11 BLLR 1189 (CC) at paras 38 – 41.

⁸ GN 1665 of 14 October 1996: Rules for the conduct of proceedings in the Labour Court.

⁹ Practice Manual of the Labour Court of South Africa, effective 1 April 2013.

[37] In explaining the Applicant's non-attendance on 2 August 2016, Mr Thabo Victor Letageng (Mr Letageng) averred that -

36.1 He is a Senior State Attorney and has been handling this matter, on the Applicant's behalf, since its inception;

36.2 From 17 to 29 June 2016 he was on leave and during that time there was no one who took charge of his office. Moreover, his secretary had not returned from 24 May 2016;

36.3 He came back from leave on 29 June 2016;

36.4 He only became aware of the status of the matter (i.e. that the application had been dismissed by Van Niekerk J) after receiving a call from Ms Motadi on 6 September 2016.

[38] Importantly, Mr Letageng does not deny that he received the notice of set down, only that he "*missed it*" as his inbox was inundated.

[39] Mr Letageng concedes that the telefax number 0[...] is his telefax number. The broadcast report attached to his affidavit reveals that the telefax was transmitted on 27 June 2016, two days before Mr Letageng returned to work after his leave.

[40] The Respondents oppose the Applicant's rescission application. The Respondents aver that they were not served with the notice of set down and were therefore not aware that the matter was set down on 2 August 2016. This explains why they were absent in court on the said date. The Respondents however oppose the rescission application brought by the Application on the basis that Applicant has not made a proper case for rescission.

[41] In order to resolve this issue, the question is whether there was a need in the first place for the Applicant to file an application for rescission. In my view the effect of Van Niekerk J's order was to strike the matter off the roll. In this event, there is therefore no need to consider the requirements as set out in Rule 16A of this court's rules. However, La Grange J on 1 June 2017 made

an order that the Applicant (the Respondent in that matter) should file an application to rescind the order made by Van Niekerk on 21 August 2016 and apply for condonation for the late filing of the rescission application. I have already dealt with the issue of condonation. Thus, the Applicant was obliged if not by the rules but the specific order of La Grange J to file both the rescission and condonation for the late filing of same.

[42] Rule 16A of the Rules of this Court empowers the court to rescind or vary any order or judgement made in the absence of that party. In its heads of argument titled, "Applicant's Second Supplementary Heads of Argument", dated 23 November 2016, the Applicant contends that there was no need for a formal rescission application of the order made by Van Niekerk J. They contend that the order made by Van Niekerk J on 2 August 2016 is tantamount to a striking off and therefore does not require a formal rescission application.

[43] Be that as it may, the Applicant had filed an explanatory affidavit explaining the Applicant's absence from court when the matter came before Van Niekerk J. The reasons are dealt with above.

[44] The Applicant has proffered an explanation for its absence in court. Before the matter came before me, it served before Nkutha-Nkontwana J. As stated above, Nkutha-Nkontwana J dealt with the matter and made various orders which were implemented by the parties. The Respondents were similarly absent. I therefore find that the matter is properly before court.

[45] Whereas it may be that both Basson J and Nkutha-Nkontwana J tried to find a practical resolution of the matter for the reasons more fully dealt with by Basson J, the question that arises is what is the effect of the orders made by my learned sisters. It is easy for this court to deal with the matter simplistically as suggested by the Applicant and find that the Award issued by the Twelfth Respondent no longer exists having been over taken by the orders of the Basson and Nkhutha-Nkontwana J. That approach will however not be helpful to the parties. This is so because, whereas she dealt with the application to review and set aside the award of the Twelfth Respondent, the parties

reached an agreement which was then made an order of court by consent. In this order, the award was not set aside in terms of section 145 (1). Her Ladyship Basson J postponed the matter *sine die* for the parties to find resolution in terms of the order. Similarly, Nkhutha-Nkontwana J did not set the Award aside. She did however in terms of the first order remit the matter to the Thirteenth Respondent. Importantly, she ordered the Thirteenth Respondent to "report" back to the court the decisions taken in terms of the measures directed by the court per Nkhutha-Nkontwana J.

[46] Thus, the above, in my view renders to review application on the one hand and the section 158(1)(c) applications alive.

[47] The interest of justice dictate that rescission should be granted and the matter be brought to finality. It is for this reason that this court will determine the matter and grant rescission of the order of Van Niekerk J in order to deal with the substantive applications for review and section 158, respectively. The court has also considered the prospects of success in the review application to come to the conclusion that this matter deserves a hearing.

[48] Moreover, as already stated the issue of rescission has, in my view, been overtaken by subsequent events, which is when my sister Nkhutha-Nkontwana J adjudicated the matter on 14 September 2018.

[49] I will now turn to deal with the issue before this court, which is the review application.

Applicable legal principles

[50] This court is called upon to determine whether the Award should be reviewed and set aside.

[51] In order to answer the question as to whether whether the Award should be set aside, this court has to grapple with the question whether or not the decision reached by the Arbitrator, that the Respondents are included in the OSD and Resolution, is one that a reasonable decision maker could reach.

