



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable
Case no: JA53/21

In the matter between:

Public Servants Association

First Appellant

**Deputy Directors of Public Prosecutions
Employed by the First Respondent and
listed in annexure "A" to the notice of appeal**

Second Appellant

and

**The National Prosecuting Authority
The Minister of Justice and Correctional
Services**

First Respondent

Second Respondent

The National Director of Public Prosecutions

Third Respondent

The Minister of Public Service and Administration

Fourth Respondent

The Minister of Finance

Fifth Respondent

**The Director General, Department of Justice
and Constitutional Development**

Sixth Respondent

Heard: 5 May 2022

Delivered: 18 August 2022

Coram: Waglay JP, Coppin JA and Kathree-Setiloane AJA

Summary: Interpretation - s18(1)(b) of National Prosecuting Authority Act 66 of 1995 - there is nothing in the text of section 18(1)(b) that requires the cost-of-living adjustments of Deputy Directors and Prosecutors in the NPA to be the same. Nor does section 18(1)(b) contemplate the cost-of-living increase of senior legal personnel and their subordinates in the Public Service to be the same. Section 18(1)(b) contemplates that Prosecutors and Deputy Directors will receive the same salary increases as determined by the Minister of Public Service and Administration for legally qualified personnel in the Public Service. The Minister of Justice and the NPA have complied with s 18(1)(b) by paying Deputy Directors of Public Prosecutions cost-of-living adjustments comparable to that of senior legal personnel in the Public Service.

JUDGMENT

KATHREE-SETILOANE AJA

- [1] This is an appeal and cross-appeal against the judgment and order of the Labour Court (Moshwana J) dismissing the review application, instituted in terms of section 158(1)(h) of the Labour Relations Act¹, against the decision of the first and second respondents, the National Prosecuting Authority (NPA) and the Minister of Justice and Correctional Services not to implement cost-of-living adjustments of Deputy Directors of Public Prosecutions (DDPPs) in accordance with the provisions of section 18(1)(b) of the National Prosecuting Authority Act (NPA Act).²

¹ No. 66 of 1995, as amended.

² No. 32 of 1998.

Background

- [2] The second appellant consists of 112 Deputy-Director Public Prosecutors (DDPPs) who are employed by the NPA in terms of the NPA Act.³ All of them are members of the first appellant, the Public Servants Association (PSA).⁴
- [3] The NPA largely comprises the National Director, National Deputy Directors, Directors, Deputy Directors and Prosecutors who are appointed in terms of the NPA Act. The National Director is appointed in terms of section 10 of the NPA Act, Deputy National Directors in terms of section 11, Directors and Acting Directors in terms of section 13, Deputy Directors (such as the appellants) in terms of section 15 and Prosecutors in terms of section 16.
- [4] The remuneration and salary increases (or cost-of-living adjustment) of DDPPs and prosecutors are governed by section 18(1) of the NPA Act (as amended by the Judicial Matters Amendment Act⁵) (JMA Act). Section 18(1) of the NPA Act provides:

(a) Subject to the provisions of this section, any Deputy Director or Prosecutor shall be paid a salary in accordance with the scale determined from time to time for his or her rank and grade by the Minister after consultation with the National Director and the Minister for the Public Service and Administration, and with the concurrence of the Minister of Finance, by notice in the Gazette: Provided that such determination is not required in respect of any cost-of-living adjustment of such scale.

(b) Cost-of-living adjustments of the scale determined by the Minister in terms of paragraph (a) shall be effected in accordance with the cost-of-

³ Their names are listed on annexure "A" to the notice of motion in the review application.

⁴ The first and second appellants are referred to collectively as the "appellants" in the judgment.

⁵ No. 11 of 2012.

living adjustments determined for legally qualified personnel in the Public Service.’

- [5] Prior to its amendment, which came into effect on 12 October 2012, section 18(1) of the NPA Act read as follows:

‘(1) Subject to the provisions of this section, any Deputy Director or prosecutor shall be paid a salary in accordance with the scale determined from time to time for his or her rank and grade by the Minister after consultation with the National Director and the Minister for Public Service and Administration, and with the concurrence of the Minister of Finance, by notice in the Gazette.’

