



REPUBLIC OF SOUTH AFRICA

Of Interest to other Judges

**THE LABOUR COURT OF SOUTH AFRICA,
IN JOHANNESBURG
JUDGMENT**

Case no: JR 2882/11

In the matter between:

**MINISTER OF CORRECTIONAL
SERVICES**

Applicant

and

**GENERAL PUBLIC SERVICE SECTORAL
BARGAINING COUNCIL**

First Respondent

M MPHAPHULI (N.O.)

Second Respondent

POPCRU obo MEMBERS

Third Respondent

Heard: 23 May 2013

Delivered: 27 May 2013

Summary: (Review – interpretation of collective agreement – determination of correct entry level salary for ‘ring-fenced’ group of learners – misdirection by arbitrator – failure to interpret the actual wording of the relevant provisions in context as starting point)

REASONS FOR JUDGMENT

LAGRANGE, J

The order

- [1] My reasons for the following order handed down on 27 May 2013 are set out below.

“Order

The arbitration award handed down by the third respondent on 25 June 2011 under case number GPBC 663/2010 is reviewed and set aside.

The third respondent's award that ring-fenced students as contemplated by clause 12.2 of resolution 2/2009 were to be translated to R 91,899 per annum from the date on which they completed their training program is substituted with an award that ring-fenced student correctional officials as contemplated by clause 12.2 of resolution 2/2009 were to be translated to R72,543 per annum, being the first notch of grade CB1-1 of the Occupational Service Dispensation for Centre-Based Correctional officials.

No order is made as to costs.”

The review application

- [2] The issue in dispute which was decided in arbitration proceedings concerns the remuneration due to a certain category of students on completion of their training. The employer, the Department of Correctional Services, had argued that their correct salary level would be R 72,543 per annum, whereas the union, The Public Servants Association ('the PSA') contended that the correct salary level was R 91,899 per annum. The arbitrator effectively ruled in favour of the employees by finding that the students in question should have their salaries "translated" to the higher level on completion of their training program.

- [3] The group of learners in question was identified in clause 12.2 of resolution 2/2009 of the General Public Service Sectoral Bargaining Council, which states:

"Current ring fenced Student Correctional Officials shall retain their current conditions of employment and upon completion of the training program, shall translate to the first notch of the OSD for full-time employment. No recognition of experience shall apply to these employees."

- [4] The object of resolution 2/2009, which came into effect on 1 July 2009, was to implement an Occupation Specific Dispensation ('OSD') for Correctional Service officials. The resolution distinguished two general classes of Officials namely, centre-based officials and non-centre-based officials. It further distinguished two learner sub-categories of centre-based recruits namely, learners at entry-level in production who are required to undergo basic training and "Current Ring Fenced Student Correctional Officials" as described in clause 12.2 above.

The arbitrator's reasoning

- [5] In his award the arbitrator distinguished three distinct groups of learners, which was a classification that the parties had apparently agreed upon in the arbitration. The first group were those who commenced and completed basic training before 1 July 2009 before the implementation of the OSD. The second group commenced training before 1 July but only completed their training afterwards. In the case of both these groups they were appointed on probation for a period of 12 months and remunerated on salary level 3. The third group started and completed their training after 1 July 2009 and were dealt with in terms of clause 12.1 of the OSD agreement.
- [6] The arbitrator accepted that the position of students in the first group and the third group was clear, and it was only the treatment of the intermediate category of learners who were still in training on 1 July 2009 that presented a problem. The arbitrator identified the issue as being a question of whether the second group of students should be benchmarked

against the first or the third group. The arbitrator concluded that the solution was to be found in the resolution, the annexes thereto and the Implementation Determination of the Minister for Public Service and Administration. The arbitrator reasoned:

"The resolution made peculiar provision in terms of its Clause 12.2 where reference was made to ring fencing. The ordinarily everyday and grammatical meaning of ring fence can only be to protect, make safe or preserve.

The protection was in the interest of the affected students. Interest has to be there for an advantage of having been in the service of the respondent at OSD implementation date, continued remuneration, no requirement to apply for full-time employment on completion of training and recognition of the fact that their training was in progress or underway when the OSD came into play.

...

It was common cause that the previous student intakes and remunerated at level 5 prior to 01 July 2009. This was converted to a salary rate of R 91,899 effective 01 July 2009.

Like for like ring fenced students should as a matter of fact translate to R 91,899 on completion of training as was the case with their peers.

