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(1) REPORTABLE: YES/NO.
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(3) REVISED.

16 FEB 2023
DATE

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THE JUDICIARY · REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR199/2021

In the matter between:

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	**Applicant**
and	
GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL	**First Respondent**
M PATEL N.O.	**Second Respondent**
PSA OBO MAREE AND OTHERS	**Third Respondent**

Heard: 8 July 2022

Delivered: 16 February 2023

JUDGMENT

SASS, AJ

Introduction

[1] This is an application to review and set aside the Arbitration Award of the second respondent under the first respondent's case number GPBC 824/2014 dated 15 December 2020 and the Variation Ruling dated 22 January 2021 in respect of the Arbitration Award.

[2] The Arbitration Award relates to an interpretation and/or application of a collective agreement dispute under the auspices of the first respondent. In particular, the second respondent was required to determine whether the applicant correctly interpreted and/or applied Resolution 1 of 2007 read with Resolution 1 of 2008 (the Resolution/Collective Agreement), by translating various members of the third respondent, being eight senior family advocates [Advocate Maree, Advocate Leshaba, Advocate Ndoni, Advocate Dengler, Advocate Khumalo, Advocate Govender, Advocate Molokwane and Advocate Parker ('the members of the third respondent')] to LP8 instead of LP9.

[3] The cases of Advocate Parker and Advocate Govender are distinguishable from the cases of the other six members of the third respondent as:

3.1 Advocate Maree, Advocate Leshaba, Advocate Ndoni, Advocate Dengler, Advocate Khumalo and Advocate Molokwane's entitlement/non-entitlement to translation in terms of the Resolution/Collective Agreement turned on whether there are translation keys for LP9 in the Resolution/Collective Agreement (six of the eight members of the third respondent); whereas

3.2 Advocate Parker and Advocate Govender's entitlement/non-entitlement to translation in terms of the Resolution/Collective Agreement turned not only on whether there are translation keys for LP9 in the Resolution/Collective Agreement or not, but also on them being appointed after the commencement date of the Resolution/Collective Agreement. They were appointed after the commencement date of the

Resolution/Collective Agreement pursuant to a recruitment process as contemplated by the Public Service Act[1] (PSA) whereas the other six members where already appointed by the time of the commencement of the Resolution/Collective Agreement.

Preliminary issues

[4] The review record ought to have been filed on or before 3 May 2021. On or about 28 April 2021, and in accordance with clause 11.2.3 of the Practice Manual of this Court, and before the sixty-day period as referred to in clause 11.2.3 had lapsed to file the record, the applicant approached the third respondent to seek consent or an extension of time for the filing of the review record. The review record was not filed on or before 3 May 2021.

[5] On or about 4 May 2021, the third respondent informed the applicant of its refusal to grant such consent and that the applicant was required to apply for an extension of time to the Judge President (which application the third respondent said it would oppose). The applicant then applied for condonation in respect of the late filing of the review record. The third respondent opposed the condonation application.

[6] Where a review record has not been filed within the prescribed period, the applicant will be deemed to have withdrawn the review application unless the applicant during the prescribed time period requests the third respondent's consent for an extension of time and such consent is given. If the consent is refused, the applicant is required to apply for an extension of time to the Judge President and the Judge President will then allocate the file to a judge for a ruling, to be made in chambers, for an extension of time that the applicant should be afforded to file the record.

[7] The applicant instead applied for condonation (as described above) and did not pursue the application process as outlined in paragraph 11.2.3 of the

[1] No. 103 of 1994.

Practice Manual. Accordingly, no ruling was made extending the time for the applicant to file the review record.

[8] Notwithstanding the above, and at the commencement of proceedings when the matter was heard, the parties agreed that to the extent that the review application may have been deemed to be withdrawn by the applicant, the review application was revived by consent and that this Court should determine the review application. In effect, this agreement from the side of the third respondent amounts to the withdrawal of its refusal to grant an extension of time and consenting to the extension of time retrospectively and/or withdrawing its opposition to the condonation application. There is therefore no need for me to consider the condonation application or any application for the revival of the review application. It is in the interests of justice and all parties for me to determine the review application. I do so below.

[9] The parties also engaged in a process to reconstruct a portion of the review record to ensure that the record was sufficiently complete. The parties agreed that the review record is sufficiently complete for a full ventilation of the review application. I am satisfied that the review record is sufficiently complete to determine the review application.

Background

[10] On or about 7 February 2022, GPSSBC Resolution 1 of 2008 was signed by organised labour and the State - an agreement on the implementation of an Occupational Specific Dispensation (OSD) for legally qualified categories of employees.

[11] Subsequent to the adoption of the OSD, the eight members of the third respondent were translated and/or appointed to Family Advocate Grade 2 (being OSD LP8) by the Department of Justice and Constitutional Development (the Department).

[12] On or about 3 April 2014, the third respondent referred an interpretation and/or application of a collective agreement dispute to the first respondent, in relation to the Resolution/Collective Agreement, seeking:

12.1 a proper interpretation and/or application of Resolution 1; and further that

12.2 the eight members of the third respondent be translated to LP9 retrospectively from 1 July 2007 (having been translated to LP8 instead by the Department.

[13] On or about 7 April 2014, the dispute was referred to conciliation. On or about 13 May 20214, a certificate of outcome of dispute was issued indicating that the interpretation and/or application of a collective agreement dispute remained unresolved. On or about 3 July 2015, the arbitration proceedings commenced.

[14] On or about 21 October 2015, an arbitration award was issued. The arbitration award translated the eight members of the third respondent to LP9 retrospectively from 1 June 2007. The applicant applied to this Court to review and set aside the arbitration award.

[15] On or about 31 January 2018, this Court dismissed the applicant's review application (i.e., the first review application).

[16] The applicant appealed against the dismissal of the first review application and on or about 5 September 2019, the appeal was heard by the Labour Appeal Court. That Court raised a concern in relation to whether it could properly consider the appeal and the appeal record as no evidence had been led at arbitration – the parties had agreed to proceed on a stated case basis at the arbitration.

[17] The parties then agreed that the first arbitration award be reviewed and set aside, and the matter be referred back to the first respondent for an arbitration *de novo*. That arbitration proceedings, which culminated in the Arbitration

Award which is the subject of this review application, ran for ten days between 27 November 2019 and 13 November 2020.

[18] On or about 15 December 2020, the second respondent issued the Arbitration Award (i.e., the second arbitration award in this matter and the one which is the subject of this review application).

[19] On or about 22 January 2021, the second respondent issued the Variation Ruling. On or about 1 February 2021, the applicant filed this review application.

Arbitration proceedings and the evidence that served before the second respondent

[20] During the arbitration proceedings, the members of the third respondent contended, *inter alia*, that:

20.1 they were incorrectly translated to LP-8 on the basis that clause 4.1.3 of the Resolution/Collective Agreement (Work streams in the OSD)[2] clearly refers to Senior Family Advocates in the work steam as LP-9;

20.2 under this notion, translation was only subject to the employee meeting the appointment requirements and performing the functions of the job; and

20.3 it was common cause that they met the appointment requirements and did perform the functions of the job (of Senior Family Advocates) as the applicant did not dispute this during the arbitration proceedings.

[21] The applicant contended, *inter alia*, the following during the arbitration proceedings:

21.1 the members of the third respondent were all placed on the salary scale of R369 000.00 on 1 July 2007 and were translated as per the OSD to R407 745.00 which is equivalent to the salary scale or notch LP8 Senior Family Advocate as per Annexure B to the

[2] Review Record: Volume 10, p33

Resolution/Collective Agreement, Part B: Translation of Family Advocate and Senior Family Advocate on Salary Levels 11 and 12;[3] and

21.2 the members of the third respondent could not state on which first phase salary scale they should be translated as there were no translation keys for LP-9.