- [6] On 6 July 2012, the Minister of Justice made his last determination of cost-of-living adjustments for DDPPs in terms of the unamended section 18 of the NPA.⁶
- [7] On 28 February 2013 (subsequent to the amendment of section 18 of the NPA Act), the Minister of Public Service and Administration issued Circular 2 of 2013 which provided for a cost-of-living adjustment of 6.6% with effect from 1 April 2013. A year later on 23 April 2014, the Minister of Public Service and Administration issued Circular 2 of 2014 which provided for a cost-of-living adjustment of 7.4% with effect from 1 April 2014. On 23 July 2015, he issued Circular 1 of 2015 which provided for a cost-of-living adjustment of 7% effective from 1 April 2015 (DPSA Circulars).
- [8] On 31 March 2016,⁷ the Minister of Public Service and Administration issued Circular 3 of 2016 which provided for a cost-of-living adjustment of 7.6%, effective from 1 April 2016. This Circular (as were its predecessors) was applicable to employees on salary levels 1 to 12 and those covered by the Occupational Specific Dispensation (OSD). It expressly excluded members

⁶ GN No. 521, GG No. 35494, 6 July 2012.

⁷ This Circular was issued following the conclusion of the collective agreement (PSCBC Resolution 8 of 2015).

of the Senior Management Service (SMS) (salary levels 13 to 16) appointed in terms of the Public Service Act 1994, and to whom the Senior Management Services Handbook (SMS Handbook) applied. It also, amongst others, excluded employees appointed in terms of the NPA Act. With reference to these exclusions, this Circular expressly stated:

'3 The measures contained in this circular do not apply to personnel groups listed below. The (possible) cost of living adjustment for these personnel groups, or the implementation/adjustment of the formulae to accommodate such adjustments, is being dealt with separately, where applicable, particulars thereof will be announced as soon as possible by the executive authorities concerned: –

3.1 Members of the Senior Management Service (SMS) (salary levels 13 to 16) appointed in terms of the Public Service Act 1994, the Correctional Services Act, 1998, the Defence Act 2002, the South African Police Service Act, 1985 and the Employment of Educators Act 1988.

3.2 Personnel on salary levels 1 to 12 employed in terms of the Employment of Educators Act, 1998, the South African Police Service Act, 1995 and the Defence Act 2002.

3.3 Personnel employed in terms of the National Prosecuting Authority Act, 1988.'

[9] Notwithstanding the express exclusion of members of the SMS (salary levels 13 to 16) appointed in terms of the Public Service Act and personnel employed in terms of the NPA Act from Circular 3 of 2016 (and its predecessors), the appellants hold the view that the salary increases determined in this circular (and its predecessors) applied across the board to "all legally qualified personnel in the Public Service" and should have applied equally to both DDPPs and prosecutors in the NPA by virtue of section 18(1)(b) of the NPA Act.

[10] Notwithstanding the express exclusion of personnel appointed in terms of the NPA Act from Circular 3 of 2016, Dr Silas Ramaite, the Deputy National

Director of Public Prosecutions for Administration (Dr Ramaite), acting in terms of section 18(1)(b) of the NPA Act, issued NPA Circular 17 of 2016 entitled "Re: Cost of Living adjustments for employees on salary level 1-12 appointed in terms of the Public Service Act with effect from 1 April 2016 and Prosecutors and investigators appointed in terms of the National Prosecuting Authority Act". The purpose of this circular was to implement DPSA Circular 3 of 2016 to cover *inter alia* prosecutors employed at levels 1 to 12 covered by the OSD. The NDPP issued similar NPA circulars implementing the salary adjustments in DPSA Circulars: 2 of 2013; 2 of 2014 and 1 of 2015 to apply to prosecutors employed at levels 1 to 12 and covered by the OSD.

- [11] On 27 July 2016, the DPSA issued Circular 5 of 2016 with regard to the cost-of-living adjustments, approved by the Minister of Public Service and Administration, in respect of the SMS in the Public Service (including legally qualified personnel) with effect from 1 January 2016. As with DPSA Circular 3 of 2016 (and its predecessors), NPA employees were excluded.
- [12] Dr Ramaite, subsequently issued NPA Circular 19 of 2016 which stated: "[a]s a result of the amendment to section 18(1) of the NPA Act 32 of 1998 and the insertion of 43B in the NPA Act 32 of 1998 as per Judicial Amendment Act No.11 of 2012, the same adjustment announced for the SMS members appointed in terms of the Public Service will be applicable to the NPA Act members appointed on levels 13 and 14".
- [13] For the years 2013 to 2015, the NPA implemented the cost-of-living adjustments in respect of DDPPs in accordance with the cost-of-living adjustments approved by the Minister of Public Service and Administration for SMS personnel (including legally qualified personnel) employed in terms of the Public Service Act.⁸ The cost-of-living adjustments for DDPPS were

⁸ By way of further example, for the 2015 salary adjustment of members of the SMS in the Public Service, the Department of Public Service and Administration issued DPSA Circular 2 of 2015 "on improvement of service of the Senior Management Service (SMS)" in terms of which the Minister of Public Service and Administration approved a 5.5% cost-of-living adjustment for SMS

as follows: (a) 5.6 % with effect from 1 April 2013; (b) 6.2% for level 13 and 5.7% for levels 14 to 16 effective 1 April 2014; (c) 5.5% effective 1 April 2015; (d) 4% for level 13; 2.5% for levels 14 and 15; and 2% for level 16 with effect from 1 January 2016.⁹