The affected students will be in a less favourable position as compared to new recruits and ring fencing would not serve any purpose if it did not afford them an advantage.

The affected students tend to be far worse off measured against the new recruits and were better measured against previous student intakes.

Ring fence would lose its meaning if not understood in a manner that would promote the interests of those protected.

All factors considered is my conclusion that there is more merit in the submissions for the interpretation of the resolution as argued by the applicant party, namely that: the ring fenced students

should upon completion of their training be remunerated on salary level 5 as substituted by the translation annual salary rates of R 91,899.”

- [7] At this juncture it must be mentioned that it is immediately apparent that the arbitrator appears to have arrived at his finding not based on an analysis of the documents which he identified as containing the solution, but primarily on his interpretation of the term ‘ring fenced’.

Grounds of review and evaluation

- [8] The applicant's first ground of review is that the arbitrator embarked on an enquiry into the fairness of paying the second group of students and entry-level salary of R 72, 543 when they completed their qualifications, instead of determining what it should be on a proper interpretation of the resolution. Secondly, the applicant's other principal ground of review is that in consequence of his misdirected enquiry the arbitrator neglected to interpret the phrase “shall translate to the first notch of the OSD for full-time employment” in clause 12.2. The applicant argues that if the arbitrator had simply started his enquiry with an analysis of the text of the clause and referred to the annex "A1" attached to the resolution as well as the implementation determination, he would have realised that the first OSD notch for full-time employment could only have referred to the first OSD notch of CB1-1 of a Security Officer which was R 72,543-00. Most of the other grounds of review relate to material issues the arbitrator neglected to deal with because of his misdirection.
- [9] Indeed, Annexure “A1” to the resolution which set out the new salary structure introduced by the OSD clearly shows that a Security Officer at entry-level production would be placed in OSD band CB1-1 with a starting notch of R 72,543-00. Annexure "B1" which set out the salary scales which existing Centre Based officials would translate to, shows that a correctional officer on salary level 5 would be translated either to OSD grade CB1-1, CB1-2 or CB1-3.
- [10] Clause 12.2 of the resolution has already been cited above. Clause 13.5 of the implementation determination of the Minister reads:

"Current ring-fenced Student Correctional Officials shall retain their current conditions of employment and shall translate to the Auxiliary Support post as at 1 July 2009. Upon successful completion of the training program is officials shall translate to the first notch of the entry-level production post attached to the Centre Based dispensation, for full-time employment. No recognition of experience shall apply to these officials.

The only difference between the two clauses is the reference to the translation of the students to the Auxiliary Support post with effect from 1 July 2009. Two of the so-called 'indicators' for such a post, which are set out in Annexure "A1" to the ministerial determination, state:

- *This Post constitutes a post to provide for Centre-based Correctional Officials who have not completed the required training program and not currently undergoing training.*
- *Centre-based Auxiliary Officials to apply for vacant, permanent post of Security Officer, Case Officer or Social Reintegration Officer grade III, upon successful completion of training.*

(Emphasis added)

[11] The only place where the salary of R 91,899 appears as the first notch is in the translation key for Centre based officials appearing in Annexure B1 to the resolution. That notch is only applied to a "Case Officer/Reintegration/Security Officer" at OSD salary level CBI-2. In Annexure C1 to the ministerial determination, which is titled "appointment requirements, career path and post grade progression opportunities for correctional occupations classified in the Centre based dispensation", the job title of a Security Officer, Grade II (CB 1-2) sets out the following appointment requirements:

11.1 Qualification

11.1.1 grade 12, and

11.1.2 Successful completion of the corrections science learnership;

11.2 Experience:

11.2.1 8 years relevant experience for an official performing consistently above average on CB 1-1; or

11.2.2 10 years relevant average for an average performing official on CB 1-1.

