



**THE LABOUR COURT OF SOUTH AFRICA
AT CAPE TOWN**

Of interest to other judges

Case no: C 323/2021

In the matter between:

**THE MINISTER OF JUSTICE &
CORRECTIONAL SERVICES**

Applicant

And

POPCRU OBO M J BASINI

First Respondent

**GENERAL PUBLIC SERVICE
SECTORAL BARGAINING
COUNCIL**

Second Respondent

JP HANEKOM

Third Respondent

Heard: 29 May 2025

Delivered: 05 June 2025

Summary: (Review – interpretation or application dispute – no dispute over interpretation – arbitrator not misdirecting himself by dealing with the dispute as a dispute over the application of a collective agreement – OSD agreement not applicable only to incumbents at the time of inception – order of payment of correct remuneration competent relief under s 138(9) of the LRA) in a dispute about the application of a collective agreement)

JUDGMENT¹

LAGRANGE, J

Introduction

- [1] This is an opposed review application. There is also an application for condonation for the late filing of the first respondent's answering affidavit.
- [2] An objection was raised by the applicant to the late answering affidavit and a condonation application was filed. The delay was over a year and caused by the first respondent's illness and problems caused by the first respondent's late realisation that his union would not pay the legal costs of opposition to the review. Ultimately the respondent did not file an opposing affidavit, and did not argue what prejudice it had suffered. Most of the prejudice suffered fell on the first respondent. In all the circumstances, I am satisfied the late filing of the answering affidavit should be condoned.

Background

- [3] On 1 May 2013, the first respondent, Mr M Basini ('Basini'), was appointed as a Centre Based Coordinator: Staff Support grade CB4. In April 2019 he learnt that an award had been made on 17 September 2018 in which the arbitrator had found, in a dispute concerning the application and interpretation of General Public Service Sectoral Bargaining Council Resolution 2 of 2009, that a Centre Coordinator of a Medium or Large Centre was supposed to be on salary level CB5 and not categorised as a Security Manager on level CB4.

¹ As varied on 9 June 2025 to correct typographical errors

- [4] Armed with knowledge of the award, on 22 July 2019, he too referred a dispute concerning the interpretation and application of the resolution, which is a collective agreement. He claimed he was in the same position as the beneficiaries of the 2018 and he should also be recognised as being on salary level CB4. Basini was represented by his union, POPCRU.
- [5] Notwithstanding the 2018 award, his employer, the Department of Correctional services ('the department') did not agree. It argued that he did not occupy a CB5 post and that Resolution 2 of 2009 would only have applied to Basini if he had occupied the post at the time it came into effect on 1 July 2009. Because he was only promoted in May 2013, he did not benefit from the OSD regrading but was engaged on the grade currently applicable to the job at the time of his promotion, namely CB4.
- [6] In the pre-arbitration minutes there is nothing to suggest that the department had claimed that the true nature of the dispute was an unfair labour practice relating to promotion, but it did advance this argument in the arbitration hearing. It also argued that, in terms of clause 7.1 of the agreement, Basini could only have been translated to level CB5 if he had been an incumbent of the post on 1 July 2009 when the OSD agreement came into effect. The pertinent portion of clause 7 reads:

"7. TRANSLATION MEASURES FOR CORRECTIONAL OFFICIALS - PHASE 1

7.1 Translation to the OSD for correctional officials shall be subject to the following principles:

7.1.1 the employee must be an incumbent in the post and;

7.1.2 must be performing the functions of the post (job).

7.2 Correctional officials shall translate to the appropriate salary scales in accordance with the posts that they currently occupy."