[14] Although all the appellants had received and accepted these salary increases, they maintained that the implementation of the cost-of-living adjustments in respect of DDPPs in accordance with the costs-of-living adjustments of SMS members employed in terms of the Public Service Act, was contrary to the provisions of section 18(1) of the NPA Act. Consequently, on 6 September 2016, they lodged a grievance against the NPA on the basis that their cost-of-living adjustments were not in line with that determined for legally qualified personnel in the Public Service and Administration in terms of section 18(1) of the NPA Act.

[15] On 12 December 2016, the grievance was referred to the Public Service Commission for consideration in terms of Rule 6(h) of the Rules for dealing

members on salary levels 13 to 16 (Director, Chief Director, Deputy Director-General and Director-General) appointed in terms of the Public Service Act effective from 1 April 2015 for the 2015/2016 financial year. By way of implementation of this Circular, Dr Ramaite issued Circular 23 of 2015 in his capacity DNDPP. Administration) which stated:

"As a result of the amendment to section 18(1) of the NPA Act 32 of 1998 and the insertion of section 43B in the NPA Act 32 of 1998 as per the Judicial Matters Amendment Act No. 11 of 2012, the same adjustment announced for SMS members appointed in terms of the Public Service Act will be applicable to the SMS members on level 13 and 14 appointed in terms of the NPA Act. The Minister for Justice and Constitutional Development is therefore not required to follow the consultative process to determine the adjustment after the announcement of the cost-of-living-adjustment by the Minister of Public Service and Administration.

It should therefore be noted that the NPA has already communicated with National Treasury (PERSAL) to implement the cost-of-living adjustment for the SMS members on level 13 and 14 appointed in terms of the NPA Act simultaneously with those SMS members appointed in terms of the Public Service Act."

⁹ At the launch of the review application, the SMS cost-of-living adjustments for 2017 had not yet been determined.

with grievances of members of the senior management services including heads of department, 2010.

- [16] On 19 April 2017, the Public Service Commission concluded that the grievance of the appellants was unsubstantiated and upheld the decision of the NPA not to implement the cost-of-living adjustments of the DDPPs in accordance with Circular 3 of 2016.
- [17] In a parallel process, on 31 March 2017, Adv. Thoko Majokweni (Acting Deputy National Director of Prosecutions) addressed a memorandum to Dr Ramaite. The purpose of this memorandum was, amongst other things, to forward to Mr Ramaite the 2017 cost-of-living adjustments for employees in the Public Service, and to convey her interpretation regarding the inclusion of Deputy Directors with reference to section 18 of the NPA Act. She attached to the memorandum, a letter from the then Minister for Public Service and Administration (Mr N Ramathlodi), dated 6 March 2017, which was addressed to the then Minister of Justice and Correctional Services (Mr TM Masuthu). She quoted the following paragraphs from that letter in her memorandum:

'The Judicial Matters Amendment Act, 2012 amended section 18 of the National Prosecuting Authority Act, 1998 to the extent that cost of living adjustments to the scales determined by the Minister of Justice and Correctional Services shall be effected in accordance with the cost-of-living adjustments determined for employees covered by the OSD for legal personnel in the Public Service.

...

As my determination is applicable to employees covered by OSD for legal personnel in the Public Service, it is in accordance with section 18 of the National Prosecuting Authority Act, also applicable to Deputy Directors and Prosecutors on comparable brackets (non-SMS) levels, effective from 1 April 2017.'

- [18] On the strength of this letter, Adv. Mojokweni recommended that the 2017 cost-of-living adjustments be implemented in respect of both prosecutors and Deputy Directors in the NPA.
- [19] Dr Ramaite responded in a letter dated 12 April 2017. With reference to the last paragraph of Minister Ramathlodi's letter (quoted above), he stated as follows:

'One of the key issues introduced by the OSD is the creation of a dual career path where there is a management stream and production stream. The management stream for DDPPs will remain as members of the Senior Management Service (SMS) and the creation of the production stream for those DDPPs whose main job will be court/legal work as opposed to legal administration. The actual implementation and finalisation was left to the Department of Justice and Correctional Services including the NPA. The MPSA [Minister of Public Service and Administration] would not know of the final status and that the NPA has not implemented this for DDPP's hence his letter had to cover all bases. However, having said that, the letter in the same paragraph specifies that this is applicable to **non-SMS**, my emphasis above.

DDPPs in the NPA have always been on the SMS salary levels and with the non-implementation of LP10 they remain on the SMS dispensation. Throughout the years there have always received the same cost of living adjustment as the rest of the SMS in the Public Service and the matter has not been raised until last year when the SMS adjustment was significantly lower than that of the non-SMS.

