



THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Reportable
Case No: D2110/18

In the matter between:

MEC FOR HEALTH, KWAZULU-NATAL

Applicant

and

LYNETTE KING

First Respondent

MOODLEY, KM N.O.

Second Respondent

**PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL**

Third Respondent

Case No. D67/21

DEPARTMENT OF CORRECTIONAL SERVICES

Applicant

and

SANJAY BALKARAN N.O.

First Respondent

PSA o.b.o. TREVOR MOORE

Second Respondent

**GENERAL PUBLIC SERVICE SECTORAL
BARGAINING COUNCIL (GPSSBC)**

Third Respondent

Heard: 5 March 2025

Delivered: 31 March 2025

JUDGMENT

MAKHURA, J

Introduction

[1] There are two applications before this Court. These applications were brought in terms of section 145 of the Labour Relations Act (LRA) to review and set aside the arbitration awards.¹ On the day of the hearing on 5 March 2025, this Court *mero motu* raised concerns with the commissioners' failure to determine whether they had the jurisdiction to arbitrate the disputes. The concerns stemmed from the characterisation of the disputes as interpretation and/or application disputes, the nature of relief sought by both employees which dated back to October and November 2011, the fact that the disputes were referred in April 2018 and July 2019 respectively and after consideration of the Labour Appeal Court (LAC) judgment in *Health & Other Services Personnel Trade Union of SA on behalf of Tshambi v Department of Health, Kwazulu-Natal*² (Tshambi).

[2] The Court proceeded to issue an order in the following terms:

¹ Act 66 of 1995, as amended.

² (2016) 37 ILJ 1839 (LAC); [2016] 7 BLLR 649 (LAC).

'1. The parties are directed to file supplementary heads of argument on or before 14h00 on 14 March 2025 to address the following issues:

1.1. The true nature of the dispute, whether it is one of interpretation and/or application of a collective agreement as characterised or not.

1.2. The jurisdiction of the bargaining council insofar as it relates to the date when the dispute arose and the date of referral of the dispute, and whether the dispute was referred within the prescribed period (if any) or within a reasonable period.

1.3. The appropriate relief in the event it is found that the dispute was referred outside the prescribed or reasonable period.'

[3] The parties have now complied with the above order and filed their respective supplementary heads of argument. The employee in D2110/18 is Lynette King, referred to in this judgment as King or employee. In D67/21, the employee is Trevor Moore, referred to in this judgment as Moore or employee.

[4] I deal first with the two interlocutory applications under matter number D67/21 – the reinstatement of the review application and/or retrieval application of the file from the archives and the application to condone the late delivery of the review application.

Reinstatement and/or retrieval application

- [5] The bargaining council served two notices in terms of Rule 7A(5) of the Labour Court Rules³ on 15 April and 14 June 2021, respectively. The record was uplifted on 29 June 2021, and a quote to transcribe the record from the transcription service provider was accepted on 26 July 2021.
- [6] On 3 August 2021, the State Attorney requested an extension to file the record and stated in the email to Moore that should he not respond to the request, they would accept the non-response as an extension. There was no response to the email.
- [7] The record was filed on 22 October 2021. The 60-day period from 15 April 2021 expired on 5 July 2021, and therefore, the record would have been filed three and a half months late. If the 60-day period is calculated from 14 June 2021, when the full record was filed by the bargaining council, 1 September 2021 would be the last day of filing the record, and the delay would be seven weeks. In my view, the 60-day period should be calculated from 14 June 2021, and therefore, the record was filed seven weeks outside the 60-day period.
- [8] The Court does not accept that the consent was given by virtue of an email dated 3 August 2021. The State Attorney does not believe that Moore granted consent, otherwise this application for reinstatement would not have been necessary.
- [9] The Department of Correctional Services (DCS) also seeks to retrieve the file from the archives. The notice in terms of Rule 7A(8) of the Labour Court Rules was filed on 4 March 2022, which was within the 12-month period from the date when the review application was properly delivered, which is 15 April 2021. It is, however, common cause that the Registrar was not notified within the 12-month period that the matter was ready to be allocated a date. In the exercise of my

³ GN 1665 of 1996: Rules for the Conduct of Proceedings in the Labour Court, repealed with effect from July 2024.

discretion, and considering the absence of any pleaded prejudice on the part of Moore, this non-compliance should be condoned.