[22] Ms Diteku, the Department's Chief Director: HR, made the following concessions during her evidence at the arbitration (as one of the applicant's witnesses):

22.1 Principal Family Advocates had all been translated to LP10 without norms or standard being published *[arguably therefore, norms or standard were not an absolute requirement for translation].* [4]

22.2 The members of the third respondent all complied with the appointment requirements, performed the functions of Senior Family Advocates, and were able to perform the functions of the occupation group/post of Senior Family Advocates of LP9.[5]

22.3 The Resolution makes provision for Senior Family Advocates on LP9.[6]

22.4 The memorandum of 13 June 2013 was never implemented (notwithstanding the fact that it was put to all the members of the third respondent by the applicant's counsel during the arbitration that the post "Senior Advocate' was only created in 2013).[7]

22.5 All the members of the third respondent were appointed as Senior Family Advocates in terms of the previous dispensation and that they were all performing the functions of a Senior Family Advocate in terms of the new dispensation.[8]

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[3] Review Record: Volume 10, p81
[4] Review Record: Transcript of Arbitration Proceedings – Volume 9; page 26 line 20 to page 37 line 25
[5] Review Record: Transcript of Arbitration Proceedings – Volume 9; page 23 line 6 to page 24 line 11
[6] Review Record: Transcript of Arbitration Proceedings – Volume 9; page 21 line 1 to 14
[7] Reconstructed Review Record: Ms Diteku's evidence at Volume 15, page 2, paragraph 4 (where it is referred to as page 212 of Bundle B of the bundles in use at the arbitration)
[8] Review Record: Transcript of Arbitration Proceedings – Volume 9; page 44 from line 9 to 13 and page 41 line 4 to 25

[23] Ms Diteku also testified as follows:

23.1 Norms and standards were required for the members of the third respondent to be translated, but she could not show where in the Resolution/Collective Agreement it was first required for norms and standards to be created.[9]

23.2 The functions that the members of the third respondent were performing, and their years of experience would have been the determining factors in deciding where they had to be translated to.[10]

[24] Ms Nkosi, the DPSA Director in Remuneration Management) testified as follows at the arbitration (as one of the applicant's witnesses):

24.1 The Minister's prescribed appointment requirements are the norms and standards. [11]

24.2 She conceded that Resolutions will have preference to DPSA circulars, and she agreed that nowhere in the Resolution/Collective Agreement is there a requirement for norms and standards to be created prior to translation or appointment of a Senior Family Advocate to LP9. [12]

24.3 It was the post and the function of that post that had to be translated.[13]

24.4 In being asked to explain the difference between salary scales and the OSD band, Ms Nkosi testified as follows:

"MS NKOSI: Okay, in OSD band it provides that, for an example, if you are in a production /eve/, the OSD band for a Family Advocate, it is LP7 and LP8, however, on that band there is salary scales attached.

MR TRUTER: Okay, so the LP is just a categorisation, am I right, LP8 and LP9 and ... [indistinct] to each one of those ... [indistinct] categories, but each of their own salary scales, am I right?

[9] Review Record: Transcript of Arbitration Proceedings – Volume 9; page 27 line 11 to page 37 line 25
[10] Review Record: Transcript of Arbitration Proceedings – Volume 9, page 17 line 7 to page 19 line 15
[11] See typed record of proceedings at Volume 8 page 5 from line 16 to page 7 at line 5
[12] See typed record, Volume 8 from page 11, line 8 to page 12, line 12
[13] See typed record of proceedings in Volume 8 at page 27 from line 10 to line 15

MS NKOSI: You have got LP7 and LP8 and under the LP7 we have salary notches or scales, the same as with LP8, we have got LP [intervene]

MR TRUTER. Yes, you are saying the same thing. So that the LP is just a name, it is name of a category, am 1 right?

MS NKOSI: It is an OSD band, as prescribed by -[indistinct].

MR TRUTER: Yes, it is the name and then each one of that different LP bands have their own salary scales?

MS NKOSI: That is correct. "[14]

24.5 With reference to numbered clause 13.2 of the Resolution/Collective Agreement Ms Nkosi conceded that employees had to be translated to the appropriate salary scales in accordance with the posts that they occupied at the time of signing of the Resolution/Collective Agreement. In this regard she testified as follows:

"MR TRUTER: Ma'am, I am looking at paragraph 30.2 (sic), I'm going to deal with the rest now, just answer my question in respect of 13.2, please. 13.2 states, employees will translate with the appropriate salary scales in accordance with the post that they currently occupy.

MS NKOSI: That is correct.

MR TRUTER: Which posts did these advocates currently occupy at the time of signing this agreement?

MS NKOSI: As per that letter you have shown me it says they were Senior Family Advocates.

MR TRUTER: They were appointed as Senior Family Advocates and they were supposed to translate to the appropriate salary scales in accordance with the post they were occupying you agree with me?

MS NKOSI: As per the collective agreement, yes, I agree.[15]

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[14] See typed record of proceedings Volume 8 at page 32 from line 8 to page 33 at line 2

[15] See typed record of proceedings, Volume 8 at page 33, line 12 to page 34, line 11

24.6 *She admitted that there are no translation keys for LP10, yet the Principal Family Advocates have been translated to LP10.*[16]

24.7 She agreed that the Resolution/Collective Agreement created the workstream of Senior Family Advocate, doing Senior Family Advocate work, having the qualifications of a Senior Family Advocate and a Senior Family Advocate OSD band LP9.[17]

24.8 She conceded that it is not a requirement of the Resolution/Collective Agreement for a post to be "post based.[18]

24.9 She conceded that the Human Resources Department of the applicant had to implement by stating the following:

"MS NKOSI: Yes, if you are appointed as a senior, when we recognise your experience, we would place you here.

MR TRUTER: Yes, who placed them there, I am just interested, because remember, we had testimony about in process and where everybody was considered, whether or not they will be translated to LP8, of course there would have been some sort of procedure in the department, am I right?

MS NKOSI: Yes sir, the department should verify [intervene]

MR TRUTER: Yes, should the department verily, ma'am?... [indistinct], sorry?

MS NKOSI: When phase 2 was implemented, it was implemented manually, it was not implemented programmatically like phase 1, because department had to go through the profiles of the individual and look at the experience that they had before they can implement phase 2

MR TRUTER: I understand. So, who in the department would be tasked with this specific job

MS NKOSI: It is HR of the department"[19]

[16] See transcribed record of proceedings at Volume 8, line 22 to page 43 at line 11
[17] See typed record of proceedings at Volume 8, from page 43, line 19 to page 44, line 9
[18] See the typed record of proceedings, Volume 8 at page 47 from line 25 to page 48 at line 7 and page 49 at line 13 and 14
[19] See typed record of proceeding, Volume 8 at page 60 from line 5 to line 20. Also see page 61 of Volume 8 from line 17 to line 20

[25] Mr Humpel, the DPSA Deputy Director – Skill and Design / Business Process Organisation, testified as follows during the arbitration (as one of the applicant's witnesses):

25.1 For a post to be created you first must identify the need, then you define the tasks / job description. It gets measured against a time equivalent, the job is evaluated, i.e., salary level of that post is established, it is created and forwarded to recruitment to advertise.

25.2 The Department was still in the process of creating norms and standards of the post of Senior Family Advocate on LP9 (by the time that he gave evidence in 2019 during the arbitration) *but he was unable to explain how several LP-9 Senior Family Advocate posts had been advertised* and Senior Family Advocates had been appointed to those posts when norms and standards for those posts had not been created.[20]

25.3 If posts are not created, it will apparently not be on PERSAL. Mr Humpel failed to explain how it is possible that both Advocates Gounden and Urban's PERSAL printouts, reflect appointment as Senior Family Advocates on LP9, with the Senior Family Advocate LP9 post class code 82210, if the post had not been created. [21]

25.4 *He conceded that the Principal Family Advocates have all been translated to LP10 without norms and standards being published by the Minister.*

25.5 He failed to comment on the fact that there have already been two appointments on the posts of Senior Family Advocate LP9, prior to 2013.

25.6 *When requested to point out where in the Resolutions any reference is made for norms and standards to be determined by departments prior to post of Senior Family Advocate LP9 being created, he failed to assist.*

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[20] See advertisements in Volume 10 at pages 258 to 264 and 317, 321 to 324

[21] See the PERSAL printouts in Volume 10 at page 324B and 324E to — the prescribed post class code is as per the CSD, Volume 10 at page 127. See typed record of proceeding, Volume 8 from page 95, line 20 to page 96, line 11

25.7 He then conceded that the creation of posts rests with the department.[78]

[26] The material documentary evidence which served before and was considered by the second respondent included the following:

26.1 various extracts from the Resolution/Collective Agreement (paragraphs 4.1.2, 4.1.3, 4.2, 13.1, 13.2 and 13.3.2)[22];

26.2 various extracts from Annexure A to the Resolution/Collective Agreement (pages A6, A7 and A8 - marked in manuscript)[23];

26.3 various extracts from Annexure B, Part 2 to the Resolution/Collective Agreement (pages B1 to B4 – marked in manuscript)[24];

26.4 various extracts from OSD: Legally Qualified Professionals (Determined by: The Minister for Public Service and Administration) – pages 42 to 44[25]; and

26.5 appointment letter and service record enquiries in relation to Advocate Gounder and Advocate Urban[26].

The Arbitration Award and Variation Ruling

[27] The second respondent found that all the members of the third respondent should be translated to LP9 by the Department in accordance with the first phase of the translation process with the only distinction between them being that Advocate Govender would be translated from 01 July 2008 whereas Advocate Parker would be translated with effect from 1 April 2011. The remainder of the members of the third respondent were to be translated retrospectively with effect from 1 July 2007.

[22] Review Record: Volume 10; pages 32, 33, 35 and 36
[23] Review Record: Volume 10; pages 43 to 46
[24] Review Record: Volume 10; pages 78 to 81
[25] Review Record: Volume 10; 159 to 161
[26] Review Record: Volume 10; pages 324A to 324E.