Lastly, salary notches are determined beforehand by the DPSA and loaded onto the Payroll System, Persal. The adjustments are based on these pre-existing notches and loading a 7.3% onto SMS salary notches will create new notches that are not in the system and will thus be rejected and will require a separate approval system including Cabinet approval as well as the concurrence of the Minister of Finance before implementation. The NPA and consequently the Department of Justice and Correctional Services on its own without the involvement of the Department of Public Service and Administration as well as the

Department of Finance is not empowered to determine any remuneration policy.

Implementing 7.3% for SMS amounts to deviation from the approved remuneration policy of government. Therefore, I am unable to approve your recommendation to implement the same Cost of Living Adjustment for DDPPs as was approved for non-SMS for the general public service and legal OSD as this will be irregular and the attached cost will constitute irregular expenditure.'

- [20] It is this decision that the appellants took on review to the Labour Court.

Labour Court Judgment

- [21] The Labour Court found that section 18(1) of the NPA Act did not strip the Minister of Justice of the power to determine the cost-of-living adjustments for DDPPs and prosecutors. It held that because the Minister of Justice is empowered to appoint DDPPs and prosecutors in terms of sections 15 and 16 of the NPA Act, respectively, "[i]t follows axiomatically that he must be empowered to determine such terms and conditions of service" and that section 18(1) (b) suggests as much. It held that "[o]nce so determined, it shall be carried into effect in accordance with the cost-of-living adjustments determined for legally qualified personnel in the Public Service".
- [22] The Labour Court held further that cost-of-living adjustments at the NPA are determined by the Minister of Justice and those in the Public Service are determined by the Minister of Public Services and Administration. However, the two determinations need to be in harmony with each other as the two Ministers are required in terms of section 18 to consult with each other.
- [23] The Labour Court accordingly dismissed the appellants' claim on the merits, holding that the NPA was entitled, in accordance with section 18(1) of the NPA Act, to pay the appellants' cost-of-living adjustments that applied to senior managers in the Public Service and, in essence, to maintain the

distinction between Senior Management and their subordinates at the NPA in conformity with the regime in the Public Service.

- [24] The respondents raised special pleas of prescription and undue delay in the Labour Court which the Labour Court dismissed.
- [25] The appeal and cross-appeal against the judgment of the Labour Court are with its leave.

The Cross-Appeal

- [26] The cross-appeal raises the question of whether the Labour Court had jurisdiction to deal with the review application in circumstances where it was purportedly instituted four years after the cause of action arose, and the applicant did not make an application for condonation to the Labour Court.
- [27] The respondents contend that the appellants' cause of action arose in April 2013, because in prayer 3 of their notice of motion the appellants seek an order directing the NPA and the Minister of Justice and Correctional Services to effect the cost-of-living adjustments for DDPPs in accordance with the cost-of-living adjustments determined by the Minister of Public Service and Administration for legally qualified personnel in the Public Service with effect from 1 April 2013.¹⁰ They contend that because the review application was only launched some four years later in July 2017, the appellants were required in law to apply to the Labour Court for condonation for the undue delay in filing the application. The Labour Court found that there was no need for the appellants to apply for condonation as their review application was brought within a reasonable period of time.

¹⁰ Circular 2 of 2013 (which was the first DPSA determination subsequent to the coming into force of the amended s 18(1) of the NPA Act) provided for a cost-of-living adjustment (6.6%) with effect from 1 April 2013.

- [28] The Labour Court's finding on this aspect is correct. The dispute before the Labour Court concerned the interpretation of section 18(1) of the NPA Act in relation to the appellants' rights to the correct cost-of-living adjustments. Since the dispute concerns the interpretation of section 18(1) of the NPA Act, any purported infringement of their rights as a result of an incorrect interpretation of the provision is continuous and will occur every time that the NPA purportedly applies section 18(1) of the NPA Act incorrectly.
- [29] Moreover, section 38 of the Public Service Act expressly provides that "if an incorrect salary, salary level, salary scale or reward is awarded to an employee, the relevant executive authority shall correct it with effect from the date on which it commenced." As such, the purported denial of the correct cost-of-living adjustments to the appellants would be continuous and on a month-to-month basis. It would be unnecessary, in the circumstances, for the appellants to seek condonation from the Labour Court.
- [30] This conclusion disposes of the cross-appeal on the issue of prescription as well. The argument advanced by the respondents on this score, is that because the dispute is a claim for higher salaries, a debt as contemplated in the Prescription Act¹¹ arose on 2 October 2012 (when the amended section 18 came into effect) or at the latest 1 April 2013 (when the salary increase in Circular 2 of 2013 became effective), and prescribed three years later.
- [31] Accordingly, I am of the view that the Labour Court did not err in dismissing the two special pleas of undue delay and prescription raised by the respondents.

