IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA76/2021

In the matter between:

PUBLIC SERVANTS' ASSOCIATION OF SOUTH AFRICA obo MEMBERS	**Appellant**
and	
PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL	**First Respondent**
COMMISSIONER M FOUCHE N.O.	**Second Respondent**
DEPARTMENT OF CORRECTIONAL SERVICES	**Third Respondent**

Heard: 14 February and 31 March 2023

Delivered: 18 May 2023

Coram: Coppin JA, Savage and Gqamana AJJA

JUDGMENT

SAVAGE AJA

LABOUR APPEAL COURT

Introduction

[1] This appeal, with the leave of this Court, is against the judgment and order of the Labour Court (per Mangena AJ) in which the arbitration award of the second respondent (arbitrator) on 26 July 2018 was set aside on review and the dispute concerning the interpretation and application of a collective agreement referred to the Public Service Coordinating Bargaining Council (PSCBC) by the appellant, the Public Servants' Association (PSA), on behalf of its members, was dismissed.

[2] The dispute referred to the PSCBC by the PSA concerned the interpretation and application of PSCBC Resolution 1 of 2007. The outcome sought by the PSA was that the Department of Correctional Services (department) pay overtime in excess of 45 hours per week worked by members of the PSA, as employees of the department, from the date on which the department implemented its 7-day establishment shift system from July 2009.

PSCBC Resolution 1 of 2007

[3] PSCBC Resolution 1 of 2007 (Resolution 1) is a collective agreement entered into on 5 July 2007 to which a number of trade unions, including the PSA, are parties. It establishes specific conditions of service which apply across the public service. Clause 4.1 provides that:

> '4. Revised Occupational Specific Salary Structures
>
> 4.1 New salary scales will be negotiated and implemented per identified occupation to attract and retain professionals and other specialists over the duration of this Agreement. The negotiators will, among others, cover the following areas: -
>
> 4.1.1 Remuneration structure, including number of notches and percentages between notches;
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> 4.1.2 Benefits and allowances to be consolidated into salaries;
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> 4.1.3 Frequency of pay progression;
>
> 4.1.4 Grade progression;
>
> 4.1.5 Career pathing;

LABOUR APPEAL COURT

4.1.6 Priorities and implementation dates;

4.1.7 Translation measures; and

4.1.8 Required levels of performance...'

[4] Clause 9 provides as follows:

'9.1 Payment Rate for Normal Overtime

Overtime on a Sunday or public holiday shall be 2 x basic salary of the employee, without the option of granting time-off. All other overtime shall be 1.5 x basic salary of the employee, without the option of granting time-off. This provision excludes employees on commuted overtime.

9.2 Basic Salary for Calculation of Overtime

The basis for the calculation of overtime worked shall be the actual salary notch of the employee, provided that it shall not be higher than a basic salary of R122 841 per annum. This amount will be increased by the percentage of the annual general salary adjustment with effect from 1 July each year, commencing on 1 July 2007. This provision excludes employees on commuted overtime.'

9.3 Maximum overtime hours

The mechanisms and conditions for the averaging of maximum overtime hours shall, where required, be determined in the respective sectoral bargaining councils.

...

9.5 Averaging of Working Hours

The mechanisms and conditions for the averaging of working hours shall, where required, be determined in the respective sectoral bargaining councils.

9.6 Payment rate for an employee who ordinarily works on a Sunday

The rate of payment for an employee in the public service who, ordinarily works on a Sunday shall be 1.5 x basic salary.

LABOUR APPEAL COURT

9.7 Payment rate for an employee who ordinarily works on a Public Holiday

The rate of payment for an employee who ordinarily works on a public holiday shall be 2 x basic salary, without the option of granting time-off...'

GPSSBC Resolution 2 of 2009

[5] Resolution 2 of 2009 (Resolution 2) was concluded in the General Public Service Sectoral Bargaining Council (GPSSBC) on 24 June 2009. While other trade unions were parties to this collective agreement, the PSA did not sign the agreement. The conclusion of Resolution 2 followed the establishment of a Ministerial task team and a process of consultation with organised labour and the management of correctional centres. This resulted in the recommendation that a 7-day establishment shift system be implemented to address the department's unique working environment and curtail extensive overtime costs incurred by the department arising from the 5-day shift system which had previously been in place.