[28] The second respondent's reasoning for the translation of the members of the third respondent to LP9 was based on the following three principal grounds, namely:

28.1 that in terms of Clause 4.3 of the Resolution/Collective Agreement, a senior family advocate falls under the Advanced Production Level LP9 and should, consequently, be translated to LP-9;

28.2 that a family advocate and senior family advocate perform different functions as demonstrated in the documents submitted during the arbitration proceedings; and

28.3 although the Department's evidence was that there were no LP-9 posts because the norms and standards had not yet been established, the Resolution itself does not make provision for the establishment of the norms and standards for the LP-9 posts.

Grounds of review and basis for opposing review

The applicant's grounds of review

[29] I do not agree with the third respondent's assessment that the applicant limited its review grounds to the basis of the relief as sought in paragraph 2a and paragraph 2b of its Notice of Motion.

[30] The applicant's grounds of review are clearly set out in its Founding Affidavit[27] and goes further than that limited basis.

[31] The applicant contends that the Arbitration Award ought to be reviewed and set aside as the second respondent committed a gross irregularity *alternatively* a misconduct in relation to the duties of a commissioner as an arbitrator by:

31.1 committing a material error of law in failing to find that where a post to which an applicant wishes to be translated does exist on the

[27] Founding affidavit, p 21, para 19.

establishment of the Department, the first phase translation in terms of the Resolution/Collective Agreement cannot take place (first ground);[28]

31.2 misdirecting herself alternatively misconstrued the issues before her by having regard to the contents of the determination of the Minister of Public Service and Administration (DPSA) [regarding the functions of senior family advocates] in finding that a family advocate and a senior family advocate perform different functions whereas such contents were not only part of a draft proposal by the DPSA but also was not of any provision of the Resolution/Collective Agreement (second ground);[29]

31.3 issuing an award which is incapable of execution in that the Department would not be able to undertake the second phase translation process without a definite specification of the LP9 notch and/or salary scale on which an individual family advocate ought to have been placed during the first phase translation process [differently put, the second respondent ruled that the Department must proceed to implement the second phase translation process without making any ruling on where exactly on the salary scale or notches of LP-9 the respective members of the third respondent ought to have been translated to] (third ground);[30]

31.4 ignoring or failing to take into account that the Resolution/Collective Agreement contains no translation keys for LP9 in respect of the translation process for the first phase, differently put, that without translation keys for LP-9, translation to LP-9 in respect of the first phase is not only impracticable but impossible;[31] - The applicant further contended in this regard that the second respondent in deciding (in the Arbitration Award) that the members of the third respondent should be translated to LP-9 and not to LP-8 (as the applicant had translated them):

31.4.1 conflated an OSD Band of LP-9 for senior family advocates with the translation process; and

[28] Founding affidavit, p 21, para 19.1.
[29] Founding affidavit, p 21, para 19.2.
[30] Founding affidavit, p 21, para 19.3.
[31] Founding affidavit, p 21, para 19.4.

31.4.2 failed to take into account that the Resolution/Collective Agreement does not provide that those senior family advocates who were appointed as such before 2007 should be translated to LP-9 (i.e., no such provision exists in the Resolution). In this regard -

31.4.2.1 The applicant simply contended that in terms of the Resolution/Collective Agreement, the Senior Family Advocates (as they were called before July 2007) and who were at Salary Level 12, translate to the appropriate OSD notch as per the table set out in Part B of the Resolution[32]. Differently put, the applicant contended that Part B of the Resolution makes provision for the translation of both the family advocates and senior family advocates (including members of the third respondent herein) as they were known before July 2007.

31.5 committing a material error of law in failing to find that where the drafters of a collective agreement have omitted or failed to make provisions for certain employees, any forum interpreting the provisions of such an agreement must desist from filling such lacuna by making a contract between the parties but should rather refer such a defective collective agreement to the drafters themselves for further deliberation and agreement, alternatively, making the contract for the parties.[33]

[32] As the third respondent pointed out, the applicant did not file a supplementary affidavit and its replying affidavit does not take its grounds of review any further. New/further grounds of review can of course not be validly raised by the applicant in its heads of argument.

The third respondent's basis for opposing the review grounds

First review ground

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[32] See: Volume 14 & 15
[33] Founding affidavit, p 21, para 19.5.

[33] The third respondent contends that this ground does not render the Arbitration Award susceptible to review because the Resolution/Collective Agreement did not require posts to be created. It was the existing post of Senior Family Advocates that had to be translated to that of Senior Family Advocates on LP9.[34] The second respondent decided the following in this regard in the Arbitration Award:

> "[54] Clause 13.2 of the Resolution states that 'employees will translate to the appropriate salary scales in accordance with the posts they currently occupy'. Clause 13.3.2.1: the 1st phase refers to 'This phase requires a minimum translation to the appropriate salary scales attached to the posts (and grades in respect of production levels). This is contained in annexure "B".[35]

Second review ground

[34] The third respondent contends that this ground does not render the Arbitration Award susceptible to review as this version was never put to the witnesses of the third respondent when they gave evidence. It was submitted that in terms of *DENOSA v Western Cape Department of Health and Others*[36], an arbitrator is entitled to take any directive into consideration. The OSD is a determination/guideline by the Minister of Public Service and Administration to implement the Resolution/Collective Agreement.[37] The second respondent did not deal in the Arbitration Award with the Directive of the Minister but was certainly entitled to take it into consideration in interpreting the Resolution/Collective Agreement.

Third review ground

[35] This ground is similar to the fourth review ground. This ground in fact relates to the limited review grounds referred to above, having regard to paragraphs

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[34] Opposing affidavit, p 81, para 35.
[35] Arbitration Award, p 30, para 54.
[36] ZALAC 72 (12 May 2016) (*DENOSA*).
[37] Opposing affidavit, p 81, para 36.

2a and 2b of the applicant's Notice of Motion, where the applicant contends that there are no translation keys. The third respondent contends that this ground does not render the Arbitration Award susceptible to review as it was specifically agreed that the members of the third respondent had to be translated to the appropriate salary scale in accordance with the posts that they occupied at the relevant stage, being 7 February 2008, the date upon which the Resolution/Collective Agreement was signed. The third respondent referred to Phase C of the OSD, where it is indicated that employees must be translated from the current post to the corresponding post on the Department's revised post establishment.[38] The third respondent submits that the second respondent interpreted all the relevant clauses and would not have granted the relief in terms of the Arbitration Award if it was not capable of execution.

Fourth review ground

[36] This ground is similar to the third review ground. The third respondent specifically addressed the alleged absence of translation keys as follows (as set out in its opposing affidavit):

> "11.8. Translation will be subject to:
>
> 11.8.1. The employee meeting the appointment requirements (i.e., possessing the relevant qualification(s) prescribed years of experience, etc.); and
>
> 11.8.2. The employee must perform the functions of the post (jobs).[39]
>
> 11.9. It was specifically agreed that the employees will translate to the appropriate salary scales in accordance with the posts that they occupied at that stage, being as on 7 February 2008, the date upon which the Resolution 1 of 2008 was signed.[40]
>
> 11.10. Translation was to be done in two phases, the first phase requiring a minimum translation to the appropriate salary scale attached to the

[38] Opposing affidavit, pp 81 and 82, para 37.
[39] See translation measures in Volume 10 at p 35, para 13.1.
[40] See Volume 10 at p 35, para 13.2.

post (and grade in respect of production levels), as contained in Annexure "B" to Resolution 1 of 2008.[41]

11.11. In terms of the first phase translation the appropriate salary scales, the occupational groups/post of Senior Family Advocate is as set out in Annexure "B" to the Resolution.[42]

11.12. It is important to point out at this stage that numbered paragraph 13.3.2.1 describing how first phase translation is to be done does not at all indicate to which salary level the post of Family Advocate has to be translated to.[43]

11.13. In as far as the discrepancy on page 81 is concerned, whereon reference is made to Senior Family Advocate on salary level LP8, it is the Third respondent's case that this is clearly an error as the work streams created in terms of numbered paragraph 4.1.3 of Resolution 1 of 2008 does not make provision for Senior Family Advocates to be appointed on LP8. It only provides for Senior Family Advocates on OSD band LP9.

11.14. It is further the Third Respondent's case that the reference to salary level LP8 on page 81 of the Arbitration Bundle is irrelevant because numbered paragraph 13.3.2.1 does not prescribe a first phase translation to the specific salary level. On a proper interpretation of the Resolution as a whole and specifically the paragraph itself, its purpose is to provide for the salary scale to which the post must be translated to.