- [10] Having considered the explanation proffered by the DCS in filing the record outside the prescribed period, the length of the delay which is not excessive and the prospects of success which shall be addressed later in this judgment, I am of the view that it is in the interest of justice to reinstate the review application and/or to retrieve the file from the archives.

Condonation application

- [11] The award was sent to the parties by email on 11 November 2020. The DCS issued an instruction to challenge the award on 11 December 2020. The State Attorney's office was instructed on 17 December 2020 in terms of a letter dated 14 December 2020.
- [12] The State Attorney's official responsible for the matter was on leave and only returned to the office on 18 January 2021. The process to appoint counsel was concluded on 21 January 2021. Counsel consulted with the client on 3 February 2021. Although the founding affidavit was signed on 5 February 2021, the notice of motion was signed on 19 February 2021, and the application was served on 19 February 2021 and filed on 26 February 2021.
- [13] Moore, in his opposing affidavit signed on 16 February 2024 and filed on 20 February 2024, contends that the application was filed on 9 April 2021 without service on him or his trade union. He contends further that the review application was filed 14 weeks outside the prescribed six-week period
- [14] The six-week period from 11 November 2020 expired on 23 December 2020. The affidavit of service shows that the review application was served on 19 February 2021 to the bargaining council and trevor.moor@dc.gov.za. This latter

email address, which purports to be that of Moore, is incorrect. On 9 April 2021, the State Attorney also served the application, *albeit* referred to as a “*notice of motion – stay*” on Moore’s correct email address at trevor.moore@dcs.gov.za.

[15] Therefore, it is obvious that the review application was served using an incorrect email address on 19 February 2021 and was later served on 9 April 2021. The date of service is therefore 9 April 2021 and the review application was therefore served 15 weeks outside the prescribed period.

[16] The delay has in my view, been adequately explained. The DCS has reasonable prospects of success as it shall appear later in the judgment. There is in my view no prejudice that Moore would suffer if the late delivery of the review application is condoned. Any prejudice Moore might suffer would be addressed by an award of backpay at the bargaining council should he succeed in his claim. Accordingly, the interest of justice dictates that the application for condonation be granted.

Material facts

D2110/18

[17] In this application, the applicant is the Member of Executive for the Department of Health, Kwa-Zulu Natal (Health Department). The application was brought to review and set aside the award dated 20 September 2018 issued under case number PSHS57-18/19. Here, the employee, represented by her trade union, the Democratic Nursing Organisation of South Africa (DENOSA), referred an interpretation and/or application dispute to the bargaining council claiming that she was appointed on an incorrect salary notch in terms of the Public Health and Social Development Sectoral Bargaining Council (PHSDSBC) Resolution 3 of 2007. This resolution came into effect on 1 July 2007. The date of her appointment is 1 October 2011.

[18] The dispute was referred on or about 13 April 2018, and the employee indicated that the dispute arose on 15 March 2018. In her referral form, the employee summarised the facts of the matter as follows:

‘The employer is disputing that my notch was calculated accordingly. The employer maintained that they appointed our members in the correct salary level. Our view is that the employer did not calculate the years of experience as stated in the Resolution page 4.’

[19] The relief sought by King was to be placed “*on the correct salary level retrospectively*”. The correct salary level referred to is notch 3.

[20] She claimed that she should have been appointed on notch 3 and relied exclusively on paragraph 2.1 of Annexure A to Resolution 3 of 2007, which deals with “*career streams, appointment requirements, recognition of experience on appointment and grade progression/promotion requirements*”. Clause 2.1 deals with the job title, Professional Nurse Grade 1 (Speciality Nurse). The qualifications required for appointment are:

‘Basic qualification accredited with the SANC in terms of Government Notice 425 (i.e. diploma/degree in nursing) or equivalent qualification that allows registration with the SANC as a Professional Nurse plus a post-basic nursing qualification, with duration of at least 1 year, accredited with the SANC in terms of Government Notice No R 212 in the relevant speciality.’