- [12] Further, Annexure "D1" to the Ministerial Determination which describes the recognition basis for Centre Based entry level production posts also stipulates at least 10 years of appropriate or recognisable experience after competing grade 12 simply in order to be placed on the minimum notch for the grade.
- [13] Somewhat clumsily, Annexure "A1" to the resolution describes the post of Centre-based Auxiliary (CBA) as "Production Still to Meet Appointment Criteria" and in a note pertaining to this category states: "Post CBA is created for **once off translation** of those employees who do not meet the appointment criteria to post CB1" (emphasis added). It appears to be common cause on the papers that the students in the second category would have been translated to the CBA post and corresponding salary scale.
- [14] The essence of the respondent's contentions in reply is that the arbitrator did in fact determine what the first notch for full-time employment was. In effect, he correctly found that the second group of trainees simply had to be translated to the new salary scale applicable to the first group of trainees who were remunerated previously on salary level 5 and then were translated to salary scale R 91,899 on 1 July 2009. The respondents argued that the object of the ring fencing was clearly to place the ring fenced group in the same position as those who had completed their training before the implementation of the OSD.
- [15] In the applicant's written submissions before the arbitrator, the applicant said that the implication of this is that even though the second group of students were not on salary level 5 on 1 July 2009, the effect of interpreting the resolution in the way POPCRU contended would be to treat them as if they had been on salary level 5 and accordingly, on completing their learnerships would be translated to a salary level of R

91,899 as if they had qualified before 1 July 2009 and were entitled to benefit from the once off translation which applied to permanent employees on the old (pre-July 2009) salary level 5. It would also mean that the second group of students would receive this second translation having already received a translation when they were placed in the posts of Centre-based Auxiliaries.

- [16] What is apparent from the brief exposition above, is that the arbitrator's analysis and reasoning showed scant regard for the intricate construction of the OSD dispensation and the specific provisions dealing with employees who have not completed training and the ramifications of clauses 12.2 and 13.5 in the resolution and ministerial determination respectively. I agree with the applicant that the arbitrator's starting point was simply to try and identify the object of ring-fencing a category of learners instead of trying to interpret the meaning of the clauses mentioned in order to properly interpret them. In this regard, one may ask, could the arbitrator even have considered why the group was referred to as 'currently' ring fenced officials? Had he done so would it not immediately have raised a question in his mind whether the ring fencing might have come about for reasons not specifically related to the implementation of the OSD dispensation?
- [17] In any event, he makes no attempt in his analysis to explain why this particular group of qualified learners would automatically fall to be categorised under OSD salary scale CB1-2, which is a necessary result of his award. The only way in which any person could reasonably conclude that an employee fell within this salary scale would be after considering the pre-requisites which would entitle the employee to that level of remuneration.
- [18] None of the requirements pertaining to OSD salary scale CB1-2 set out above, read also with the classification of employees falling within the category of Centre-based Auxiliaries can be reconciled with the placement of the second group of learners on the entry-level notch of CB 1-2. Yet this is what the arbitrator managed to do and as a result his conclusion must be regarded as one that no reasonable arbitrator would have reached.

- [19] In the circumstances, I am satisfied that the arbitrator's award was unreasonable and the result of a serious misdirection as to the nature of the enquiry. Consequently, it stands to be set aside.

Re-evaluation

- [20] On a reconsideration of the evidence, in my view a proper interpretation of clause 12.2 and clause 13.5 of the resolution and the ministerial determination respectively would lead to the conclusion that the "first notch of the entry-level production post attached to the Centre Based dispensation, for full-time employment" is a reference to the entry-level notch for OSD salary scale CB1-1, which at the relevant time of the dispute was R 72,543. This is because here is simply no plausible basis for identifying the first notch of OSD salary grade CB1-2 as the appropriate starting point with effect from the commencement of their full-time employment rather than the first notch of OSD salary grade CB1-1.
- [21] The route by which the respondents seek to rationalise the arbitrator's finding to that effect by means of translating them from a putative pre-July 2009 salary level 5 to the OSD salary level CB 1-2, appears to be an unduly convoluted one. I am not persuaded that it can provide a plausible explanation for the arbitrator's conclusion. It also seems anomalous that such a group would be placed on a scale for which considerably more experience is stipulated as a requirement. Further, this reasoning also would also seem to entail that the second group benefited twice from what was supposed to be a once-off translation process,
- [22] Moreover, in my view there is also no reason to assume that the ring-fencing of the group in question was intended to ensure that at the end of their training they would be in the same position as their predecessors who were in permanent employment before 1 July 2009, rather than their successors who started and completed their training after that date. Ring-fencing can simply mean that a group or entity is separated and treated distinctly from other groups or entities: it does not automatically have a protective connotation in my view. In addition, the considerations which informed the classification of the second-group as ring-fenced seem to have pre-dated the introduction of the OSD, and it would be wrong in my

view to infer that the term was introduced to indicate some kind of protected status which members of that group would enjoy *vis-a-vis* those learners who only started and were permanently employed after 1 July 2009.

R LAGRANGE, J

Judge of the Labour Court of South Africa

LABOUR COURT