The award

- [7] The arbitrator found it was common cause that Basini held the position of Centre Coordinator: Staff Support at a medium institution on salary band CB 4, and the salary band for that position is CB5 in terms of the OSD.
- [8] Basini wanted his post aligned with the OSD. The department had argued that the post of Centre Coordinator did not exist on the establishment at the time Basini was appointed in 2013 and that the translation was a once off event in 2009 before he was appointed to the post. The arbitrator rejected these arguments. He held that the introduction of OSD was not a once off event after which OSD disappeared. After the initial translation phase, the salary structure and other provisions of OSD remained in place and future appointments had to conform with it. In light of these factors and relying on a dictum in the LAC decision *in Hospersa obo Tshambi v Department of Health, KwaZulu-Natal*², the arbitrator found that the dispute concerned the application of the OSD agreement.
- [9] Of his own accord, the arbitrator raised the question whether the referral of the dispute had been made within a reasonable time in accordance with the principles set out in the Labour Appeal Court decision in *Tshambi*. Although Basini's appointment had taken place in 2013, the arbitrator found the dispute about his salary level arose around April 2019, when he became aware of the 2018 arbitration award referred to earlier. Prior to that he had been unaware of the provisions of the OSD agreement but acted as soon as he was. Consequently, the arbitrator found Basini's referral of his dispute was made within a reasonable time.

² (2016) 37 (ILJ) 1839 (LAC), viz:

"[17] ... 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."

Grounds of review

- [10] The department asserted in its founding affidavit there was no dispute about what the OSD resolution meant.
- [11] It argued that the arbitrator misconceived the true nature of the dispute as one of interpretation of clause 6 of the resolution and this was done to circumvent the 90 day time period, which applies to referrals of unfair labour practices in terms of s 191(b)(ii) of the Labour Relations Act, 66 of 1995 ('the LRA'). In the absence of condonation application, the arbitrator had no jurisdiction to hear the dispute. The department argued the true nature of the dispute concerned Basini's promotion in 2013. Accordingly, the referral of his dispute in 2019 was well out of time. The department contended that because the arbitrator misconstrued the dispute, he failed to consider the undue delay in referring it.
- [12] An alternative version about the true nature of the dispute emerged in the department's supplementary affidavit, where it advanced an argument that Basini was not disputing the interpretation of the OSD agreement but whether it had been correctly applied to him. Essentially, that amounted to a claim for arrear wages and should have been pursued as a contractual claim.
- [13] Secondly, it argues that because Basini was promoted to the position of Centre Co-ordinator on 1 May 2013, he was not occupying the position when the OSD agreement took effect on 1 July 2009. Consequently, he did not meet the incumbency requirement of clause 7.1.1 and could not qualify for remuneration on the OSD scale.
- [14] Clause 6 (Translation Measures) of the resolution set out the salary structures that would apply to centre based and non-centre based staff. It reads:

"6.1 TRANSLATION MEASURES

6.1.1 Centre Based and Non-Centre Based Correctional Officials, as defined in this agreement shall translate to the OSD, which shall provide for the following:

(1) Unique Remuneration Structure

The introduction of a unique remuneration structure, with 3% increments between the notches.

(2) Differentiated Dispensation

Differentiated salary structures 4 Centre Based and Non-Centre Based Correctional Officials attached as an annexure A1 (Centre Based), and annexure A2 (Non-Centre Based) and as summarised hereunder:

... [Table setting out work streams , OSD bands and occupational groups relating to each band] ...

(3) Centre Based Correctional Officials shall translate to the appropriate salary scales in accordance with Annexure Basini.

(4) Non-Centre Based Correctional Officials shall translate to the appropriate salary scales in accordance with annexure B2.”

Evaluation

The nature of the dispute

- [15] Basini was promoted in May 2013 to the post of Centre Co-ordinator: Staff Support in the Overberg (Helderstroom) Management Area of the department on salary level CB4. It was only six years later that he learned that his salary on promotion might have been incorrect. This was not a dispute about not being promoted. It was a dispute about the correct level he should have been paid on the OSD scale once promoted or, to use the language of the LAC in *Tshambji*, whether the OSD resolution 2 of 2009 could be ‘invoked’ in his case, to determine that his correct level of remuneration was stipulated in clause 6.1 of the OSD for Centre Based Coordinator in a Medium Centre. I am satisfied that the existence of Basini’s promotion to the position, which was common cause, was a precondition for entertaining the question what his correct level of remuneration should have been. Considering the above, I am satisfied the arbitrator did not misconceive the nature of the dispute before him. It was a dispute about the application of the agreement to Basini and that is what he determined.

The question of incumbency

- [16] Clause 1 of Public Service Coordinating Bargaining Council Resolution 1 of 2007 initiated the introduction of the OSD system. Clauses 1.2 and 1.3 of the resolution identified it as one of the objectives of the agreement, viz:

“1.2 To introduce revised salary structures per identified occupation that caters for career pathing, pay progression, grade progression, seniority, increased competencies and performance with a view to attract and retain professionals and other specialists.