[21] For experience, the requirement is a minimum of four years “*appropriate/recognisable experience in nursing after registration as Professional Nurse with the SANC in General Nursing*”.

[22] At the commencement of the proceedings, the commissioner introduced the matter and allowed the respective representatives to introduce themselves. He then confirmed that the parties have been correctly cited and that he was:

'satisfied that the bargaining [council] had jurisdiction to hear this dispute. The dispute on hand is about whether or not the applicant qualifies for appointment to the post of professional nurse speciality or not... The remedy being sought is that of payment of three notches to the applicant with effect from 1st of October 2011... The only issue in dispute is whether or not the applicant qualifies for appointment to notch three... R170 244.00.' [Emphasis added]

[23] It is common cause that the employee was appointed as a nurse with effect from 1 October 2011, on salary notch 1. She testified as follows about when she became aggrieved:

'L KING: Like I said, when, on appointment, I was under the impression that everything was as they agreed, as they had said to us that they take the experience into consideration. It was only at, when we got our new increases in 2012 and they gave us a copy of the salary scale that I realised I was on the same notch as people that had started, that had just qualified in nursing, people that had just finished four years now and because they had speciality they started on the same level as me. So I went and I enquired about it.

DK MSOMI: You started enquiring in 2012?

L KING: Yes.'

[24] As is apparent, the employee became aware of the alleged incorrect salary level in 2012. She, however, referred the dispute in April 2018, claiming that the

dispute arose in March 2018. In its closing argument before the commissioner, the Health Department submitted that:

‘considering the years involved in the matter it [the dispute] should not have been considered for the sitting as it happened about 8 (eight) years ago which leads to the question of whether the Commissioner has the jurisdiction to arbitrate the matter.’

[25] The commissioner did not deal with the above point. The commissioner determined the issue before him to be whether the employee was correctly appointed on level 3, notch 1 or whether she qualified to be appointed on notch 3 of level 3. He concluded that the Health Department interpreted the resolution incorrectly and that the employee should have been appointed on salary notch 3 of post level 3. The commissioner concluded:

‘The Respondent, Department of Health – KwaZulu Natal, is hereby directed to appoint the [employee], King L to the post of Professional Nurse Grade 1 (Speciality Nursing), on notch 3 of post level 3, with effect from 1 October 2011.’

D67/21

[26] In this application, the employee, represented by the Public Servants Association (PSA), referred an interpretation and/or application dispute on or about 26 July 2019. It was alleged that the dispute was about the interpretation and/or application of paragraph 11 of the GPSSBC Resolution 2 of 2009 read with Departmental Bargaining Chamber (DBC) Settlement Agreement 1 of 2016. Clause 11 of Resolution 2 of 2009 provides that:

‘11.1 With effect from 1 April 2010, the recalculation of salary notch position shall be based on DCS experience as at 30 June 2009

based on years of experience obtained in addition to the experience required for appointment on that level. The recalculation of salary notch will be limited to officials in the production levels (current salary levels 3-8).

11.2 Translation of experience shall be recognized as 1 notch for every 5 years worked, calculated from the date of employment in DCS based on the new notch of the OSD.

11.3 The employer shall introduce a basis for salary recognition for relevant experience on appointment for employees who are appointed from outside the public service in production posts.'

[27] On 21 November 2016, the DCS and trade unions reached an agreement, recorded as *"Agreement on the implementation of clause 11 of General Public Service Sector Bargaining Council (GPSSBC) Resolution 2 of 2008: Recognition of Experience (Phase 2) of the Occupation Specific Dispensation (OSD) for Correctional Services Officials"* (settlement agreement).

[28] The settlement agreement makes it clear that it was concluded after the different interpretations on the wording of clause 11.1 of Resolution 2 of 2008, which deals with the recognition of experience in addition to the experience required for appointment. The parties agreed that the experience required for appointment on the various pre-OSD salary levels would be as follows:

28.1 Salary levels 3 – 5: zero years;

28.2 Salary level 6: three years;

28.3 Salary level 7: five years; and

28.4 Salary level 8: seven years.

[29] Clause 3.2 of the settlement agreement provides that the above years of experience should be deducted from the qualifying employees' total years of experience and the remaining years would then be used for the purpose of calculation of the employees' correct notch calculated from the new notch of the OSD that the employee was translated to during the implementation of the first phase. Clause 3.4 provides that:

'Qualifying correctional officials who were promoted or changed occupations or moved to another salary dispensation during the period 1 April 2010 to 31 October 2016 shall be paid a pro-rated amount for the period that they qualified for the OSD Second Phase translation, depending on their date of promotion or charge of occupation or move to another salary dispensation.'