Parties' Submissions in the Appeal

- [32] The appeal turns on the interpretation of section 18(1) of the NPA Act. The appellants contend that the Labour Court erred in concluding that the

¹¹ No. 68 of 1969.

Minister of Justice retained the power to make cost-of-living determinations. They contend that the effect of the amendment to section 18 of the NPA Act is twofold: it was no longer required of the Minister of Justice to issue determinations with regard to cost-of-living adjustments for the DDPPs and prosecutors, and it prescribed how those costs are to be determined: namely, that whenever the Minister of Public Service and Administration determines cost-of-living adjustments for legally qualified personnel in the Public Service, such determination is *mutatis mutandis* applicable to the salary scale of prosecutors and DDPPs.

- [33] In essence, the appellants' case is that the legislature intended that both DDPPs and prosecutors should benefit from the same cost-of-living adjustments, hence the DDPPs' salary increases should have been in accordance with the cost-of-living adjustments for the period 2013 to 2017 as determined by the Minister of Public Service and Administration for legally qualified personnel in the Public Service in the DPSA Circulars, and not the SMS Handbook.
- [34] On the contrary, the respondents argue that before the amendments to the NPA Act by the JMA Act, cost-of-living adjustments were determined by the Minister of Justice by way of notice in the Government Gazette. However, once the NPA Act was amended in 2012, cost-of-living adjustments were still to be determined by the Minister of Justice but without the need for notice in the Gazette as is the requirement when the Minister of Justice determines salary scales for DDPPs and prosecutors in terms of section 18(1)(a) of the NPA Act.
- [35] The respondents' case is that the DDPPs cost-of-living adjustments since 2013 was commensurate with the cost-of-living adjustments applicable to legally qualified personnel in the Public Service employed in the SMS (levels 13-16) to whom the SMS Handbook applies. They therefore argue that DDPPs are not entitled to the annual cost-of-living adjustments which legally qualified personnel in the Public Service, appointed at levels 1-12 and covered by the OSD, received in terms of the DPSA Circulars from April

2013 onwards. They point out that while the annual salary increase of this category of employee in the Public Service is subject to collective bargaining, the annual salary increase of a legally qualified person in the Public Service employed in Senior Management is not. They point out, in this regard, that given their rank and grade, the DDPPs' posts and salary levels are instead equivalent to legally qualified personnel employed in the Public Service in terms of the SMS and not those employed at levels 1 to 12 or covered by the OSD.

Interpretation of s 18(1) of the NPA Act

- [36] The law on the interpretation of legislation was articulated by the Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality* as follows:¹²

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document...'

¹² 2012 (4) SA 593 (SCA) at para 18. Approved by the Constitutional Court in *Airports Company South Africa v Big Five Duty Free (Pty) Ltd and Others* 2019 (5) SA 1 (CC) at para 29 and *Road Traffic Management v Waymark Infotech (Pty) Ltd* 2019 (5) SA 29 (CC) at para 29.

- [37] Section 18(1)(a) of the NPA Act empowers the Minister of Justice to determine the salary scale based on the rank and grade at which prosecutors and deputy directors are paid after consultation with the National Director of the NPA and the Minister for Public Service and Administration and with the concurrence of the Minister of Finance, and by notice in the Government Gazette. However, in relation to cost-of-living adjustments or increases in the salary scale determined by the Minister of the Justice, he or she is not required to consult with the National Director of the NPA and the Minister for Public Service and Administration. Nor is the Minister of Justice required to obtain the concurrence of the Minister of Finance or publish the cost-of-living adjustment in the Government Gazette.
- [38] While the parties are in agreement on the interpretation of section 18(1)(a) of the NPA Act, their views on the interpretation of section 18(1)(b) diverge. There are possibly two ways of interpreting section 18(1)(b). The one is to construe it as releasing the Minister of Justice of the obligation to make a determination on the cost-of-living adjustments for DDPPs and prosecutors, because in terms of section 18(1)(b) of the NPA Act, the cost-of-living adjustments for DDPPs and prosecutors must be the same as those which are determined by the Minister of Public Service and Administration for legally qualified personnel in the Public Service.
- [39] The other way of interpreting section 18(1)(b) is to construe it as requiring the Minister of Justice to determine the cost-of-living adjustments, but that in implementing it, it must be done in accordance with the cost-of-living adjustments determined by the Minister for Public Service and Administration for legally qualified personnel in the Public Service. Properly construed, neither of the two interpretations would require the Minister of Justice and Correctional Services to consult with the Minister of Public Service and Administration as the Minister of Justice is obliged, in terms of section 18(1)(b) of the NPA Act, to apply the cost-of-living adjustments determined by the Minister of Public Service for legally qualified personnel in the Public Service to deputy directors and prosecutors in the NPA.