[52] I am guided by the following passages of the Labour Appeal Court decision in *Herbert v Head of Education: Western Cape Education Department and others*¹⁰ -

‘[21] In *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*, the Court made it clear that:

“A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. 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 particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.”

[22] In *DENOSA*, it was suggested that –

“... the concept of the error of law is relevant to the review of an arbitrator’s decision within the context of the factual matrix as presented ...; that is a material error of law committed by an arbitrator may, on its own without having to apply the exact formulation set out in *Sidumo*, justify a review and setting aside of the award depending on the facts as established in the particular case.”

¹⁰ [2022] ZALAC 9; (2022) 43 ILJ 1618 (LAC) at paras 21-24.

[23] This Court, in *MacDonald's Transport*, had regard to the different context in which private arbitration occurs. In *Telcordia Technologies v Telkom* it was made clear that the review of material errors of law in a private arbitration are prevented because the arbitrator is, in accordance with the limitations which arise from the Arbitration Act, intended to have exclusive jurisdiction over questions of fact and law. In a different context, in *Hira v Booysen*, it was stated that:

“... Where the complaint is that the tribunal has committed a material error of law, then the reviewability of the decision will depend, basically, upon whether or not the Legislature intended the tribunal to have exclusive authority to decide the question of law concerned. This is a matter of construction of the statute conferring the power of decision.”

[24] In *MacDonald's Transport* it was found that the Labour Relations Act (“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 section 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”.’ (own emphasis)

[53] In light of the above, I have to consider whether the Arbitrator correctly interpreted the Resolution. In interpreting the Resolution the Arbitrator “*was required to have regard to the aim and purpose of the collective agreement, the words and language used*” therein “*having regard to ordinary rules of grammar and syntax, and the context within which*” the Resolution came about.¹¹

[54] Applying the aforementioned principles, I am of the view that the Arbitrator incorrectly interpreted and applied the Resolution to include the Respondents for the following reasons -

47.1 Textually, the Respondents are not included in the category of persons bound by the Resolution. The Resolution has an exhaustive list of occupational categories (i.e. a list of persons) to whom the Resolution applies. What the Arbitrator did, in his analysis and interpretation is tantamount to altering the clear provision of the Resolution which is not allowed.

47.2 Contextually, when the collective agreement was negotiated and concluded the positions the Respondents held in the Department were not even created yet. Meaning, the parties who negotiated and concluded the collective agreement could not have foreseen that the Respondents would be included in the category of persons bound by the Resolution. In other words, it could never have been the intention of the negotiating parties that the categories of persons the Respondents fall under would be included in the Resolution.

47.3 A further indicator that the Respondents are not included in the Resolution lies in the fact that the GPSSBC itself refused to absorb the

¹¹ *Herbert v Head of Education: Western Cape Education Department and Others* [2022] ZALAC 9; (2002) 43 ILJ 1618 at para 16.

Respondents into the Resolution. After this refusal, the PSCBC similarly refused to absorb them in the Resolution.

[55] In addition, the interpretation given by the Arbitrator as to who is bound by the Resolution is unreasonable and incorrect. When one looks at clause 3 of the Resolution, it is clear that the Resolution makes scope for only 2 categories of employees who are bound by the Resolution, who -

48.1 Are employees of the Department who are members of a trade union party to the collective agreement; and

48.2 Are employees who are not members of a trade union party to the agreement but who fall within the registered scope of the GPSSBC.

[56] Once an employee falls within the aforementioned categories, then they have to fall within the closed list of occupational categories set out in clause 3.1.3. It then follows that clauses 3.1.1, 3.1.2 and 3.1.3 are to be read conjunctively. This view is further fortified by the use of the “and” instead of “or” in clause 3 of the Resolution. Therefore, the Arbitrator's approach that clause 3 has to be interpreted disjunctively was incorrect in my view.

[57] Moreover, the Arbitrator could not even start to interpret and apply the collective agreement in the absence of the unions who negotiated and concluded the collective agreement. The unions (and by extension their constituents) had a direct and substantial interest in the proceedings before the Arbitrator and ought to have been joined. Further, the process, including this court, would have benefitted from the submissions of the parties who actually concluded the Resolution forming the subject matter of these proceedings. In this regard, I fully align myself with the views of my sister Basson J that this was tantamount to a misjoinder. It follows that the review application should then be upheld.

[58] This leads me to the authority of this court in the matter of *South African Police Services v Du Preez and Others In Re: Du Preez v South African*

*Police Services*¹² wherein this court, per Moshoana J, in explaining who is to be considered a “party” in terms of section 24 of the LRA, held as follows -

‘[10] In the matter of *Arends v SALGBC and others*, I had an occasion to say the following:

[16] It must follow axiomatically that an individual employee cannot be a party to a collective agreement. A party can either be a registered trade union or an employer or employer’s organisation...The issue of who a party is, is distinct from the binding nature of the agreement. Alive to the concept of *stipulatio alteri*, the legislature introduced section 23(1)(c)-(d). Employees can derive benefits from a collective agreement even if not parties. To my mind employees only derive benefits from a collective agreement and are not parties to the agreement...