11.15. The second phase translation relates to a recalculation of relevant experience obtained by a person, who occupies a post on a production level in the relevant legal category, based on full years' service/experience as on 31 March 2007.[44]

36.1 The third respondent presented evidence during the arbitration, that *inter alia* supports the version presented in its opposing affidavit as referred to above, although various witnesses referred to the issue of translation keys. Reference is specifically made to the undisputed evidence of the evidence of Advocate Govender:

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41 See Volume 10 at p 36, para 13.3.2.1.
42 See Volume 10 at p 81.
43 See Volume 10 at p 36.
44 See Volume 10 at p 6, para 13.3.2.2.

"MS GOVENDER: Yes, I was trying to say that you know you referred me to page 81. Page 81 according to the bundle it says: 'Senior Family Advocate to Senior Family Advocate'. And it says: 'LP8.'

But that is not correct. That is why I referred you to page 97 because 97 makes mention of Senior Family Advocate to Senior Family Advocate revised production grade LP9. And also if you allow me to, I will tell you why I say page 81 there is an error there with regards to the LP8. It should have been corrected to LP9. It should have been LP9. I will tell you why. If you look at page 33 of the bundle, makes reference to advance production LP9 Senior Family Advocate. And then page 45 of the bundle if you go to page 45 it also refers to LP9, Senior Family Advocate LP9. Then you get page 81 which I do not agree with the LOP8 there on page 81. And then page 97 makes reference to Senior Family Advocate to Senior Family Advocate LP9. And then also page 127 when you go to page 127 you will see Senior Family Advocate LP9. Page 127 of the bundle you will see Senior Family Advocate LP9. And then also in page 160 point 10 of the table it is Senior Family Advocate LP9. Reference to Senior Family Advocate LP. And then 229 of the bundle there is reference to Senior Family Advocate to Senior Family Advocate LP9. That is when I started referring you to page 97 to show you that Senior Family Advocates are referred to on LP9 and that page 81 there is a mistake there on page 81. You can only conclude that reference to Senior Family Advocate LP8 on page 81. I can conclude that that is a mistake it should have been LP9."[45]

Fifth review ground

[45] See Volume 6 at p 238, para 10 to p239 at para 14.

[37] The third respondent contends that this ground does not render the Arbitration Award susceptible to review in that the second respondent did not commit any error of law in that the Resolution/Collective Agreement is not ambiguous, and the second respondent did not fill any lacuna in the Resolution/Collective Agreement, but simply interpreted the Resolution/Collective Agreement. The second respondent relied on the interpretation of the Resolution/Collective Agreement and there was no need for the second respondent to fill any lacuna in the wording or meaning of the Resolution/Collective Agreement.

[38] Insofar as the situation of Advocate Parker and Advocate Govender is distinguishable from the other six members of the third respondent because they were appointed after the implementation of the Resolution/Collective Agreement, the third respondent submitted that it followed that if the members of the third respondent who were employed prior to the implementation of the Resolution/Collective Agreement are entitled to be translated to LP9, that the members who were employed after the implementation of the Resolution/Collective Agreement, are also entitled to be translated to level LP9 with effect from the date that those members were employed, as the purpose of the OSD is to provide the applicant with the ability to attract and retain a sufficient number of employees with required competencies.

[39] The third respondent submitted that the applicant failed to show that the Arbitration Award of the second respondent should be reviewed not only on the basis that the applicant failed to set out a factual and/or legal basis, but because the third respondent showed, with reference to the relevant document and evidence presented at the arbitration, that the third respondent's members are entitled to be translated to level LP9 in terms of the Resolution/Collective Agreement.

Applicable legal principles

Collective agreements

[40] The provisions of the Labour Relations Act[46] (LRA) in section 138(9) guide an arbitrator to give effect to any collective agreement where it states the following:

> "The commissioner may make any appropriate arbitration award in terms of this Act, including, but not limited to, an award –
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> 1. That gives effect to any collective agreement;
> 2. That gives effect to the provisions and primary objects to this Act;
> 3. That includes, or is in the form of, a declaratory order."

[41] In terms of the LRA therefore, an arbitrating commissioner has the power to direct how a collective agreement should be interpreted or applied and in appropriate circumstances to make an order that gives effect to the collective agreement.

[42] In *Western Cape Department of Health v Van Wyk and Others*[47] the Labour Appeal Court (LAC) provided the following guidance on how the interpretation and application of an OSD should be conducted:

> "[21] The arbitrator had the authority to determine, in the event of disagreement as to the correct interpretation of the OSD collective agreement by the parties, the interpretation and how the agreement should be applied. The managerial powers of the DG cannot, in my view, trump the statutory powers of the arbitrator when interpreting and applying the collective agreement.
>
> [22] In interpreting the collective agreement the arbitrator is required to consider the aim, purpose and all the terms of the collective agreement. Furthermore, the arbitrator is enjoined to bear in mind that a collective agreement is not like an ordinary contract. Since the arbitrator derives his/her powers from the Act he/she must at all times take into account the primary objects of the Act. The primary objects of the Act are better served by an approach that is practical to the interpretation and application of such agreements, namely, to promote the effective, fair and speedy resolution of labour disputes. In addition,

[46] No. 66 of 1995.
[47] (2014) 35 ILJ 3073 (LAC) (*Van Wyk*) at para 21 and 22.

it is expected of the arbitrator to adopt an interpretation and application that is fair to the parties."

[43] The LAC referred to the provisions of section 5(4) and section 5(6) of the Public Service Act which provides that:

> "[20] ... the appellant's reliance on the PSA does not take account of s 5(4) of the PSA which provides that:
> 'Any act by any functionary in terms of this Act may not be contrary to the provisions of –
> *(a)* Any collective agreement contemplated in item 15(i) of Schedule 7 to the Labour Relations Act; or
> *(b)* Any collective agreement concluded by a bargaining council established in terms of the said Act for the public service as a whole or for a particular sector in the public service.'
> And s 5(6) which provides that:
> (a) Any provision of a collective agreement contemplated in subsection (4), concluded on or after the commencement of the Public Service Amendment Act, 2007, shall, in respect of conditions of service of employees appointed in terms of this Act, be deemed to be a determination made by the Minister in terms of section 3(5).
> (b) The Minister may, for the proper implementation of the collective agreement, elucidate or supplement such determination by means of a directive, provided that the directive is not in conflict with or does not derogate from the terms of the agreement.'"[48]

[44] The Labour Appeal Court was satisfied that the arbitrator in the *Western Cape Department of Health* case considered what was required and stated that: (i) the arbitrator was alive to what was required of her; (ii) the arbitrator considered the aim and purpose of the OSD Collective Agreement; (iii) the arbitrator considered the evidence placed before her by the parties; (iv) the arbitrator was entitled to determine whether the interpretation of parties was

[48] *Van Wyk* (Ibid) at para 20.

incorrect and contrary to the spirit and purpose of the Collective Agreement; and (v) the arbitrator applied the fairness standard in the interpretation and application of the OSD Collective Agreement.[49]

[45] In *HOSPERSA obo Tshambi v Department of Health, KwaZulu Natal*[50] the LAC deals with the enforcement of a collective agreement and states *inter alia* the following:

> "Collective agreements are legally enforceable instruments. Any dispute over the interpretation or application (which would include enforcement) of a collective agreement is a rights dispute, a resort to power to settle differences is not permitted ..."

[46] In HOSPERSA reference is also made to, *inter alia, NUCW v Oranje Mynbou en Vervoer Maatskappy Bpk*[51] where the court stated the following:

> "Whether a dispute about the "application" of a collective agreement, referred to in section 24(1) of the Act, would include the enforcement of a collective agreement when it is breached, is a further question which needs to be decided. Enforcement of an agreement only becomes an issue when there is some form of non-compliance with that agreement. When a party wishes to enforce the agreement it would be, at least *inter alia*, because it believes the agreement is applicable to the party who is in breach thereof. Therefore a "dispute about the application of a collective agreement" (section 24(1) of the Act) applies to the situation where there is non-compliance with a collective agreement and one of the parties wishes to enforce its terms. Consequently, the CCMA, and not the Labour Court, should entertain disputes arising from the non-compliance with collective agreements."

[47] In HOSPERSA reference is also made to *John Grogan's work, Collective Bargaining*[52], where the following is stated:

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[49] See: *Van Wyk* (Id fn 48) at paras 23 and 24.
[50] (2016) 37 (ILJ) 1839 (LAC) (*HOSPERSA*) at para 20.
[51] [2000] 2 BLLR 196 (LC).
[52] (2007) Juta, Cape Town at p114.

"The dividing line between 'interpretation' and 'application' disputes may not always be absolutely clear. A dispute over the interpretation of a collective agreement exists if the parties disagree over the meaning of a particular provision. A dispute over the application of a collective agreement arises when the parties disagree over whether the agreement applies to or in a particular set of facts and circumstances. It is quite possible that both types of disputes may arise in the same case."