- [40] This interpretation would be consistent with the objects of the amended section 18(1) of the NPA which was to jettison the cumbersome consultation process that had to be followed by the Minister of Justice when implementing cost-of-living adjustments for prosecutors and deputy directors. I deal with the legislative purpose for amending the old section 18(1) of the NPA Act in greater detail later in the judgment.
- [41] Whether or not section 18(1)(b) empowers the Minister to make a determination of the cost-of-living adjustments for prosecutors and DDPPs is immaterial. What matters is that, at the end of the day, prosecutors and DDPPs must receive the same cost-of-living adjustments that the Minister of Public Service and Administration determines for legally qualified personnel in the Public Service.
- [42] Crucial to the interpretative exercise is the meaning that should be attributed to the words "legally qualified personnel in the Public Service". Construed in the context of section 18 as a whole, it is clear that this term contemplates legally qualified personnel of different ranks and grades in the Public Service, whose salary scales may differ. Section 18(1)(b) must be read in the context of section 18 as a whole and not in isolation.
- [43] As pointed out earlier, section 18(1)(a) empowers the Minister of Justice to determine the salary scale of deputy directors and prosecutors based on their rank and grade. This provision not only distinguishes between deputy directors and prosecutors but also recognises that they are employed at different ranks and grades, which is relevant to the determination of the salary scale at which they are to be remunerated. This is apparent from the words "subject to the provisions of this section, any Deputy Director or Prosecutor shall be paid a salary determined from time to time for his or her rank and grade".
- [44] The rank, grade and scale distinction is maintained in section 18(1)(b) which reads: "[c]osts-of-living adjustments of the scale determined by the Minister in terms of paragraph (a) shall be effected in accordance with the

cost-of-living adjustments determined for legally qualified personnel in the Public Service". The cross-referencing in subsection (1)(b) back to subsection (1)(a) is crucial in maintaining the distinction for purposes of determining the cost-of-living adjustments for prosecutors and deputy directors. In other words, cost-of-living adjustments may differ depending on the rank and grade, and of course seniority of DDPPs and prosecutors. Section 18(2) also maintains this distinction in providing that "[d]ifferent categories of salaries and salary scales may be determined in respect of different categories of Deputy Directors and prosecutors".

- [45] Cost-of-living adjustments would likewise differ for different categories of legally qualified personnel, based on rank, grade and seniority in the Public Service. There is nothing in the text of section 18 that requires the cost-of-living adjustments of DDPPs and prosecutors in the NPA to be the same. Nor does section 18 contemplate the cost-of-living increase of senior legal personnel and their subordinates in the Public Service to be the same. That the text of section 18 does not refer to the "SMS dispensation", is not decisive for purposes of determining cost-of-living adjustments of deputy directors and prosecutors. This is because section 18 read as a whole retains the distinction between prosecutors and deputy directors and maintains the relevance of rank and grading and, axiomatically, seniority to such determinations. As is further illustrated below, this is a sensible, business-like construction of section 18(1)(b) of the NPA Act in its context.
- [46] The Public Service maintains the distinction between SMS members and their subordinates. The Public Service employs legally qualified personnel at the SMS level (appointed at levels 13-16) and non-SMS levels (appointed at levels 1-12 or the OSD level). Senior Management in the Public Service is governed by the SMS Dispensation. For example, Directors of Legal Services in the Public Service are legally qualified and form part of Senior Management.
- [47] Their terms and conditions including matters of recruitment and selection, discipline, etcetera, are determined in terms of the SMS Handbook. This

notwithstanding, the Minister of Public Service and Administration determines or approves the cost-of-living adjustments for legally qualified personnel in the Public Service who form part of Senior Management, such as Directors and Chief Directors of legal services.

- [48] Historically, the NPA has also maintained the distinction between members of Senior Management and their subordinates. Deputy Directors and Chief Prosecutors in the NPA are appointed at levels 13 to 16 and are part of Senior Management, whilst prosecutors are appointed at levels 9 to 12 and form part of the OSD. The appellants are all appointed at level 14 in the NPA. Chief Directors of legal services in the Public Service are appointed at the same level. Senior Management posts and salary levels at the NPA are thus equivalent to SMS members in the Public Service which include legally qualified personnel at Senior Management level. The appellants have, as such, always received annual salary increases on the basis of what has been paid to senior management in the Public Service such as Directors and Chief Directors.
- [49] The appellants, however, argue that the distinction between Senior Management and their subordinates (such as prosecutors) appointed at levels 1 to 12 and covered by the OSD is irrelevant. This submission is unfounded, because the DPSA Circulars upon which they rely as being directly applicable to them, also maintain the fundamental distinction between legally qualified personnel in the Public Service employed at Senior Management level and their subordinates employed at the OSD level.
- [50] Since section 18(1)(b) contemplates that Deputy Directors and prosecutors are to receive the same annual salary increases as determined by the Minister of Public Service and Administration for legally qualified personnel in the Public Service, that regime must apply equally to deputy directors and prosecutors employed by the NPA. To the extent that the annual salary increments, as determined by the Minister of Public Service and Administration in the DPSA Circulars, apply to employees at levels 1 to 12

