



THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Not Reportable
Case No: DA16/2024

In the matter between:

JABULANI BASIL BASI

Appellant

and

DEPARTMENT OF CORRECTIONAL SERVICES

First Respondent

BHEKI MTHETHWA N.O

Second Respondent

**GENERAL PUBLIC SERVICE SECTORAL
BARGAINING COUNCIL**

Third Respondent

Z D ZULU AND OTHERS

Fourth to Eleventh Respondents

Heard: 11 September 2025

Delivered: 04 November 2025

Coram: Mahalelo ADJP, Nkutha-Nkontwana JA et Basson AJA

JUDGMENT

NKUTHA-NKONTWANA, JA

Introduction

- [1] This appeal turns on a crisp issue of whether Ms Basi qualified for an appointment to the ungraded post of Chairperson of the Correctional Management Committee (CMC), a unit within the first respondent's (DCS) operational structure. He was appointed as a Senior Correctional Officer (SCO) in 2015. At about the same time, he was also appointed as the Chairperson of CMC, a post he held until it was upgraded and advertised. He duly applied for the upgraded post but was not shortlisted, a decision he challenged at the third respondent (GPSSBC) as an unfair labour practice in terms of section 186(2)(a) of the Labour Relations Act¹ (LRA).
- [2] The appellants' case at the GPSSBC was bifurcated into two separate claims. First, he contended that he should have been absorbed or appointed to the ungraded post of Chairperson of the CMC (impugned post) in accordance with the provisions of Regulation 45 of the Public Service Regulations of 2016.² Second, and alternatively, he contended that he should have been shortlisted and appointed to the advertised upgraded post.

Factual background

- [3] Mr Basi commenced his employment with the DCS as a correctional officer in the CMC unit and has been in that unit for about 20 years. The CMC is responsible for the admission of offenders, addressing their day-to-day needs, and managing overcrowding in the prison. The structure of the CMC is not in dispute and has always consisted of a chairperson, a clerk, and a secretary. Mr Basi initially worked as a clerk and later became a secretary.
- [4] Mr Basi testified that in December 2014, he successfully applied for the post of Chairperson of the CMC, which was at the salary level CB4. On 1 February 2015, he received an appointment letter from the Head of the Correctional Centre. His job description clearly stated his position as the Chairperson of the CMC. Furthermore, his job performance was evaluated based on the job description of a Chairperson of the CMC. It is common cause that Mr Basi

¹ Act 66 of 1995, as amended.

² GNR.877 of 29 July 2016: Public Service Regulations, 20161 (Government Gazette No. 40167) as amended by Notice Government Gazette Date 11 April 2019.

received a satisfactory review in all his performance evaluations, including the one that was conducted during the financial year 2018/2019.

- [5] Mr Basi further testified that in January 2019, he learned with surprise that the DCS advertised several upgraded posts of Chairperson of the CMC. He applied for the impugned post out of caution. At the time, he did not have a copy of his Diploma in Business Management because he had returned it to the institution that issued it to correct an error in his identity number. He, nonetheless, attached all other certificates that demonstrated that he had met the requirements for a diploma. Still, he was not shortlisted. He challenged the decision not to shortlist and/or appoint him, contending that he ought to have been appointed without the post being advertised in accordance with Regulation 45,³ as he was an incumbent in the impugned post.
- [6] The DCS opposed Mr Basi's claim, and the nub of its defence was that the impugned post did not exist on its organogram before 19 November 2018. It contended that Mr Basi had always been appointed to a post of a Senior Correctional Officer at the salary level CB4. The impugned post was created and graded at salary level CB5 consequent to the national circular that communicated the National Commissioner's decision to approve funding for, *inter alia*, filling vacant posts. Therefore, the DCS was adamant that no post was upgraded to trigger Regulation 45. Alternatively, the DCS contended that Mr Basi did not possess the requisite qualification, and if he did, it was fraudulently acquired. Hence, he was not shortlisted.

³ Regulation 45 provides:

'Undegraded posts.

- (1) If the job weight demonstrates that a post is undegraded and the department's budget and the medium-term expenditure framework -
 - (a) provides for sufficient funds, an executive authority shall increase the grade of the post to a higher salary level; or
 - (b) does not provide for sufficient funds, an executive authority shall redesign the job to equate with the grade of the post prior to regrading.
- (2) If an executive authority increases the grade of a filled post as provided under subregulation (1) (a), he/or she shall continue to employ the incumbent employee in the higher-grade post without advertising the post if the incumbent –
 - (a) already performs the duties of the post;
 - (b) has received a satisfactory rating in his or her most recent annual moderated and approved performance assessment in the post, and where the incumbent has not yet been assessed, his or her performance shall first be assessed to determine whether the performance is satisfactory;
 - (c) meets the inherent requirements of the post; and
 - (d) has been in the post for at least twelve calendar months.' (Own emphasis)

Arbitrator's findings

[7] The arbitrator found in favour of Mr Basi for the following reasons:

‘(a) the Public Service Regulations of 2016, Regulation 45 sub-regulation 2 obliges the executive authority to absorb an employee to a post that had been graded higher should she/he meets the minimum requirements of the occupied post; (b) in this matter; the Applicant met all the requirements of the Chairperson of the CMC post when it was advertised on 2 January 2019; (c) he had obtained a relevant three year diploma in 2018; (d) prior to the upgrading of the Chairperson of the CMC position the Applicant had been performing all the duties of this post since 1 February 2015; (e) he had been in the post for more than twelve calendar months when the post was created and funded; and/or upgraded to salary level CB5. The Applicant had received [a] satisfactory rating for his performance assessment for the financial year 2018/2019 after it had been moderated and approved as the Chairperson of the CMC. The First Respondent did not dispute that the job description of the Applicant had not changed since he was first appointed as the Chairperson of the CMC on 1 February 2015.’

[8] Consequently, the matter was disposed of based on Regulation 45, and the arbitrator deemed it superfluous to deal with Mr Basi's alternative claim. The DCS was ordered to absorb or appoint Mr Basi to the impugned post at salary level CB5 retrospectively to 2 January 2019.

At the Court *a quo*

[9] The DCS was disgruntled and sought to review the award on various grounds, which in essence impugned the reasonableness of the outcome reached by the arbitrator. Mr Basi opposed the review application in defence of the award.

[10] The Court *a quo* endorsed the arbitrator's findings that Mr Basi had been an incumbent in the impugned post since 2015 and that, based on the objective or undisputed facts, his job performance was rated as satisfactory for the financial year 2018/2019.

- [11] Yet, contrary to the arbitrator, the Court *a quo* found that Mr Basi did not have the requisite RQV13 qualification in Correctional Services Management to trigger Regulation 45. The award was consequently found to be vitiated by unreasonableness, set aside, and substituted with an order dismissing Mr Basi's claim.

In this Court

- [12] Discontented with the outcome, Mr Basi took the matter on appeal. The appeal is solely against the Court *a quo*'s finding that Mr Basi did not possess a requisite qualification to trigger Regulation 45 successfully.
- [13] Mr Basi submits that the Court *a quo* erred in its finding that he did not have the requisite qualification, as it was common cause that he holds a Diploma in Business Management; a copy thereof was submitted during the arbitration proceedings. Furthermore, although the advertisement did not explicitly state that equivalent qualifications would be considered, the shortlisting notes clearly indicate that the shortlisting committee did consider and shortlist the candidates with equivalent qualifications.
- [14] Mr Randal Kumar Somaru (Mr Somaru), the only witness for the DCS, conceded under cross-examination that, had Mr Basi shown that he had a three-year diploma, he would have met the requirements for the impugned post. Mr Basi's counsel referred us to the transcript to underscore his submission that it was not the DCS's case that Mr Basi did not possess a relevant or equivalent qualification. Instead, the DCS's case turned on the denial that the impugned post existed before 19 November 2018.
- [15] The DCS defends the impugned findings of the Court *a quo*. While it concedes that, *de facto*, Mr Basi may have performed some duties as Chairperson CMC since 2015, it persisted with the submission that the post did not formally exist before 19 November 2018. The newly created post was upgraded, requiring an RVQ13 qualification in Correctional Services Management, which Mr Basi did not possess. Furthermore, it contends that a Diploma in Business Management is not an equivalent qualification in the context of the Correctional Services environment, considering the seniority of

the impugned post, the related qualification, and the importance of completing a learnership. It was submitted that the Court *a quo* was correct in its finding that there was no reasonable basis for the arbitrator to conclude that Mr Basi met the inherent requirements of the impugned post as set out in Regulation 45(2)(c).

Discussion

- [16] The enquiry into whether Mr Basi met the inherent requirements of the impugned post per Regulation 45(2)(c) must commence with the definition of 'inherent requirements of the job'. The Public Service Regulations define 'inherent requirements of the job' as the competency, experience, qualifications and any other requirement that an employee needs to perform a job.
- [17] The DCS's case during the arbitration proceedings was articulated by its representative (Mr Shope) in his opening statement. Mr Shope submitted that DCS would show that Mr Basi misrepresented his CV, as he had not acquired a Diploma in Business Management, or that it was obtained fraudulently. That was so, he further submitted, because to be awarded a Diploma in Business Management, a student had to complete a two-year in-service training in a business environment.
- [18] The cross-examination of Mr Basi was accordingly focused on the legitimacy of his qualification. Mr Basi was adamant that he had legitimately obtained his qualification and that he had completed his in-service training after hours when he was off duty. The DCS failed to adduce any evidence in rebuttal of Mr Basi's evidence, despite having had the opportunity to request authentication of the qualification from the awarding institution.
- [19] In any event, Mr Somaru conceded during his cross-examination that Mr Basi's qualification was a determining factor in his elimination during the selection process. The essence of his testimony was that, had Mr Basi submitted a copy of his Diploma in Business Management when shortlisting was conducted, he could have met the inherent requirements of the impugned post. The contention by the DCS that the Diploma in Business Management is

not an equivalent qualification in the context of the Correctional Services environment is therefore untenable.