[6] As contemplated in clause 4 of Resolution 1, Resolution 2 introduced a new Occupational Specific Dispensation (OSD) within the department for Centre Based and Non-Centre Based Correctional Officials. In doing so, it provides *inter alia* for a unique salary structure, career-pathing opportunities, pay and grade progression, the recognition of experience, the introduction of differentiated salary scales and "(t)*he introduction of 45-hour work week for the implementation of OSD and the implementation of a 7-day establishment/shift system for Centre Based Correctional Officials*". In terms of clause 4, Resolution 2 binds the employer and employees of the department who are members of trade union parties to the agreement and those who are not but who fall within the registered scope of the GPSSBC.

[7] Clause 13 of Resolution 2 provides that:

'13.1 All Centre Based Correctional Officials will be translated to the 45 hour week, with effect from 1 July 2009.

LABOUR APPEAL COURT

13.2 The Department shall introduce a 7-day establishment for correctional facilities with effect from 1 July 2009.

13.3 The Department shall develop 7-day establishment models taking into consideration institution-specific needs.'

[8] Clause 17 provides that overtime is to be compensated in terms of Resolution 1 beyond 45 hours for Centre-Based employees and beyond 40 hours for Non-Centre Based employees.

National Commissioner's Circular and departmental Overtime Policy

[9] On 1 July 2009, the National Commissioner of Correctional Services issued a circular in which a 7-day establishment and 45-hour work week aligned with Resolution 2 was implemented. The 45-hour work week was implemented on a two-week shift roster system, with ordinary working hours calculated over a two-week period. From the implementation of Resolution 2, employees, including the appellant's members, have worked in accordance with the 7-day shift system, rostered over a two-week period.

[10] The department's 2015 Overtime Policy defines overtime as work performed in excess of normal working hours, whether 45 hours or 40 hours per week. In terms of clause 7.14, overtime will be paid for work performed in excess of normal working hours where prior approval has been granted by the delegated authority. Clause 7.12 prohibits the performance of overtime duties without the prior written approval of the delegated authority except in exceptional circumstances.

Dispute referred to the PSCBC

[11] On 22 May 2012, the PSA referred a dispute as to the interpretation and application of Resolution 1 to the PSCBC, contending that some 12 000 of its members employed were owed overtime by the department but had not been compensated in accordance with clauses 9.1 to 9.7 of Resolution 1 as a result of the incorrect interpretation and application of that Resolution by the department.

LABOUR APPEAL COURT

[12] The department objected to the jurisdiction of the PSCBC to determine the dispute on the basis that the real dispute between the parties concerned the interpretation and application of Resolution 2 and as such, the matter should be arbitrated by the GPSSBC. On 24 February 2013, the PSCBC ruled that it had jurisdiction to arbitrate the dispute referred. The department applied in June 2013 to the Labour Court for the review and setting aside of the PSCBC ruling and sought condonation for the late filing of its review application. The Labour Court dismissed the Department's application for condonation.

[13] Again, at the hearing of the matter on 27 October 2015, the department challenged the jurisdiction of the PSCBC to determine the matter on the basis that the dispute ought properly to have been referred to the GPSSBC. On 26 February 2016, the PSCBC again ruled that the PSCBC had the requisite jurisdiction to arbitrate the matter. The department applied for the rescission of that ruling, seeking condonation for the late filing of its rescission application, and, after condonation was refused, the matter was again set down by the PSCBC for arbitration.

[14] A further ruling was made on 7 June 2017 by the second respondent (arbitrator) in terms of which a number of preliminary points raised by the department were dismissed with costs. These included the appellant's failure to put up a list of employees and to exhaust internal remedies prior to referring a dispute to the PSCBC. The arbitrator took issue with the department's failure to raise these issues during the pre-arbitration conference and ruled that the interpretation issue be determined separately from that of quantum. The department's subsequent application for the review of that ruling was once again out of time and condonation was refused by the Labour Court on 22 April 2021 on the basis that there had been no clear or reasonable explanation for the delay in launching its review application.

[15] Following the ruling made on 7 June 2017, the arbitrator refused to postpone the matter. The department unsuccessfully sought that the Labour Court stay the arbitration proceedings in the PSCBC. After some delay, the matter was determined by the arbitrator with the arbitration award issued on 26 July 2018. It is against this award that the current appeal lies.