and legally qualified personnel at the OSD level in the Public Service, the same increments would apply to prosecutors at OSD level in the NPA who are of equivalent rank and grade. It is important to bear in mind that the terms and conditions of employment of this category of employee in the Public Service is determined through collective bargaining under the PSCBC which expressly excludes Senior Management.

- [51] Section 18(1) of the NPA Act contemplates that deputy directors in the NPA employed at Senior Management level must receive the same salary increments **as** determined by the Minister of Public Service and Administration for legally qualified personnel employed at Senior Management levels in the Public Service. As already alluded to, this is what has occurred in practice since the amended section 18 of the NPA Act came into force in 2012.
- [52] Read in context, the term "legally qualified personnel" as appears in the phrase "in accordance with cost-of-living adjustments determined for legally qualified in the Public Service in section 18(1)(b) of the NPA Act", must also be read within the contextual framework of the Public Service Act and the SMS Handbook which maintains the distinction between SMS members and their subordinates for the determination of salary adjustments in the Public Service. To do otherwise, would be to ignore the entire contextual framework for the determination of cost-of-living adjustments in the Public Service.
- [53] The legislative purpose for amending section 18(1) of the NPA Act is set out in the Memorandum on the Objects of the Judicial Matters Amendment Bill, 2012 (Memorandum) as follows: "[c]ause 9 [of the JMA Act] seeks to do away with the cumbersome and time-consuming consultation process in respect of cost-of-living increases of Deputy Directors of Public Prosecutions and prosecutors in terms of [the old] section 18 of the NPA Act, whilst simultaneously retaining the existing consultation process when the Minister determines the salary structures of these personnel, should it become necessary to have such structures reviewed".

- [54] In this regard, the Memorandum specifically recognised that “[a]lthough the Minister of Public Service and Administration and Finance may agree to the proposed salary determinations in terms of [the old] section 18(1) of the NPA Act, the process of consultation required by the Act takes time and results in prosecutors receiving their salary increases long after the increases for public servants have been implemented. The consultation process is cumbersome and every year there is great concern, uncertainty and unhappiness regarding the situation.”
- [55] The Memorandum also states, that: “[f]urthermore the Occupational Specific Dispensation for legally qualified personnel in the Public Service was recently introduced and was determined by the Minister, in terms of section 18(1) of the NPA Act, to be applicable to Deputy Directors of Public Prosecutions and prosecutors. As a result, Deputy Directors of Public Prosecutions and prosecutors are now on the same scale that applied to legally qualified personnel in the Public Service.”¹³
- [56] The appellants submit that this paragraph clearly expresses the intention of the legislature to link the cost-of-living increases of DDPPs to the OSD for legally qualified personnel in the Public Service and not the SMS Handbook. Contrary to what they averred in their founding affidavit, the appellants argue that they were never appointed to Senior Management but were rather appointed into LP10 positions created in terms of the OSD Dispensation. They point out that “[o]ne of the objectives of the OSD was to introduce an occupational specific remuneration and career progression system for “legally qualified professionals” as defined by the Minister, being specialists in the legal profession who have gained at least 10 years active legal court experience and whose post require active involvement in

¹³ On 2 December 2010, the Minister of Justice determined an “Occupational Specific Dispensation and second phase translation for prosecutors as per Schedule with effect from 1 July 2007. See Government Gazette No. 33826, GN 1146 of 2 December 2012.

litigation and work.”¹⁴ The appellants accordingly contend that the respondents’ classification of DDPPs as “senior management” is wrong, but in any event, irrelevant to the interpretation of section 18(1) of the NPA Act. They argue that the cost-of-living adjustments which the NPA has applied to them is determined in terms of the SMS Handbook applicable to SMS personnel in the Public Service and not to legally qualified personnel in the Public Service.