[30] Clause 4 of the settlement agreement deals with the payment of qualifying employees. Clause 4.1 provides that all qualifying employees who were on salary levels 3 to 8 as at 30 June 2009 should be placed on the:

'correct notches they would have been on as at 1 October 2016, had they been translated to their correct Second Phase OSD notches on 1 April 2010.'

[31] Clause 5 deals with the implementation of the settlement agreement, which the parties agreed could be made an arbitration award. It provides that the targeted date for the placing of all qualifying employees *"on the notches they would have been on as at 1 October 2016 had they been translated to their correct Second Phase OSD notches on 1 April 2010"* is 15 February 2017.

[32] The employee is an Assistant Director: Employee Relations. On 3 June 2018, he lodged a grievance seeking rectification of his salary and backpay. The nature of the dispute was formulated as follows:

'Prior to my promotion on 1st November 2011 to Senior Administrative Officer I was a CB 1-3 with OSD my yearly salary notch was R205 374 but was supposed to have been R223 401.00 after rectification of the OSD resolution 2 of 2009, this salary notch was only rectified in 2018 and if it was rectified as per the resolution in 2010 I would [have] received the correct salary scale as per my promotion which stated that I had to receive one notch above the notch I was on, this being R224 370.00, which means that my notch with salary increases would have been R361 623.00 in 2018 and that my starting notch with my promotion in 2018 would have been R361 623.00 and not R356 289.00.' [Emphasis added]

[33] The dispute allegedly arose on 22 July 2019. The employee stated that he lodged a grievance on 3 June 2019 and was informed on 26 June 2019 that his salary would be rectified. He was subsequently requested to submit a written report, which he did. The DCS declined his request or dismissed his grievance.

[34] The employee sought the following relief or outcome:

'That the Department [of] Correctional Services adhere to their own Policies as well as Resolution 2 of 2009 and rectify my salary accordingly with effect 1 November 2011 and that I receive back [pay of] the amount under paid to me from 1 November 2011 with interest.' [Emphasis added]

[35] The DCS raised two jurisdictional points at the bargaining council, which were dismissed by the commissioner. The jurisdictional points had nothing to do with the delay and/or the true nature of the dispute or the issues raised by this Court. The DCS did not seek to review these rulings.

[36] On 11 November 2020, the commissioner issued an award in favour of the employee. He ruled that:

- '31. The Respondent had interpreted clause 3.4 and paid Moore the pro-rated amount that he qualified for the period for the OSD Second Phase translation. However, there is no merit in the Respondent's contention that the Applicant did not qualify when interpreting and applying the law or the provisions of the Agreement and I fail to appreciate what was expected of the Commissioner when the provisions of clause 4.1 (Payment) were clear and unambiguous as the Respondent had calculated the full Backdated Salary (A162) and had approved and signed off. The Respondent had failed to consider Moore as per clause 4.1, notwithstanding he met all the requirements of DBC Settlement Agreement (1 of 2016).
32. It is therefore ordered that the Department of Correctional Services (Respondent) implement the following within 30 days from receipt of this award:
- 32.1 Moore's salary notch on PERSAL, when promoted to SAO, be rectified with effect [from] 1 November 2011 which should have been R223 401.00 plus one notch to reflect R224 370.00 and the rectifications with increased for every subsequent year also reflect on PERSAL.
- 32.2 Moore receive back pay for the period 1 November 2011 to 31 May 2018 amounting to R63 830.75 with interest...' [Emphasis added]

Analysis

Legal principles

[37] In D2110/18, the employee, King, was appointed with effect from 1 October 2011 and sought backpay from that date. King's dispute was referred to the bargaining council on 13 April 2018, claiming that the dispute arose on 15 March 2018.