[48] In *DENOSA* the LAC dealt with the interpretation and application of an OSD for nurses and whether the employees have been correctly translated in terms of the OSD. The LAC extensively dealt with the proper approach to the interpretation of an OSD and confirmed that the relevant collective agreement had to be read together with directives *in order to glean the intended meaning.*[53]

[49] The LAC stated that there is a need to look beyond the OSD agreement and the translation table for a complete answer to the issue of translation. It stated that support for that proposition was to be found in the translation tables themselves in that matter[54].

[50] The LAC in *DENOSA*[55], with reference to the proper approach to interpretation, referred *inter alia* to the following:

"[32] Much reliance was placed by the parties upon the decision in Natal Joint Municipal Pension Fund v Endumeni Municipality (Endumeni) (with regard to the proper approach to the interpretation of the "OSD" document and, in particular, that the language of the document falls to be construed in the light of its context and the apparent purpose to which is directed as well as the material known to those responsible for its production. In his judgment, Wallis JA, after examining precedent with regard to the interpretation of legislation or documents, said at para 19: "All this is consistent with the 'emerging trend in statutory construction'. (Jaga v Dönges NO and Another, Bhana v

[53] See: *DENOSA* (Id fn 36) at paras 29 and 30.
[54] See: *DENOSA* (Id fn 36) at para 30.
[55] See: *DENOSA* (Id fn 36) at paras 32 and 33.

Dönges NO and Another 1950 (4) SA 653 (A) at 662G-663A). It clearly adopts as the proper approach to the interpretation of documents the second of the two possible approaches mentioned by Schreiner JA in Jaga v Dönges NO and Another, namely that from the outset one considers the context and the language together, with neither predominating over the other. This is the approach that courts in South Africa should now follow, without the need to cite authorities from an earlier era that are not necessarily consistent and frequently reflect an approach to interpretation that is no longer appropriate." See also DexGroup v Trust Co Group International (Pty) Ltd and Others 2013 (6) SA 520 (SCA) at para 16.

I remain uncertain as to whether or how these dicta have significantly changed the approach to the interpretation of a legal text. In *Coopers & Lybrand and Others v Bryant* Joubert JA referred expressly to the golden rule of interpretation and stated that:

'the correct approach to the application of the '*golden rule*' of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:

To the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the '*contract*'.'

[33] The difference in this approach from that articulated in Endumeni supra is not easy to determine. Of course, context is not a secondary consideration but is part of the very process required to resolve any linguistic difficulty. The words employed and the purpose of the speaker are inextricably linked. This follows inherently from the very concept of the language. In the same manner, the content of an ordinary conversation cannot, in general, be divined from the meaning of the sentences employed or even with the conversationalist's goals in saying what they did, so the content of a legal text cannot, in general, simply be determined by the ordinary or technical meanings of the sentences in the text or indeed with the policy goals motivating the drafting thereof."

[51] In the *DENOSA* case, the LAC also referred to the test for an Arbitration Award as fashioned in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[56] and the further elucidation in *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*[57] and quoted the following:

> "... A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s145(2)(a) of the LRA. From a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside but are only of any consequence if their effect is to render the outcome unreasonable."

[52] The LAC further stated the following:

> "To recap, Navsa AJ said in Sidumo at para 105, that the review powers in terms of s 145 '*must be read to ensure that administrative action by the CCMA is lawful, reasonable and procedurally fair.*' Given that the section must be interpreted to be in compliance with the Constitution, it would appear that the concept of the error of law is relevant to the review of an arbitrator's decision within the context of the factual matrix as presented in the present dispute; that is a material error of law committed by an arbitrator may, on its own without having to apply the exact formulation set out in *Sidumo*, justify a review and setting aside of the award depending on the facts as established in the particular case."[58]

[53] The threshold to be met in review applications is a test of reasonableness as established by the Constitutional Court in *Sidumo*. In respect of the reasonableness test, the question to be asked by the review court is whether

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[56] (2007) 28 ILJ 2405 (CC).
[57] (2013) 34 ILJ 2795 (SCA) at para 25.
[58] See: *DENOSA* (Id fn 36) at para 22.

the decision reached by the arbitrator is one that a reasonable decision-maker could not reach.

[54] In *Herholdt*[59] the Supreme Court of Appeal (SCA) emphasised the following regarding the review test established by the Constitutional Court in *Sidumo:*

> "That test involves the reviewing court examining the merits of the case in the round' by determining whether, in the light of the issues raised by the dispute under arbitration, the outcome reached by the arbitrator was not one that could reasonably be reached on the evidence and other material properly before the arbitrator....The reasons are still considered in order to see how the arbitrator reached the result. That assists the court to determine whether that result can reasonably be reached by that route. If not, however, the court must still consider whether, apart from those reasons, the result is one that a reasonable decision maker could reach in the light of the issues and the evidence".

[55] In *Herholdt*, the SCA then summarised the review test as follows:

> "In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii) the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside but are only of any consequence if their effect is to render the outcome unreasonable".[60]

[56] More recently, in *National Union of Mineworkers and Another v Rustenburg Platinum Mine (Mogalakwena Section) and Others*[61] the LAC stated that:

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[59] *Herholdt* (Id fn 57) at para 12.
[60] *Herholdt* (Id fn 57) at para 25.
[61] [2015] 1 BLLR 77 (LAC) at paras 26.

"A reasonable award is not necessarily a right or correct award. As long as it falls within the range of reasonable decisions that could be made based on the evidence before the decision-maker, there would be no reason to set the award aside. The reviewing court should always guard against substituting its views for those of the decision-maker. It is pre-eminently the task of the CCMA or Bargaining Council commissioners to determine the fairness or otherwise of the dismissal. Commissioners are not expected to give awards that are akin to judgments of the Supreme Court of Appeal or the Constitutional Court. Awards are not meant to be perfect or satisfactory in all respects. The mere fact that an award is unsatisfactory in one or more respects does not mean that it is unreasonable."

Review test

[57] As stated above, the test on review is well-established, and for an applicant to be successful, the Court must be persuaded that the award or the decision arrived at by the arbitrator is one that a reasonable decision-maker would not have made in the light of the material presented to him or her. The enquiry is whether the arbitrator properly applied her mind to the issues before her, considered all the material presented, and adopted an approach that gave effect to the purpose of the provisions of the agreement.

[58] As it was stated in *Ekurhuleni Metropolitan Municipality v SA Municipal Workers Union and others*[62]:

'...The test is concerned with outcomes, not the process by which the outcomes are achieved. Only when the outcome is one which no reasonable arbitrator, with the material that was to hand, could produce, is an award liable to be set aside. The frailties of an arbitrator's reasoning, or inattention to mentioning every facet of relevance, or clumsiness in articulation are unimportant, unless they are causally connected to an unfair outcome.'

[59] This court is entitled to interfere with an award made by an arbitrator if, and only if, the arbitrator misconceived the nature of the enquiry (and thus denied

[62] (2018) 39 ILJ 546 (LAC) at para 18.

the parties a fair hearing) or committed a reviewable irregularity which had the consequence of an unreasonable result. The applicants contend for the latter, on the basis reflected above.

[60] The courts have been clear that the failure by an arbitrator to attach particular weight to evidence or attachment of weight to the relevant evidence and the like is not in itself a basis for review; the resultant decision must fall outside of a band of decisions to which reasonable decision-makers could come on the same material.[63]

[61] Furthermore, whether a decision is unreasonable in its result ultimately requires this court to consider whether apart from the flawed reasons or any irregularity by the arbitrator, the result could still be reasonably reached in the light of the issues and the evidence.[64]

[62] Having regard to the above principles and for the reasons as set out below, it would appear that the second respondent *in casu* complied with all the requirements referred to above and therefore the Arbitration Award does not appear to be a decision that a reasonable decision-maker could not reach. The second respondent analysed and interpreted all the relevant paragraphs in the Resolution/Collective Agreement.[65]

Analysis and evaluation

[63] It was common cause that the members of the third respondent held the positions of Senior Family Advocate before their translations and were translated to Senior Family Advocates LP-8 Grade 2 (the third respondent contended of course that they should have been translated to Senior Family Advocate LP-9 and not LP-8).

[64] The second respondent relied on paragraph 13.1 of the Resolution/Collective Agreement that translation was dependent on the members of the third

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[63] See: *Herholdt* (Id fn 57).
[64] See: *Head of Department. of Education v Mofokeng* (2015) 1 BLLR 50 (LAC), at para 30.
[65] Arbitration Award, pp 30 and 31 of Pleadings bundle, paras 54 to 65.

respondent meeting the appointment requirements (i.e., possessing the relevant qualification(s), prescribed years of experience etc.) and performing the functions of the post (job).[66] The applicant did not dispute that the members of the third respondent met the appointment requirements and performed the functions of the job (mentoring etc.).