LABOUR APPEAL COURT

Arbitration award

[16] In the arbitration award, the arbitrator reiterated that although the issue of jurisdiction was *res judicata*, the PSCBC had jurisdiction to determine the dispute in that the right asserted derived from Resolution 1, to which Resolution 2 is ancillary, and that while "*it may become necessary to also have regard to GPSSBC Resolution 2 of 2009… that does not convert the dispute into one concerning GPSSBC Resolution 2 of 2009*". The arbitrator found that the GPSSBC could not determine interpretation and application disputes relating to Resolution 1. The fact that the dispute concerned one department in the public service was found not to alter the fact that the PSCBC had jurisdiction to determine a dispute concerned with the interpretation and application of Resolution 1.

[17] The arbitrator noted that clause 9.1 of Resolution 1 deals with the rates of payment of overtime for the entire public service. Resolution 2, it was found, was agreed to "*give effect to clause 4.1*" of Resolution 1, which required the negotiation and implementation of new salary scales for identified occupations. Resolution 2, as the product of these negotiations, introduced the OSD, the seven-day establishment and the 45-hour work week for centre-based officials to curtail excessive overtime costs incurred by the department.

[18] The effect of this, the arbitrator found, was an averaging of working hours. While Resolution 1 sought to align conditions of employment in the public service with the Basic Conditions of Employment Act (BCEA),[1] the averaging of working hours had to be dealt with by agreement in accordance with section 12 of the BCEA.[2] It was found that the averaging of working hours had been put into effect without a collective agreement having been concluded and that neither

[1] Act 75 of 1997.

[2] Section 12 reads:

'(1) Despite sections 9 (1) and (2) and 10 (1) (*b*), the ordinary hours of work and overtime of an employee may be averaged over a period of up to four months in terms of a collective agreement.

(2) An employer may not require or permit an employee who is bound by a collective agreement in terms of subsection (1) to work more than—

(*a*) an average of 45 ordinary hours of work in a week over the agreed period;

(*b*) an average of five hours' overtime in a week over the agreed period.

(3) A collective agreement in terms of subsection (1) lapses after 12 months.

(4) Subsection (3) only applies to the first two collective agreements concluded in terms of subsection (1).'

LABOUR APPEAL COURT

the National Commissioner's circular nor the overtime policy, introduced after the appellant referred its dispute, altered this position. The department was found to be interpreting and applying Resolution 1 incorrectly by averaging working hours in the absence of a collective agreement concluded by the parties in the GPSSBC permitting as much. The PSA's claim on the merits therefore succeeded and costs, including the cost of counsel, were awarded against the department on the basis that it had acted in a vexatious manner and put the PSA to unnecessary trouble and expense.

Judgment of the Labour Court

[19] Dissatisfied with the decision of the arbitrator, the department sought the review of the arbitration award by the Labour Court. In its judgment, the Court found that the arbitrator had failed to appreciate the true nature of the dispute between the parties. It was found that jurisdiction had been assumed on an issue that fell outside of the purview of the arbitrator since there was no dispute as the interpretation and application of Resolution 1, to which the department accepted it was bound. The real dispute was found to concern the interpretation and application of Resolution 2 and the payment of overtime following the implementation of the 7-day shift establishment. The Court noted that the evidence of wide consultation prior to the implementation of the OSD and the 7-day shift system indicated general consensus on the issue and the signatories to Resolution 2 were aware that the 7-day shift system entailed one longer and one shorter week of work, and implicit in this structure, the averaging of working hours. It was found that a specific provision dealing with the averaging of working hours was not, therefore, necessary and that to argue differently was disingenuous and opportunistic.

[20] Since Resolution 2 and not Resolution 1 was the source of a claim for overtime, the Court found that the PSCBC did not have jurisdiction to determine the matter and that the arbitrator had arrived at a conclusion which no reasonable decision maker could reach. For these reasons, the award was set aside. Given the ongoing relationship between the parties, no order of costs was made.

LABOUR APPEAL COURT

Submissions on appeal

[21] On appeal, the PSA sought that the order of the Labour Court be set aside and the award of the arbitrator be confirmed. Issue was taken with a number of the findings of the Labour Court, including that the PSCBC lacked jurisdiction to deal with the dispute when this issue was *res judicata* given the rulings previously made. Even if this was not so, it was submitted that clause 9 of Resolution 1 affords the PSCBC jurisdiction over the dispute, with Resolution 2 not determining how overtime will be compensated. It was thus argued to be for the PSCBC to determine whether there are "mechanisms and conditions" in place for the averaging of working hours in the GPSSBC or not, with Resolution 2 only relevant when determining the quantum of compensation for overtime. Although the appellant initially sought an order of costs if successful on appeal, in argument such an order was not pursued.