[20] What is true, though, is that the impugned post existed *de facto* since 2015, and that Mr Basi was the incumbent until it was advertised at a higher salary level as found by the arbitrator. Mr Basi's job description remained the same even after the appointment of a new Chairperson for the CMC in 2019. Interestingly, Mr Basi was appointed as a Deputy Chairperson for the CMC, a position that was neither advertised nor shown to exist or listed on the DCS organogram. Quizzed on these issues, Mr Somaru gave a nebulous explanation. Also, the DCS's threat in its papers before the Court *a quo* to seek leave to file its organogram, which shows the posts as they existed before and after 2019, was of no avail.

[21] Counsel for Mr Basi implored us not to be charmed by the DCS's ardent submissions, as they are not supported by the evidence that was before the arbitrator. Had the DCS challenged the relevance and suitability of Mr Basi's qualification, he could have mounted a different defence. Counsel for the DCS, on the other hand, was constrained to concede that it was never the DCS's case that Mr Basi's qualification, a Diploma in Business Management, is not equivalent in the context of the correctional services environment or did not meet the inherent requirements of the impugned post per Regulations 45(2)(c). This line of defence is obviously extraneous to the record of the arbitration proceedings and only emerged in the DCS review papers and submissions before the Court *a quo*.

[22] In *Makuleni v Standard Bank of SA (Pty) Ltd & others*,⁴ this Court reasserted the high threshold for review. It reminded the review court to show fidelity to the legislative intent and to avoid straddling the line between review and appeal.⁵ It also underscored the trite tenet that the review exercise requires that the award be read and evaluated holistically within the context of the

⁴ [2023] 44 ILJ 1005 (LAC); [2023] 4 BLLR 283 (LAC) at paras 3 and 4.

⁵ *Ibid.*

evidence adduced before the arbitrator to determine whether it falls within the band of reasonable awards.⁶

[23] Therefore, the record of the arbitration proceedings is central to determining whether the award is reviewable. Arguments that emerge for the first time during the review application will be countenanced only in instances where they were fully canvassed in evidence during the arbitration proceedings.⁷ Here, the converse is true. Mr Basi is correct in his submission that what constitutes an inherent requirement of the impugned post was not fully canvassed in evidence before the arbitrator. The DCS impermissibly raised this issue for the first time before the Court *a quo*, even though it is not a purely legal issue.⁸ Judgment by ambush is impermissible.⁹

[24] It follows that, given the evidence on the record of the arbitration proceedings, considered in its totality, the arbitrator cannot be faulted in his finding that Mr Basi met all the requirements to be appointed to the impugned post in accordance with Regulation 45(2). Mr Basi holds a National Diploma in Business Management, an equivalent qualification, and accordingly met the inherent requirements of the impugned post per Regulation 45(2)(c).

[25] The DCS nailed its colours squarely to the mast of an allegation that Mr Basi's qualification was fraudulently obtained. Upon the demise of that defence, it did not avail the DCS to construct a new defence in its arguments before the Court *a quo* that was obviously extraneous to the record of the arbitration proceedings.

Conclusion

[26] All things considered, the outcome reached by the arbitrator falls within the band of reasonable outcomes, and the Court *a quo* erred in upsetting the

⁶ Ibid, see also *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others* [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ at paras 18 - 21; *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer & others* (2015) 36 ILJ 1453 (LAC) at para 12.

⁷ See: *Coin Security (Pty) Ltd v CCMA & others* [2005] 7 BLLR 672 (LC); (2005) 26 ILJ 849 (LC) at para 37.

⁸ Ibid.

⁹ See: *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA); [2009] 2 All SA 243 (SCA) at para 47, though in a context of motion proceedings.

award. The appeal is to be upheld, and the order of the Court *a quo* is to be set aside and replaced with an order dismissing the review application.

Costs

[27] Turning to costs, the DCS did not act frivolously in defending the judgment of the Court *a quo* and cannot, therefore, be saddled with costs. To do so would not accord with the requirements of law and fairness.¹⁰

[28] The following order is made:

Order

1. The appeal is upheld.
2. The order of the Court *a quo* is set aside and replaced with an order that the review application is dismissed.
3. There is no order as to costs.

Nkutha-Nkontwana JA

Mahalelo ADJP *et* Basson AJA concur.

APPEARANCES:

FOR THE APPELLANT: R B Donachie, Henwood Britter & Caney

FOR THE RESPONDENT: Adv N G Winfred
Instructed by State Attorney Kwazulu-Natal

¹⁰ Section 179(1) of the LRA provides: "The Labour Appeal Court may make an order for the payment of costs, according to the requirements of the law and fairness".