[65] The second respondent considered a table in the Resolution/Collective Agreement under paragraph 4.1.3 which read "Work streams in the OSD". This table clearly refers to Senior Family Advocates (as an 'Occupational Group') under OSD Band 'LP9' and in the Work Stream 'Advanced Production'. Family advocates (which the members of the third respondent were not) fell under OSD Band 'LP7' and 'LP8'. Further none of the Occupational Groups in the 'Advanced Production' Work Stream included 'LP8' (or 'LP7' for that matter). This is unambiguous.[67]

[66] The second respondent considered Annexure B to the Resolution/Collective Agreement which related to 'General Legally Qualified Professionals' consisting of various 'Occupational Classes' including 'Family Advocate'.[68] Part B of Annexure A related to 'Translation of Family Advocate and Senior Family Advocate on Salary Levels 11 and 12'.[69] It was common cause that the members of the third respondent were on Salary Level 12 prior to their translation. According to this table, Senior Family Advocates from Salary Level 12 pre-translation/pre-1 July 2007, translated to notch LP8 and also Family Advocates from Salary Level 11 translated to notch LP8. In terms of Occupation Specific Dispensation (OSD) Legally Qualified Professionals, determined by the Minister for Public Service and Administration, the 'competencies' for 'Family Advocate; Grade 2; LP-8' were different in nature to 'Senior Family Advocate; LP-9'.[70] Whilst indicating the differences in the positions, the pages of the OSD also confirm that the Job Title/Scale of a Family Advocate was LP-8 and that the Job Title/Scale of a Senior Family Advocate was LP-9.

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[66] Review Record: Volume 10; page 35
[67] Review Record: Volume 10; page 33 para 4.1.3
[68] Review Record: Volume 10; Resolution 1 of 2008; Annexure B, pages 78 to 89
[69] Review Record: Volume 10; Resolution 1 of 2008; Annexure B, pages 80 and 81
[70] Review Record: Volume 10; pages 159 to 160

[67] All six of the following pieces of documentary evidence that served before the second respondent, and as referred to during the evidence of witnesses (for example, Advocate Govender), indicated that Senior Family Advocates ought to be translated to LP9 (and not LP8):

67.1 paragraph 4.1.3 of the Resolution/Collective Agreement[71] [making reference to 'Advance Production LP-9 Senior Family Advocate'];

67.2 pages A6, A7 and A8 of Annexure A to the Resolution/Collective Agreement[72] [making reference to 'Senior Family Advocate LP-9'];

67.3 part D of Annexure C to the Resolution/Collective Agreement[73] [making reference to 'Senior Family Advocate to Senior Family Advocate - Revised Production Grade LP-9'];

67.4 page 10, Table 2: Post, Grade and Salary Structure of the OSD Legally Qualified Professionals[74] [making reference to 'Senior Family Advocate – Salary Scale: LP-9];

67.5 pages 42, 43 and 44 of the OSD Legally Qualified Professionals[75] [making reference to 'No. 10: Job Title Scale – Senior Family Advocate – LP-9]; and

67.6 page 11, part F of Annexure B the OSD Legally Qualified Professionals: Second translation – Recalculation of Salary[76] [making reference to 'Senior Family Advocate to Senior Family Advocate: Revised Production Grade – LP-9'].

[68] It is only part B of Annexure B to the Resolution/Collective Agreement that points to Senior Family Advocates being translated to LP-8 (and not LP-9).

[69] If one has regard to the purpose and objective of the Resolution/Collective Agreement which was to provide for career progression as well as the introduction of differentiated salary scales for identified categories based on a

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[71] Review Record: Volume 10; page 33
[72] Review Record: Volume 10; pages 43, 44 and 45
[73] Review Record: Volume 10; page 97
[74] Review Record: Volume 10; page 127
[75] Review Record: Volume 10; pages 159 to 161
[76] Review Record: Volume 10; page 229

new remuneration structure, it does indeed appear to be an absurdity that Family Advocates and Senior Family Advocates would be placed on the same salary scale (i.e., LP-8). It does appear unlikely that this was the intention of the parties to the Resolution/Collective Agreement – not only because of what has been stated above having regard to the purpose and objective of the Resolution/Collective Agreement but also because the Resolution/Collective Agreement refers to Senior Family Advocates on Salary Scale/OSD Band LP-9 at six places at the very least whereas it only refers to Senior Family Advocates on Salary Scale/OSD Band LP-8 at one place.

[70] Further, paragraph 13.1 of the Resolution/Collective Agreement states that:

> "Employees will translate to the appropriate salary scales in accordance with the posts that the currently occupy"[77] and paragraph 13.3.2. thereof states that 'Translation will be done in two phases" and then goes on to explain the two phases in paragraphs 13.3.2.1 and 13.3.2.2.[78]

[71] The second respondent also considered clauses 4.1.2 and 4.2 of the Resolution/Collective Agreement. Clause 4.1.2 created four work streams to enhance career pathing – (i) Entry Level Production; (ii) Advanced Production Level; (iii) Specialist Production Level; and (iv) Supervisory Level.[79] The last sentence of clause 4.2 stated that the number of posts created will be subject to norms to be determined by the Department. Apparently with reliance on this last sentence, the applicant contended that no LP9 posts could be created until norms and standards had been created and thus there were no translation keys for LP9. It is apparent that clause 4.2 only refers to the Production Specialist stream (i.e., Principal State Law Advisor) which was OSD Band LP-10. Therefore, the norms and standards only had to be established in respect of Work Stream: Specialist / OSD Band: LP-10 / Occupational Group: Principal State Law Advisor Occupational Group (and not for LP-9). Further, there were no translation keys for LP-10 either, yet individuals were translated to LP-10 in the absence of translation keys. No

[77] Review Record: Volume 10; page 35
[78] Review Record: Volume 10; pages 35 and 36
[79] Review Record: Volume 10; page 32

evidence was placed before the second respondent that the Resolution/Collective Agreement required that norms and standards must be created for LP-9 posts.

[72] The second respondent further considered the situation where individuals holding the same positions as the members of the third respondent (Senior Family Advocates) were translated to LP-9. The applicant contended that this had been done in error (even though it had not been corrected by the time of the arbitration in 2019, since 1 January 2008 and 4 February 2010 – 11 and 9 years without correction) and that LP-9 posts did not exist until 2013 and therefore those newly created posts could only be filled through appointments and not translation. The second respondent found that situation did not advance the third respondent's case as the second respondent was not required to consider fairness or consistency. *However*, this does indicate that translation to LP-9 prior to the arbitration was not an impossibility without translation keys.

[73] The evidence of Ms Diteku, Mr Hempel and Ms Nkosi as well as the contents of paragraph 4.1.3 of the Resolution/Collective Agreement[80], pages A6, A7 and A8 of Annexure A to the Resolution/Collective Agreement [81] and pages 42, 43 and 44 of the OSD Legally Qualified Professionals[82] (as well as other portions of the review record referred to above) appear to be fatal to the applicant's review application as it supports the contentions and averments of the third respondent. It is ultimately only part B of Annexure B to the Resolution/Collective Agreement that supported the contentions and averments of the applicant.

[74] With regard to the second respondent's powers to give effect to a collective agreement, a dispute about the interpretation and/or application of a collective agreement applies to a situation where there is non-compliance with a collective agreement and one of the parties wishes to enforce its terms. As far as 'interpretation' disputes are concerned, these exist if the parties disagree

[80] Review Record: Volume 10; page 33
[81] Review Record: Volume 10; pages 43, 44 and 45
[82] Review Record: Volume 10; pages 159 to 161

about the meaning of a particular provision. As for 'application' dispute, these arises where the parties disagree over whether the agreement applies to or in a particular set of facts and circumstances.

[75] The third respondent led specific evidence at the arbitration on the translation measures and what translation would be subject to (paragraph 13 of the Resolution/Collective Agreement) – meeting appointment requirements and performing the functions of the post.

[76] It was also the undisputed evidence of Advocate Govender that the reference to 'LP-8' on the table that forms part of Part B of Annexure B to Resolution 1 of 2008 was a mistake and that it should have referred to LP-9. This evidence was not placed in dispute by the applicant.[83]

[77] If individuals employed before the effective date of the Resolution/Collective Agreement (1 July 2007) are entitled to be translated to LP-9, then people employed after that date should also be entitled to translation to LP-9 if one has regard to the purpose of the OSD which is to attract and retain a sufficient number of employees with required competencies.

[78] During the arbitration, the applicant contended that OSD: Legally Qualified Professionals[84] was a draft proposal and not part of Resolution 1. It was not, however, put to any of the third respondent's witnesses by the applicant during arbitration that it was only a draft proposal.