[17] ... I conclude by saying that a non-party cannot refer a dispute in terms of section 24 of the Act. Since employees are generally non-parties but beneficiaries, they cannot in my view refer a dispute in terms of section 24.

[11] The matter of *Arends* was taken on appeal. On appeal, the LAC did not upset the above finding. By necessary implication, the findings were approved by the LAC. It must therefore follow that Du Preez had no *locus standi* to refer a dispute to the Bargaining Council. Also, the third respondent had no jurisdiction to entertain the dispute. An award issued without the necessary jurisdiction is a nullity. On this basis alone, the award is susceptible to review.’ (own emphasis added)

[59] I agree with the above sentiments. It is common cause that the Respondents were not a party to the collective agreement and therefore the Resolution.

¹² [2019] ZALCPE 3.

It therefore stands to reason that they did not have the *locus standi* to refer a section 24 dispute¹³ and neither did the Arbitrator and the GPSSBC have the jurisdiction to determine the dispute before it. Because, in my view, the Award was issued without the necessary jurisdiction and the Respondents did not have *locus standi* as they were not parties to the Resolution, the Award is a nullity and therefore stands to be reviewed and set aside.

[60] In any event, the law in relation to reviews is that such a misinterpretation and application of a collective agreement constitutes a reviewable error. This is a material error of law and this court can certainly not be expected to uphold such an error. The Award is therefore reviewed and set aside.

[61] It is my view that it will serve no purpose to remit the matter to the GPSSBC as it will not promote the effective resolution of the dispute between the parties, which is whether or not the Respondents ought to be included in the OSD.

[62] Therefore, in conclusion what the Respondents seek is to be included in the Resolution so that they can benefit in terms of it. However, the manner in

¹³ See section 24 of the LRA which deals with "Disputes about collective agreements" and provides that -

- (1) Every collective agreement excluding an agency shop agreement concluded in terms of section 25 or a closed shop agreement concluded in terms of section 26 or a settlement agreement contemplated in either section 142A or 158(1)(c), must provide for a procedure to resolve any dispute about the interpretation or application of the collective agreement. The procedure must first require the parties to attempt to resolve the dispute through conciliation and, if the dispute remains unresolved, to resolve it through arbitration.
- (2) If there is a dispute about the interpretation or application of a collective agreement, any party to the dispute may refer the dispute in writing to the Commission if—
 - (a) the collective agreement does not provide for a procedure as required by subsection (1);
 - (b) the procedure provided for in the collective agreement is not operative; or
 - (c) any party to the collective agreement has frustrated the resolution of the dispute in terms of the collective agreement.
- (3) The party who refers the dispute to the Commission must satisfy it that a copy of the referral has been served on all the other parties to the dispute.
- (4) The Commission must attempt to resolve the dispute through conciliation.
- (7) Any person bound by an arbitration award about the interpretation or application of section 25(3)(c) and (d) or section 26(3)(d) may appeal against that award to the Labour Court.

which they are attempting to do so is not legally competent as it is tantamount to gate crashing their way into a collective agreement that they are not parties to and/or bound by.

- [63] The most sensible approach is for the Applicant and Respondent to meet and carve out their own bilateral dispensation, outside the Resolution, but on terms similar to the Resolution. This should, in my view, effectively resolve the dispute between the parties.

Section 158(1)(c) application

- [64] Having granted the review application, there is thus no need for this court to consider the section 158(1)(c) application.

Costs

- [65] I now turn to deal with the issue of costs. Section 162 of the LRA gives me the discretion to make an order of costs subject to the requirements of law and fairness.

- [66] I am of the view that law and fairness dictate a cost order is not warranted in this matter. This matter has travelled far to come to this point. The Applicant, which is ultimately successful in the matter, also did not conduct itself fittingly in proceeding with the present matter in that they failed to comply with the order of this court per Le Grange J. The non-compliance was however not unreasonable in light of the conflicting judgments regarding the status of the order dismissing as opposed to striking off the matter. It would be wholly unfair that the Applicant be mulcted with the costs of this matter. Similarly, it will be unfair for the Respondents to be saddled with a cost order in circumstances where they are unable to benefit from the Resolution like other from other employees who are covered by the Resolution.

- [67] Accordingly, the following is ordered –

Order

1. The late filing of the rescission application is condoned;

2. The rescission application is granted and the order of Van Niekerk J is rescinded;
3. The application to review and set aside the award made by the twelfth respondent acting under the auspices of the thirteenth respondent is granted;
4. There is no order as to cost.

B Sono
Acting Judge of the Labour Court South Africa

Appearances:

For the Applicant: Adv DT Skosana SC with Adv M Kgatla

Instructed by: State Attorney

For the Respondent: D S Mpanza