[22] The department opposed the appeal on the basis that it is complying with Resolution 1 and pays overtime at the prescribed rates, with there being no dispute about the interpretation and application of Resolution 1 in the calculation and payment of overtime. The real dispute, it was argued, is about the non-payment of overtime to employees whose hours of work have been averaged as a result of the introduction of the 7-day establishment shift model and that the arbitrator misconstrued the nature of the dispute and arrived at an unreasonable conclusion. This was argued to be evident from the fact that the effect of the arbitration award is that the members of the PSA will be paid overtime for one week of the two-week shift cycle in spite of them having been paid for 45 hours of work in the other week, despite working less than 45 hours in the second week. In recognising as much, it was argued, the Labour Court cannot be faulted. As a result, the department sought that the appeal be dismissed with no order of costs given the ongoing relationship between the parties.

LABOUR APPEAL COURT

Evaluation

[23] Collective agreements operate within the framework of the Labour Relations Act[3] (LRA) and must be interpreted in accordance with the purposes of the Act.[4] A collective agreement is not an ordinary contract and operates in a context distinct from that of a commercial contract. Section 28 of the LRA provides that a bargaining council may only exercise the powers and functions entrusted to it in relation to its registered scope, including *inter alia* (a) to conclude collective agreements; (b) to enforce those collective agreements; and (c) to prevent and resolve labour disputes.[5] The PSCBC is the bargaining council with jurisdiction in respect of matters specific to the public service. It is empowered by section 37(1)(a) to designate a sector of the public service for the establishment of a bargaining council, which, in terms of section 37(5), is to have –

> '…exclusive jurisdiction in respect of matters that are specific to that sector and in respect of which the State as employer in that sector, has the requisite authority to conclude collective agreements and resolve labour disputes.'

[24] The GPSSBC has been designated as a sectoral bargaining council with exclusive jurisdiction in respect of matters that are specific to the general public service sector. Forty-four national government departments and a number of provincial departments currently fall within the scope of the GPSSBC, including the Department of Correctional Services.[6]

[25] The dispute referred by the PSA to the PSCBC concerns the interpretation and application of Resolution 1 in relation to the payment of overtime to its members employed by the department. Any interpretation and application dispute is, in terms of clause 19 of Resolution 1, to be dealt with in accordance with the dispute resolution procedure of the PSCBC.[7] As such, the PSA was entitled to

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[3] Act 66 of 1995, as amended.
[4] Sections 1 and 3 of the LRA; *Wyeth SA (Pty) Ltd v Manqele and other* [2005] 6 BLLR 523 (LAC); *Business SA v COSATU and another* [1997] 5 BLLR 511 (LAC).
[5] Section 28(1). *Member of the Executive Council for Health, Western Cape v Coetzee and others* (2020) 41 ILJ 1303 (CC) at para 57.
[6] The GPSSBC was registered as a bargaining council with the Registrar of Labour Relations on 28 July 1999.
[7] Clause 19 states that: "*[d]isputes about the interpretation and application of this Agreement shall be dealt with according to the dispute resolution procedure of the Council*".

LABOUR APPEAL COURT

refer the dispute insofar as it concerned Resolution 1 to the PSCBC for determination.

[26] The task of an arbitrator is however to reach for the real dispute between the parties, with the parties' characterisation of a dispute not necessarily conclusive as to the nature of such dispute.[8] The nature of a dispute is to be determined through an examination of the substance of the dispute and a consideration of all the facts, including the description of the dispute, the outcome requested by the union and the evidence presented during the arbitration.[9] In *Health & Other Services Personnel Trade Union of SA obo Tshambi v Department of Health, KwaZulu-Natal,*[10] this Court emphasised that the phrase "interpretation or application" does not reflect disjunctive terms but rather terms that ought to be read as being related.[11] At minimum, a dispute about the interpretation of a collective agreement involves a difference of opinion about what a provision of the agreement means, while the application of a collective agreement is concerned with, at minimum, a difference of opinion about whether such agreement can be invoked.[12]

[27] There is no dispute between the parties to this appeal that the overtime rates agreed in Resolution 1 apply across the public service. There is also no dispute that clauses 9.3 and 9.5 of Resolution 1 provide that "*where required*" the mechanisms and conditions for the averaging of maximum overtime hours and working hours are reserved for determination by the "*relevant sectoral bargaining council*". Since the department falls within the scope of the GPSSBC, it is the GPSSBC as the "*relevant sectoral bargaining council*" that is therefore, "*where required*", to determine the mechanisms and conditions for the averaging of maximum overtime hours and the averaging of working hours in the department.