[79] Insofar as the Arbitration Award being incapable of execution as the Department cannot undertake the second phase of translation without a notch or salary scale on which the members of the third respondent ought to have been placed during first phase of translation, the evidence that served before the second respondent appeared to indicate that it had been specifically agreed that the employees had to be translated to the appropriate salary scale in accordance with the posts they occupied on 7 February 2008 when the Resolution/Collective Agreement was signed. Phase C of the OSD also

[83] Review Record: Volume 6; page 238 line 8 to page 243 line 5 – particularly page 238 line 8 to page 239 line 14
[84] Review Record: Volume 10; pages 159 to 161

indicated that employees must be translated from the current post to the corresponding post on the Department's revised post establishment.[85]

[80] Insofar as the contention of the applicant is concerned that '*where drafters of a collective agreement fail or omit to make provision for certain employees, a forum interpreting such a collective agreement must desist from filling such lacuna*', there does indeed not appear to be any such lacuna in relation to a failure or omission to make provision for certain employees that needs to be filled or needed to be filled. The second respondent, in accordance with her powers as an arbitrating commissioner seized with an interpretation and/or application of a collective agreement dispute, set about interpreting that collective agreement in accordance with the evidence that served before her during the arbitration.

[81] Central to this review application is whether the second respondent committed various reviewable irregularities in coming to her decision that by translating the senior family advocates to LP-8 instead of LP-9 the applicant's application was incorrect and in effect contrary to the aim and purpose of the collective agreement. The key question is whether a reasonable decision-maker could not have reached the decision reached by the second respondent.

[82] The court in *Sidumo* held that if the decision reached by the second respondent is one which a reasonable decision-maker could not have reached, then that decision falls to be reviewed and set aside by the reviewing court. The Arbitration Award would stand to be set aside on the grounds of outcome-based unreasonableness where it was incapable of justification on all the material before the second respondent.

[83] Apart from this ground of review (outcome-based ground), the Arbitration Award could also be set aside on the grounds of what has been referred to as "*process-based unreasonableness.*" This would be the case where the second respondent committed a gross irregularity in the proceedings, such as an error of law, failure to apply her mind, failure to consider material facts

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[85] Review Record: Volume 8; page 58, line 6 to page 60, line 20 and also Volume 10, page 133 (Third Respondent's Opposing Affidavit, paragraph 37 – Pleadings, page 81 and 82

related to the matter, misconduct, exceeding powers, considering irrelevant or inadmissible material, or committing other gross irregularity during the proceedings.

[84] Where an arbitrating commissioner fails to take material facts into account, the arbitration proceedings cannot, in principle, be said to be fair because the Commissioner has failed to discharge her mandate. In so failing, the arbitrating commissioner prevents the aggrieved party from having his complaint fully and fairly determined. This constitutes a gross irregularity in the arbitration proceedings as envisaged in section 145(2)(a)(ii) of the LRA, and the award that follows falls to be set aside by the reviewing court for want of reasonableness.

[85] Similarly, the process leading to the award is as important, as is the award (outcome/finding) itself. If the process leading to the award is tainted with an error of law, failure to consider vital evidence related to the matter, considering irrelevant or inadmissible material, failure of the Commissioner to apply her mind, or committing other gross irregularities during the arbitration proceedings, the award will be set aside by the reviewing court. This will apply, even where the finding or outcome is reasonable.[86] Of course, not every process-based irregularity in the arbitration proceedings will lead to the reviewing and setting aside of that arbitration award. For a process-based irregularity in the proceedings to be set aside it must have prevented a fair trial of the issues.

[86] Having considered the Arbitration Award and based on the evidence and documents which served before the second respondent, I am satisfied that:

86.1 the second respondent correctly assessed what she was required to determine;

86.2 the Arbitration Award is incapable of justification in light of all the material that served before the second respondent;

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[86] See: *Southern Sun Hotel Interests (Pty) Ltd v CCMA and others* [2009] 11 BLLR 1128 (LC); *SA Airways (Pty) Ltd v Blackburn and others* [2010] 3 BLLR 305 (LC) at 313D-E; *Pam Golding Properties (Pty) Ltd v Erasmus and others* (2010) 31 ILJ 1460 (LC) at para 8.

86.3 the second respondent did not commit any gross irregularity in the proceedings such as an error of law, a failure to apply her mind, a failure to consider or take into account material facts related to the matter, misconduct, exceeded powers and/or considered irrelevant or inadmissible material;

86.4 the second respondent did not prevent the applicant from having its complaint fully and fairly determined;

86.5 the process leading to the award is not tainted with an error of law, failure to consider vital evidence related to the matter, a consideration of irrelevant or inadmissible material and/or a failure by the second respondent to apply her mind; and

86.6 a fair trial of the issues was not prevented.

[87] In accordance with the provisions of section 23 of the LRA, collective agreements are binding on the parties. The purpose of section 24 of the LRA is to resolve disputes where a party to an agreement is alleged to have been in breach of the provisions of that agreement by failing to interpret or apply its terms either correctly or at all.[87]

[88] The principles applicable to the resolution of such disputes, and the manner in which arbitrating commissioner are required to interpret collective agreements, are trite as summarised in *Dioma and Another v Mthukwane NO and Others*[88]. These are that:

> "i. When interpreting a collective agreement, the arbitrator is enjoined to bear in mind that a collective agreement is not like an ordinary contract, and she is therefore required to consider the aim, purpose and all the terms of the collective agreement;
>
> ii. The primary objects of the LRA are better served by an approach which is practical to the interpretation of such agreements, namely to promote the effective, fair and speedy resolution of labour disputes. In addition, it is

[87] See: *Public Servants Associations on behalf of Liebenberg v Department of Defence and others* (2013) 34 ILJ 1769 (LC), at para 2.

[88] (JR784/2016) [2020] ZALCJHB 138 (11 August 2020). See also: *North East Cape Forests v SAAPAWU and others (2)* [1997] 6 BLLR 711 (LAC); *Food and Allied Workers Union v Commission for Conciliation, Mediation and Arbitration and others* (2007) 28 ILJ 382 (LC), at para 35.

expected of the arbitrator to adopt an interpretation and application that is fair to the parties.

iii. A collective agreement is a written memorandum which is meant to reflect the terms and conditions to which the parties have agreed at the time that they concluded the agreement.

iv. The courts and arbitrators must therefore strive to give effect to that intention, and when tasked with an interpretation of an agreement, must give to the words used by the parties their plain, ordinary and popular meaning if there is no ambiguity. This approach must take into account that it is not for the Courts or arbitrators to make a contract for the parties, other than the one they in fact made;

v. The "parol evidence" rule when interpreting collective agreements is generally not permissible when the words of the memorandum are clear.

vi. Collective agreements are generally concluded following upon protracted negotiations, and it is expected of the parties to those agreements to remain bound by their provisions. It therefore follows that such agreements cannot be amended unilaterally."

[89] *In casu*, it does appear that the second respondent did not fail to properly interpret the collective agreement and the annexures thereto, in question. In interpreting the collective agreement, the second respondent appears to have considered the aim, purpose and all the relevant terms thereof, thereby considering all the relevant and material documentary evidence that served before her. Furthermore, and in doing so, the second respondent appears to have been aware and borne in mind that a collective agreement is not like an ordinary contract (as she was required to do).[89]

[90] Since the second respondent derived her powers from the LRA, she was at all times required to take into account the primary objects of the LRA. The primary objects of the LRA are better served by an approach that is practical to the interpretation and application of collective agreements, namely, to promote the effective, fair and speedy resolution of labour disputes.[90] In

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[89] See: *Van Wyk* (Id fn 47) at para 22.

[90] See: *SA Municipal Workers Union v SA Local Government Bargaining Council and others* (2012) 33 ILJ 353 (LAC) at para 15.

addition, it was expected of the second respondent to adopt an interpretation and application that is fair to the parties. She did so too.

[91] The second respondent was alive to what was required of her; considered the aim and purpose of the Resolution/Collective Agreement; considered the evidence placed before her by the parties; was entitled to determine whether the interpretation of parties was incorrect and contrary to the spirit and purpose of the Resolution/Collective Agreement; and applied the fairness standard in the interpretation and application of the OSD Collective Agreement.[91]

[92] The second respondent analysed and interpreted all the relevant paragraphs in the Resolution/Collective Agreement[92] and it does therefore appear that the second respondent has complied with all the requirements referred to in the authorities above.

[93] In my view the second respondent considered the evidence placed before her by the parties, particularly the evidence of the third respondent's witnesses which were reliable, corroborated and/or not tested by the applicant, as well as the concessions provided by the applicant's witnesses, in order to properly give meaning to the Resolution/Collective Agreement. It would be illogical to expect the second respondent to disregard the evidence of the third respondent and/or the concessions made by the applicant's own witnesses without a valid reason.