- [57] In response, the respondents explain that the appellants have not been formally appointed into LP10 positions created in terms of the OSD as the actual implementation for DDPPs was left to the Department of Justice and Correctional Services and the NPA, but has not been done to date.¹⁵ As things, therefore, stand, no OSD posts exist in the NPA for DDPPs but only for prosecutors.
- [58] While it is permissible for the court to have regard to the Memorandum on the objects of the JMA Act on which the appellants rely, it cannot override the plain text of section 18 which retains the distinction between senior management and their subordinates by use of the words “rank and grade”, as well as the distinction between deputy directors and prosecutors as separate categories. Properly understood, the sole purpose for amending

¹⁴ Legal Opinion of Adv. G Nel to Acting CEO, NDPP Adv. Karen van Rensburg, dated 2 April 2013 on the question of whether DPSA Circular 2 of 2013 and consequently the 6.6% cost-of-living adjustment is applicable to DDPPs in the NPA.

¹⁵ The question of the applicability of the OSD structure of remuneration to posts held by DDPPs and Chief Prosecutors in the NPA is the subject of two separate disputes: a promotion pending in the PSCBC and another that was instituted in the High Court after the institution of the review application in this matter. In the application before the High Court, the NPA contended that the court did not have jurisdiction to adjudicate the matter because the PSA’s application was a quintessential labour dispute which was to be processed through the mandatory procedures set out in the Labour Relations Act. The High Court dismissed the jurisdictional point and went on to hold that the PSA was entitled to the relief of specific performance, and declared that the NDPP’s approval regarding the implementation of the OSD was lawful and enforceable and had to be complied with. On appeal to the SCA, the majority held that the High Court should have struck the matter from the roll for want of jurisdiction.

section 18(1) of the NPA Act was to jettison the cumbersome consultation process required in terms of the old section 18(1) and not to obliterate the different regimes applicable for cost-of-living adjustments as they apply in the Public Service. While the Memorandum recognises that the OSD for legally qualified personnel in the Public Service was introduced and was determined by the Minister of Justice, in terms of the old section 18(1) of the NPA Act, to be applicable to DDPPs, this was not the legislative purpose of the amended section 18(1) of the NPA. Nor was its purpose to rectify the salary regimes applicable to the NPA.

- [59] To the extent that section 18(1)(b) contemplates that the prosecutors and deputy directors in the NPA will receive the same salary increases as determined by the Minister for Public Service and Administration for legally qualified personnel in the Public Service, the NPA has complied with this obligation by according prosecutors exactly the same salary increases as determined by the Minister of Public Service and Administration in terms of the DPSA Circulars for legally qualified personnel in the Public Service appointed at non-SMS or OSD levels since 2013.
- [60] Equally, the NPA has since 2013 accorded DDPPs salary adjustments which are equivalent to the salary adjustments which the Minister of Public Administration has determined for legally qualified personnel employed at Senior Management level in the Public Service.
- [61] The appellants are employed at the Senior Management level in the NPA. Their grievance was lodged with the Public Service Commission in September 2016. They accept that it was lodged in terms of the Senior Management Grievance Procedure. Despite their arguments to the contrary, the appellants expressly state in their founding affidavit that they are part of Senior Management in the NPA. They also accept that the NPA has implemented cost-of-living adjustments for DDPPs in accordance with the cost-of-living adjustments for members of Senior Management employed in the Public Service since 2013, which is governed by the SMS Dispensation.

[62] The DPSA Circulars which are pivotal to the appellants' case do not apply across the board to all legally qualified personnel in the Public Service. As already pointed to, these DPSA Circulars are only applicable to legally qualified personnel in the Public Service appointed at salary levels 1 to 12, or at the OSD level. They pertinently exclude legally qualified personnel employed at the Senior Management level (13 to 16) in the Public Service whose terms and conditions are governed by the SMS Handbook. These DPSA Circulars, therefore, have no application to DDPPs in the NPA.

[63] In the final analysis, it is clear that the Minister of Justice and the NPA have acted lawfully by paying the appellants cost-of-living adjustments comparable to SMS members in the Public Service since 2013, and in doing so have complied fully with section 18(1) of the NPA Act.

[64] For all these reasons, the appeal falls to be dismissed.

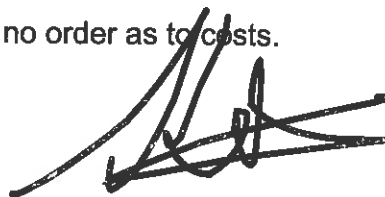
Costs

[65] Neither party seeks costs against the other in both the appeal and cross-appeal.

Order

[66] In the result, I make the following order:

1. The appeal is dismissed with no order as to costs.
2. The cross-appeal is dismissed with no order as to costs.



KATHREE-SETILOANE AJA

Waglay JP and Coppin JA concurring.

APPEARANCES:

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Instructed by Messrs Ntshebe Attorneys

FOR THE RESPONDENTS: F A Boda SC with S Tilly
Instructed by State Attorney Pretoria

LABOUR APPEAL COURT