1.3 To replace the existing Scarce Skills Framework for the public service with the introduction of revised salary structures.”

(emphasis added)

Clause 4.1 of the same agreement identified the nature of the new salary structure:

“4. REVISED OCCUPATIONALLY SPECIFIC SALARY STRUCTURES

4.1 New salary scales will be negotiated and implemented per identified occupation to attract and retain professionals and other specialists over the duration of this Agreement. ...”

- [17] The OSD salary scale set out in clause 6 of Resolution 2 of 2009 reflected the implementation of an OSD salary structure for the department. Because this agreement initiated the OSD salary structure for the department it necessarily had to spell out how it would apply to correctional service staff currently employed on the date of implementation. This necessitated a method of identifying which current employees would be eligible for remuneration on the OSD salary structure. Clause 7 of the resolution set out the eligibility criteria, namely that the employee occupied and performed the functions of the post appearing on the OSD salary structure.

- [18] The development of an OSD salary scale for certain posts was not a temporary once-off event. The objective of developing the OSD scale

would have been defeated if it had only applied to staff occupying certain posts on 1 July 2009. That was simply the inception date of a new salary structure which replaced the former scarce skills remuneration structure. It is difficult to see on what rational basis the arbitrator could have found that resolution 2 of 2009 was a once-off event. It is true that staff whose jobs were not identified on the OSD scale would remain on the normal public service pay scales, but there was simply no basis for the arbitrator to infer that the OSD scale of CB5 no longer applied to the position Basini occupied in May 2013.

- [19] The arbitrator's finding that Basini should have been remunerated on the CB5 salary level from the date he occupied a post on the OSD salary scale was a perfectly reasonable conclusion.

A remuneration dispute is a contractual matter

- [20] As already mentioned, this argument was raised in the supplementary affidavit as an alternative argument that the arbitrator was being asked to determine a wage claim under the guise of a dispute about the application of a collective agreement.
- [21] It is true that Basini could have simply issued a demand for payment of salary shortfalls he suffered since his appointment and that such a claim, if valid, might partly have been met with a plea of prescription. However, among the general provisions governing arbitration, section 138(9) of the LRA states:

“(9) The commissioner may make any appropriate arbitration award in terms of this Act, including, but not limited to, an award-

- (a) that gives effect to any collective agreement;*
- (b) that gives effect to the provisions and primary objects of this Act;*
- (c) that includes, or is in the form of, a declaratory order.”*

- [22] If, as in this case, an arbitrator decides that a particular provision of a collective agreement stipulating a salary scale applies to an employee, an award ordering the employer to pay the employee in accordance with that

scale clearly would be giving effect to the agreement. Whether prescription might be raised in respect of the relief so ordered as it could be raised in a contractual claim, does not fall to be considered in this matter, because the department never raised it in the arbitration.

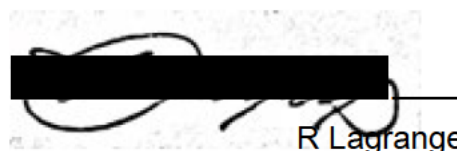
Conclusion

[23] For the reasons stated above, I am satisfied that the arbitrator's award was one that a reasonable arbitrator could have made on the material before him. Consequently, the review application must fail.

[24] POPCRU argued that the fact that the department still disputed the award, even though the 2018 award had also found against it in a very similar case, warranted a cost award to discourage repeated attempts to dispute the same issue. The submission has some merit, but I am not satisfied the cases were indistinguishable to an extent that it is inexplicable why the department took this award on review. In the circumstances, bearing in mind principles of law and fairness I am disinclined to make a cost award.

Order

1. The late filing of the First Respondent's answering affidavit is condoned.
2. The review application is dismissed.
3. No order is made as to cost.



R Lagrange

Judge of the Labour Court of South Africa.

Appearances:

For the Applicant: Adv Y Abbas instructed by
State Attorney Cape Town

For the First Respondent: Adv K Qaba instructed by Ntlokwana Mpikashwe
Attorneys