[94] The reasonable decision-maker test which is applied in determining whether an arbitration award is susceptible to a review involves a consideration of not only the reasons given by the commissioner but also all the material that properly served before him or her. The reasonableness of the decision of the second respondent must be judged on the basis of the information placed before her during the arbitration. Based on the record of the proceedings, there is no basis on which it can be concluded that the second respondent had arrived at a decision which no other reasonable commissioner would

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[91] See: *Van Wyk* (Id fn 47) at paras 23 and 24.
[92] Arbitration Award, pp 30 and 31 of Pleadings bundle, paras 54 to 65.

have arrived at in light of what was before her at the time (as referred to above).

[95] The second respondent considered the evidence referred to above, mostly undisputed if properly construed, and found, on the basis of that evidence, that the applicant failed to translate the senior family advocates correctly. The second respondent was entitled to determine whether the applicant's application of the Resolution/Collective Agreement and the annexures thereto together with the determination issued by the Minister of Public Service and Administration, was correct. She found that by translating the senior family advocates (the members of the third respondent) to LP8 instead of LP9, the applicant's application was incorrect and in effect, contrary to the aim and purpose of the collective agreement.

[96] The LAC in the matter of *Herbert v Head Education - Western Cape Education and Others*[93] stated that:

> [13] In *University of Johannesburg v Auckland Park Theological Seminary and Another*, the Constitutional Court stated that the approach to interpretation adopted in Natal Joint Municipal Pension Fund v Endumeni Municipality had "updated" the previous position, which was that context could be resorted to if there was ambiguity or lack of clarity in the text. In cases subsequent to Endumeni, the Constitutional Court noted that the Supreme Court of Appeal "*has explicitly pointed out that context and purpose must be taken into account as a matter of course, whether or not the words used in the contract are ambiguous.*"
>
> [14] In *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* the Supreme Court of Appeal stated that:
>
> '...Endumeni has become a ritualised incantation in many submissions before the courts. It is often used as an open-ended permission to pursue undisciplined and self-serving interpretations. Neither Endumeni, nor its reception in the Constitutional Court, most

[93] (2022) 43 ILJ 1618 (LAC) at para 13 onwards.

recently in University of Johannesburg, evince skepticism that the words and terms used in a contract have meaning.'

[15] The Court noted that what Endumeni does is that it-

'... simply gives expression to the view that the words and concepts used in a contract and their relationship to the external world are not self-defining. The case and its progeny emphasise that the meaning of a contested term of a contract (or provision in a statute) is properly understood not simply by selecting standard definitions of particular words, often taken from dictionaries, but by understanding the words and sentences that comprise the contested term as they fit into the larger structure of the agreement, its context and purpose. Meaning is ultimately the most compelling and coherent account the interpreter can provide, making use of these sources of interpretation. It is not a partial selection of interpretational materials directed at a predetermined result.'

[97] In interpreting the Resolution/Collective Agreement in this matter, the second respondent was required to have regard to the aim and purpose thereof, the words and language used in it (having regard to ordinary rules of grammar and syntax), and the context in which the disputed term/words/phrase is used with its interrelation to the contract as a whole including the nature and purpose of the Resolution/Collective Agreement.

[98] From the foregoing, I am satisfied that the second respondent did so.

[99] There does not appear to be any basis upon which to review and set aside the Arbitration Award because it is not capable of being executed due to the Department being unable to undertake the second phase of translation without a notch or salary scale on which the individual advocates ought to have been placed during the first translation process[94]. I am in agreement with the third respondent's submission that it was specifically agreed that the employees had to be translated to the appropriate salary scale in accordance with the posts that they occupied at that stage, being 7 February 2008, the date upon which the Resolution/Collective Agreement was signed. Phase C of

[94] Pleadings: Applicant' founding affidavit – paragraph 19.3, page 22

the OSD was relied on by the third respondent, where it is indicated that employees must be translated from the current post to the corresponding post on the Department's revised post establishment.[95]

[100] In this regard, the third respondent alleged the following in its opposing affidavit, which was not denied by the applicant (in the absence of any replying affidavit from the applicant)[96]:

100.1 "It was specifically agreed that the employees had to translate to the appropriate salary scales in accordance with the posts that they occupied at that stage, being as on 7 February 2008, the date upon which the Resolution/Collective Agreement was signed.

100.2 To simplify and as an example, if one considers page 81 of Volume 10, a Senior Family Advocate that was earning 369,000 as on 7 February 2008 had to translate to Senior Family Advocate scale / notch 405,168. In terms of second phase translation, and considering page 97 of Volume 10, this same Senior Family Advocate with full 8 years' post graduate experience would be on notch R417.411. That is why I testified that the second phase translation nullifies the first phase.

100.3 As indicated during the arbitration, the prejudice lies therein that the top notch for Family Advocate on LP8 is R387,471 whereas the top notch for Senior Family Advocate is R470,211. That is only the first phase translation.

100.4 The second phase translation for Family Advocate on LP8 is R521,862 for full 30 years and more post graduate service whereas that of Senior Family Advocate for the same years of experience is R579,192.

100.5 Human Resources are in possession of all the Senior Family Advocates' historic remuneration information, including increments and bonuses and that is why Phase C of the OSD provides:

"4.2.5 Phase C constitutes the translation of the employees from their current posts to the corresponding posts on the departments' revised post establishments. This translation implies a minimum translation to a revised salary and will be done in terms of the translation tables ...

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[95] Opposing affidavit, pp 81 and 82, para 37.
[96] Pleadings: Third respondent's opposing affidavit – paragraph 37, pages 81 and 82

4.2.6 It is important that the translation to the revised dispensation is based on the proper recording of the transaction. This is necessary for auditing purposes, as well as to serve as documentary evidence should individual disputes arise regarding implementation."[97]

[101] The second respondent did correctly interpret the relevant provisions of the collective agreement insofar as they related to the members of the second respondent. There was therefore no error of a material nature that it resulted in a decision which, on a proper interpretation of the collective agreement, was one that a reasonable arbitrating commissioner on the material before them could not reach.

[102] Nothing in the review record suggests that the second respondent's conclusions are findings which no reasonable arbitrating commissioner could make. The evidence and the probabilities support the conclusions. The interpretation adopted was fair to the parties and the essence of the collective agreement.

[103] In the end and having considered all the factors pertinent to this case, I am satisfied that the second respondent properly applied her mind to the issues before her, considered all the material before him, and adopted an approach that gave effect to the tenor, aims and purpose of the provisions of the collective agreement, and those of the LRA.

[104] On the basis of the above authorities and the, relevant evidence, the second respondent's conclusion - that by translating the senior family advocates to LP-8 instead of LP-9 the applicant's application was incorrect and in effect, contrary to the aim and purpose of the collective agreement, is reasonable. I do not find fault with the second respondent's reasoning in that regard. There was sufficient undisputed evidence before the second respondent to justify her decision that the translating of the senior family advocates to LP8 instead

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[97] Review record" Volume 10 at page 133

of LP9 was incorrect and in effect, contrary to the aim and purpose of the collective agreement, as addressed above.

[105] For the reasons as discussed above, it is my view that: (i) the second respondent did not commit any misconduct; (ii) the second respondent did not commit any gross irregularity which resulted in him reaching a decision that is not legally justifiable; and (iii) the decision of the arbitrator, in this case, was not a decision that a reasonable decision-maker could not reach or could not have made. The conclusions reached by the second respondent were reasonable and justified by, and having regard to, the material placed before him and fall within a band of reasonableness. Therefore, the arbitration award does not stand to be set aside and there is no reason for this Court to interfere with the second respondent's Arbitration Award.

Conclusion

[106] In all the circumstances, I see no reason why the review application ought to succeed, and I am of the view that the applicant's review application stands to be dismissed for the reasons as set out above.

[107] I now turn to consider the issue of costs.

Costs

[108] In terms of the provisions of section 162(1) of the LRA, which regulates orders for costs in this Court, I have a wide discretion when it comes to the issue of costs and having regard to the requirements of the law and fairness after taking into account all of the relevant facts and circumstances.

[109] In exercising this judicial discretion, the Constitutional Court in *Long v South African Breweries (Pty) Ltd and Others*[98] reaffirmed the principle set in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*[99] with regard to costs

[98] (2019) 40 ILJ 965 (CC) at para 30.
[99] (2018) 39 ILJ 523 (CC).

in employment disputes and stated that '*when making an adverse costs order in a labour matter, a presiding officer is required to consider the principle of fairness and have due regard to the conduct of the parties.*"[100]

[110] Taking into account of all the relevant facts and circumstances and having regard for the requirements of the law and fairness, I do not consider it appropriate to make a costs order, and I exercise my discretion as to costs accordingly.

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

Order

1. The review application is dismissed.

2. There is no order as to costs.

M. Sass
Acting Judge of the Labour Court of South Africa

[100] Id fn 98 at para 29.

Appearances:

For the Applicant	:	Adv. R Ramawele SC and Adv. K Magano
Instructed by	:	The State Attorney
For the Third Respondent	:	Adv. PH Kirstein
Instructed by	:	Couzyn, Hertzog & Horak Attorneys