[38] In D67/20, the employee, Moore, seeks backpay from November 2011. Moore referred his dispute to the bargaining council on 26 July 2019, claiming that the dispute arose on 22 July 2019.

[39] The employees' respective disputes are characterised as interpretation and/or application disputes in terms of section 24 of the LRA. This section provides that:

'Disputes about collective agreements

'(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*.’

[40] In both matters, the collective agreements or resolutions made provision that the interpretation and/or application of the agreements should be dealt with in terms of the dispute resolution procedure of the bargaining council. Section 24 does not prescribe the time period when a dispute should be referred to the bargaining council. The respective resolutions do not set out the time period for the referral of disputes arising out of the implementation thereof.

[41] In *Tshambi*, the LAC was confronted with a matter which dealt with a dispute that was referred to the bargaining council as one of interpretation and/or application of a collective agreement. The LAC made two fundamental findings – first, it reiterated the duties of the commissioner insofar as the nature of the dispute is concerned, and second, it decided on the issue of delay in referring interpretation and application disputes.

[42] On the duties of the commissioner, the LAC held that:

‘An arbitrator is required to determine the true dispute between the parties. To that end, it is necessary to establish the relevant facts and construe the category of dispute correctly. An arbitrator must make an objective finding about what is the dispute to be determined. This court in *Wardlaw v Supreme Mouldings (Pty) Ltd (Wardlaw)*, addressed directly the question of whether the employee's characterisation of a dispute should enjoy deference and rejected that approach. Distinguishing the formalistic school of thought from the substantive school of thought, this court held that the latter should prevail. As a result, in *Wardlaw*, an arbitrator was held to have incorrectly assumed jurisdiction over a dispute that was about an automatically unfair dismissal, a category of dispute reserved for

adjudication by the Labour Court. The Constitutional Court disposed of this issue in *Commercial Workers Union of SA v Tao Ying Industries & others*:

‘A commissioner must, as the LRA requires, “deal with the substantial merits of the dispute”. This can only be done by ascertaining the real dispute between the parties. In deciding what the real dispute between the parties is, a commissioner is not necessarily bound by what the legal representatives say the dispute is. The labels that parties attach to a dispute cannot change its underlying nature. A commissioner is required to take all the facts into consideration including the description of the nature of the dispute, the outcome requested by the union and the evidence presented during the arbitration. What must be borne in mind is that there is no provision for pleadings in the arbitration process which helps to define disputes in civil litigation. Indeed, the material that a commissioner will have prior to a hearing will consist of standard forms which record the nature of the dispute and the desired outcome. The informal nature of the arbitration process permits a commissioner to determine what the real dispute between the parties is on a consideration of all the facts. The dispute between the parties may only emerge once all the evidence is in.’

That approach has been reaffirmed by this court in *National Union of Metalworkers of SA on behalf of Sinuko v Powertech Transformers (DPM) & others* (2014) 35 ILJ 954 (LAC) at paras 16-21 per Cripps JA.

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

The idea that the breach of a right that derives from a collective agreement is automatically a dispute contemplated by s 24 is wrong. Section 23, which provides for the enforceability of collective agreements, and s 24 need to be read together. Together they create the legal edifice for the legal effect of collective agreements and certain disputes which take place about them. Sections 23 and 24 are located in chapter III of the LRA. That chapter deals with collective bargaining. Part A of chapter III addresses organisational rights, and part B addresses collective agreements. Sections 23 and 24 are in part B. Parts C and D address bargaining councils. It is plain that s 24 is a procedure to oil the wheels of the collective bargaining process and an efficient resolution of disputes about collective agreements.⁴

[43] Referring to the phrase “*interpretation or application*”, the LAC said that these two terms are not disjunctive, but must be read as being related, which refer to disputes about what the agreement means and what it is applicable to.⁵

[44] The LAC then dealt with the issue of delay. During arbitration proceedings in *Tshambi*, the employer argued that the union and its member referred the dispute inordinately late without condonation application. Further, that the referral ought to have been made within 90 days, as prescribed by section 191(1)(b)(ii) of the LRA which regulates the time periods for the referral of disputes about unfair dismissals and unfair labour practices. Therefore, so the employer argued, the referral was made outside the period without a condonation application. The union and the employee, in response, argued that there is no time period to refer interpretation and application disputes to the bargaining council and that the referral was made within a reasonable time. The reasonable time referred to by the union and employee was 692 days. The LAC held:

⁴ Ibid at paras 16 – 19; see also *Public Servants Association on behalf of Strauss & others v Minister of Public Works NO & others* (2013) 34 ILJ 2929 (LC); [2013] 7 BLLR 710 (LC) (*Strauss*), where this Court held at para 17 that “[e]ven where a party had referred an interpretation and application dispute to a bargaining council, it was incumbent on the arbitrator to decide what the real dispute was”.

⁵ Ibid at para 25.

'A reading of the ruling evidences that the arbitrator did not interrogate whether the appellant's characterisation of his dispute was, objectively, correct. Rather, after correctly disposing of the distracting irrelevancies advanced by the respondent, the arbitrator took the appellant's characterisation at face value.

Upon the uninvestigated premise that the dispute that had been referred to him was indeed one contemplated by s 24, the arbitrator gave a ruling about the question of the alleged delay. His rationale is stated in paras 7-8 of the ruling:

'The claim having its foundation in the agreement has therefore been characterised as an "interpretation/application" dispute. That being said, applicant's claim is, nevertheless, essentially a claim of a debt. As such applicant's claim is subject to the provisions of the Prescription Act 68 of 1969. The provisions of that Act stipulate that a debt is prescribed by prescription three years after same becomes due. ... This dispute (ie a claim for a debt arising from the agreement) was referred to this council well within the three-year period as stipulated in the [Act] and has therefore not prescribed. When a period is prescribed for the referral of a dispute, as is the case in this dispute, the unreasonable delay rule does not apply.'

It is plain that the arbitrator was muddled. He did not make a decision whether the dispute had been referred within a reasonable time; rather he concluded that a period had been prescribed by the Prescription Act for this particular dispute and that the period had not yet elapsed.⁶

[45] The LAC concluded:

'It is not strictly necessary to address the arbitrator's flawed rationale that because a dispute, purportedly contemplated by s 24, resembles a money

⁶ Ibid at paras 11 - 13.

claim, and because s 24 does not prescribe a time period for referral, therefore that dispute is subject to a prescribed period for referral as determined by the Prescription Act. Nevertheless, it is appropriate to deal with such flawed thinking in order to inhibit any repetition. Axiomatically, the arbitrator missed the point about determining a reasonable period by thinking the Prescription Act prescribed a period. Perhaps a generous reading of his ruling could be that, by analogy, inspiration could be derived from the laws about prescription of money claims to assess reasonableness. However, what constitutes a reasonable time within which to refer a true labour dispute is dictated by the expectations to be derived from the LRA not from civil litigation. A true money claim belongs to civil litigation and insofar as such a claim is covered by s 77 of the Basic Conditions of Employment Act 75 of 1997, which confers concurrent jurisdiction on the Labour Court to hear certain civil claims, the Labour Court could hear the case and the Prescription Act would prevail in such a context. The use of analogy must be tempered by an appreciation of the context and functionality of the procedures and remedies provided in the LRA. In true labour disputes, the provisions of s 191(1) of the LRA are a more obvious general yardstick to test what is a reasonable time for a referral. The absence of a prescribed period does not automatically license a longer period than is the norm for other labour disputes to be referred. In labour disputes, expedition is the watchword, not because that is simply a good idea, but because the prejudice of delay in matters concerning employment often is not capable of remedial action. This applies to both employees and employers. The appropriate enquiry is into the history of the engagement between the parties about the controversy, and the elapse of time since engagement to resolve the controversy ceased. Self-evidently, the ultimate decision on reasonableness has to be fact-specific. A lapse of 692 days in respect of a failure to pay a salary is a

remarkably long time. On this record, nothing said provides a convincing rationale why the delay was unavoidable.⁷ [Emphasis added]

The delay & jurisdiction

[46] Regardless of the true nature of the dispute, the employees were, in my view, required to apply for indulgence. It follows from the LAC decision in *Tshambi* that despite section 24 not prescribing the period within which an interpretation or application dispute may be referred, such a dispute must be referred within a reasonable time and that section 191(1) of the LRA provides a yardstick to test what is a reasonable time for a referral. Section 191(1) prescribes a maximum period of 90 days to refer a dispute relating to an unfair conduct on the part of the employer.