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[8] *Commercial Workers Union of SA v Tao Ying Metal Industries and others (CUSA)* (2008) 29 ILJ 2461 (CC) at para 64. See also, *National Union of Metalworkers of SA and others v Bader Bop (Pty) Ltd and another* (2003) 24 ILJ 305 (CC) at para 52.
[9] *CUSA* at para 66. See also, *Coin Security Group (Pty) Ltd v Adams and others* (2000) 21 ILJ 924 (LAC) at paras 15 - 16.
[10] (2016) 37 ILJ 1839 (LAC).
[11] Id at para 25.
[12] Id at para 17.

LABOUR APPEAL COURT

[28] The introduction in Resolution 2 of "*an Occupation Specific Dispensation (OSD) for Centre Based and Non-Centre Based Correctional Officials*", with effect from 1 July 2009, included salary increases to be implemented in a new salary structure under a 45-hour work week and a 7-day establishment/shift system. Clause 13.3 requires that "*(t)he Department shall develop 7-day establishment models taking into consideration institution-specific needs*". Institution-specific needs, according to the department, have been addressed through agreements concluded in individual correctional institutions and facilities, with overtime compensated in accordance with the terms of Resolution 1 beyond 45 hours for Centre-Based employees and beyond 40 hours for Non-Centre Based employees.

[29] The PSA avers that no averaging agreement has been concluded in the GPSSBC, as required by clauses 9.3 and 9.5, and that the department has, in the absence of such an agreement, failed to pay the overtime rates agreed in Resolution 1. The department disputes that this is so. To determine whether an averaging agreement has been concluded or not requires an interpretation and application of collective agreements that have been concluded between the department and organised labour, both at an institution-specific level, as well as those at a sectoral level in the GPSSBC, such as Resolution 2. Any determination as to the interpretation or application of such collective agreements is, by virtue of section 37(5), reserved for the exclusive jurisdiction of the GPSSBC given that it concerns matters specific to the department which falls within the scope of the general public sector. In addition, clause 19 of Resolution 2 expressly reserves any dispute as to the interpretation and application of that Resolution for determination by the GPSSBC.[13]

[30] A determination regarding the interpretation and application of particular collective agreements concluded both at GPSSBC and at an institutional level is required to resolve the dispute as to whether the averaging of overtime and working hours has been agreed to or not. This is a matter for the GPSSBC and not the PSCBC to determine. To find differently would lead to impractical

[13] Clause 19 reads: "*[s]hould there be a dispute about the interpretation or application of this agreement any party may refer the matter to the Council for resolution in terms of the dispute resolution procedures of the Council*".

LABOUR APPEAL COURT

results, which are neither reasonable nor sensible,[14] and when there is no dispute between the parties as to the interpretation to be afforded to Resolution 1. To permit the PSCBC to engage in an interpretation of collective agreements which are for the GPSSBC to determine, would allow the PSCBC to encroach on the exclusive jurisdiction reserved by statute for the GPSSBC. It would also disregard the dispute resolution procedure agreed upon in Resolution 2 and ignore both the purpose of clauses 9.3 and 9.5, which empowers the GPSSBC to determine such matters where required, and the context in which such clauses have been agreed.

[31] It follows, albeit for different reasons, that the order of the Labour Court was correct and that the appeal in this matter cannot succeed. There is no reason in law or fairness why an order of costs should be made in this matter, particularly given the ongoing relationship between the parties.

[32] In the result, the following order is made:

Order

1. The appeal is dismissed with no order of costs.

SAVAGE AJA

Coppin JA and Gqamana AJA agree.

APPEARANCES:

FOR THE APPELLANT:	L Malan SC Instructed by Bowman Gilfillan
FOR THE RESPONDENTS:	M S Mphahlele SC and D Sigwavhulimu Instructed by the State Attorney

[14] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 at paras 18 and 26.

LABOUR APPEAL COURT