[47] An enquiry into whether an interpretation or application dispute was referred within a reasonable time would consider the nature of the claim or dispute referred by the employee, the history of the engagement between the parties on the subject matter, the time elapsed to attempt to resolve the matter and the time it took the employee to refer the dispute to the bargaining council after the parties ceased to engage. The whole period must, in my view be adequately explained and accounted for.

[48] In both applications, the commissioners failed to enquire whether they had the jurisdiction to arbitrate the disputes. In D2110/18, the commissioner did not deal with the issue despite it being raised, *albeit* belatedly, in the Health Department's closing arguments. Regardless, the commissioner should have been alert to this issue if he properly construed the referral form and King's evidence that she had known of the issue since 2012.

⁷ Ibid at para 32.

[49] In D67/21, Moore's complaint appears to have been brought about by the promotion. On the face of his referral, Moore's complaint, properly construed, is that when he was promoted on 1 November 2011, he was not remunerated in terms of the correct level or notch. He acknowledges that the DCS made the necessary adjudgment on his salary in accordance with the settlement agreement concluded in November 2016. Therefore, on the face of the documents and his evidence, the cause of action for his claim arose in November 2011. The commissioner had awarded relief with retrospective effect from 1 November 2011.

[50] Had the commissioners in both matters properly construed the issues before them with reference to the referral, the documentary and oral evidence and the seven or eight years retrospective relief sought and awarded, they would have enquired whether they were indeed clothed with the necessary jurisdiction to arbitrate the disputes and the power to grant the relief sought. Consequently, they would have required the parties to address them on bargaining council's jurisdiction to arbitrate the disputes.

Remedy and conclusion

[51] If employees are to refer these interpretation or application disputes in terms of section 24 and the disputes are dealt with by the commissioners without considering whether the disputes were referred within a reasonable time, that would mean that even after 20 years of the conclusion of the collective agreement, employees would remain free to obtain a hearing from the bargaining council without the need to explain why they had taken that long to refer their disputes. That in my view, would be untenable and against the spirit of the LRA to speedily and efficiently resolve disputes between the employee and the employer.

[52] The commissioners have, therefore committed a material error and misdirection which vitiate the awards. They were required to enquire into this significant aspect to ensure that they issued awards that are within their jurisdiction and powers. The employees in both applications were required, based on the fact that they referred to what they characterised as interpretation or application disputes, to demonstrate either during evidence or by way of affidavits that their disputes were referred within a reasonable time and that the commissioner should overlook the delay. The awards fall to be reviewed and set aside on this basis.

[53] In the premises, the following order is made:

Order:

D2110/18

1. The arbitration award dated 20 September 2018 issued by the second respondent under case number PSHS57-18/19 is reviewed and set aside.
2. The matter is remitted to the third respondent for a hearing *de novo* before a commissioner other than the second respondent, which will include the determination of the third respondent's jurisdiction to arbitrate the dispute.
3. There is no order as to costs.

D67/21

4. The review application is reinstated and/or retrieved from the archives and the applicant is granted leave to proceed with the application.
5. The late delivery of the review application is condoned.

6. The arbitration award dated 16 October 2020 issued by the first respondent under case number GPBC1476/2019 is reviewed and set aside.
7. The matter is remitted to the third respondent for a hearing *de novo* before a commissioner other than the first respondent, which will include the determination of the third respondent's jurisdiction to arbitrate the dispute.
8. There is no order as to costs.

M. Makhura

Judge of the Labour Court of South Africa

Appearances:

D2110/18:

For the Applicant: Ms N. Govender
Instructed by: The State Attorney, Durban
For the 1st Respondent: Mr D. Carls of Carls Attorneys

D67/21:

For the Applicant: Mr N.G. Winfred
Instructed by: The State Attorney, Durban
For the 2nd Respondent: Mr S. Morgan
Instructed by: Logan Naidu Attorneys