



Of interest to other judges

**THE LABOUR COURT OF SOUTH AFRICA,**

**HELD AT CAPE TOWN**

**Case no: C486/2018**

In the matter between:

**PUBLIC SERVANTS' ASSOCIATION**  
**obo D POOL**

**Applicant**

and

**THE DEPARTMENT OF**  
**CORRECTIONAL SERVICES**

**First Respondent**

**THE GENERAL PUBLIC SERVICE**  
**SECTORAL BARGAINING COUNCIL**

**Second Respondent**

**JACQUES BUITENDAG N.O.**

**Third Respondent**

**Date of Set Down:** 1 July 2020

**Date of Judgment:** This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court

website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 8 December 2020

**Summary:** (Review – Interpretation of translation in OSD agreement – determining correct OSD salary band - misdirection of inquiry resulting in material error of law affecting result – costs – needless repetition of issues previously canvassed on review)

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## JUDGMENT

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LAGRANGE J

### Introduction

- [1] The applicant, Mr D Pool ('Pool'), represented by his union ('the PSA') has applied to review and set aside an arbitration award relating to his entitlement to translation under the Occupational Specific Dispensation ('OSD') applicable to correctional services officials contained in resolution 2 of 2009 of the GPSSBC. He believed that during the first phase of implementation of the OSD, he should have been translated to OSD band CB5 and not band CB4.
- [2] The first respondent ('DOCS' or 'the department') contended that the bargaining Council did not have jurisdiction to entertain the dispute because it arose when Pool was translated in 2010, with retrospective effect to 1 July 2009, yet he only referred his dispute to the bargaining Council in 2017.
- [3] The arbitrator dismissed the jurisdictional objection of the employer on the basis that Pool had provided an adequate explanation for the lengthy delay and had some prospects of success. Also, because all the relevant facts were known that the department was not prejudiced in conducting its case. However, he dismissed Pool's claim because he found that he had failed to establish that he was entitled to translation to the higher band.
- [4] The department's answering affidavit was 12 days late and it applied for condonation though no objection had been taken in terms of the practice manual to its noncompliance. In any event, Pool did not oppose the application or dispute the explanation for the lateness given and in the

absence of any demonstrable prejudice I am satisfied that the late filing of the answering affidavit should be condoned.

The award

[5] I do not intend to summarise the contents of the award but just the main threads of the arbitrator's reasoning.

[6] It was common cause that -

6.1 Since 11 November 2008, which was prior to the implementation of the first phase of the OSD on 1 July 2009, Pool was holding the position of Centre Coordinator: Operational Support;

6.2 At that time he was a Senior Correctional Official on salary level 8;

6.3 From 1 July 2009 he was translated to the post of Security Manager (CB 4);

6.4 When he queried why he was being paid at salary band CB 4 rather than CB 5 he was told that they had not yet been a budget allocation for "upgraded posts".

6.5 On 1 July 2017 he was reappointed as a Centre Coordinator: Operational Support;

[7] Relevant provisions of the agreement are set out below.

7.1 Clause 3 sets out the general objectives of the implementation of OSD in the department and states:

**"3. OBJECTIVES**

3.1 To introduce an Occupational Specific Dispensation (OSD) for Centre Based and Non-Centre Based Correctional Officials that provides for-

3.1.1 a unique salary structure;

3.1.2 career pathing opportunities based on competencies, experience, performance and scope of work;

3.1.3 pay progression;

3.1.4 grade progression based on performance;

3.1.5 recognition of appropriate experience;

3.1.6 increased competencies;

3.1.7 protection of current compensation;

3.1.8 the introduction of differentiated salary scales were different categories of Correctional Officials;

3.1.9 The introduction of a 45 hour workweek for the implementation of OSD and the implementation of a 7-day establishment/shift system for Centre Based Correctional Officials.

3.1.10 The appointment of new recruits as learners.'

## 7.2 Clause 6.1 states:

### 6.1 TRANSLATION MEASURES

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

#### (1) Unique Remuneration Structure

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

#### (2) Differentiated Dispensation

Differentiated salary structures for Centre Based and Non-Centre Based Correction Officials attached as Annexure A1 (Centre Based) and Annexure A2 (Non-Centre Based) and as summarised hereunder:

No	Work Stream	OSD Band	Occupational Groups Included
...	...	...	...
4.	Management of Correctional Centres (Centre Based)	<u>CB 4</u>	<ul style="list-style-type: none"> <li>• <u>Security Manager</u></li> <li>• Reintegration Manager</li> <li>• Unit Manager</li> <li>• Head of Correctional Centre (Small Centre)</li> <li>• Head of Community Corrections (Small)</li> </ul>
		<u>CB 5</u>	<ul style="list-style-type: none"> <li>• <u>Centre Coordinator (Medium or Large Centre)</u></li> <li>• Head of Correctional Centre (Medium Centre)</li> <li>• Head of Community Corrections (Medium Centre)</li> </ul>
		CB 6	<ul style="list-style-type: none"> <li>• Centre Coordinator (Large Centre)</li> <li>• Head of Correctional Centre (Large Centre)</li> </ul>

No	Work Stream	OSD Band	Occupational Groups Included
			<ul style="list-style-type: none"> <li>Head of Community Corrections (Large Centre)</li> </ul>
...	...	...	...

(3) Centre Based Correctional Officials shall translate to the appropriate salary scales in accordance with Annexure B 1

...'

(emphasis added)

7.3 Clause 7 of the collective agreement set out the first phase translation measures:

**'7. TRANSLATION MEASURES FOR CORRECTIONAL OFFICIALS-  
PHASE 1**

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

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

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

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

7.3 Translation measures to facilitate translation from the existing dispensation to the appropriate salary scales attached to the OSD are based on the following principles:

7.3.1 No person shall receive a salary (notch or package) that is less than what he/she received prior to the implementation of the OSD; and

7.3.2 A minimum translation will be implemented to the appropriate salary scale attached to the posts (and grades in respect of production levels). As contained in Annexure B 1 and B 2.

7.3.3 Employees who are translated to total cost packages, shall have the benefits protected (employee shall not be worse off).'

[8] The arbitrator's reasoning may be summarised, as follows.

- 8.1 The OSD introduced a unique remuneration structure and a differentiated dispensation for Centre and non-Centre Based correctional officials.
- 8.2 One of the new work streams created was that of Management of Correctional Centres (Centre-based), containing three OSD bands, namely CB 4, CB 5 and CB 6.
- 8.3 The occupational groups under CB 4 were Security Manager, Reintegration Manager, Unit Manager, Head of Correctional Centre (Small Centre) and Head of Community Corrections (Small).
- 8.4 The occupational groups under CB 5 were Centre Coordinator (Medium or Large), Head of Correctional Centre (Medium Centre) and Head of Community Corrections (Medium Centre).
- 8.5 From a plain reading of the collective agreement a Centre Coordinator of a Medium Centre fell into OSD band CB 5.
- 8.6 Pool was translated to the Management Correctional Centre work stream under the occupational group classification of Security Manager at band CB 4, whereas he claimed that he should have been translated to the occupational group classification of Centre Coordinator (Medium or Large Centre) at band CB 5;
- 8.7 the provisions of clause 7.1 of the agreement provided that for translation to take place the employee must both be an incumbent of the post and must be performing the functions of the post;
- 8.8 on the face of clause 7.1 because Pool had occupied the post of Centre Coordinator Operation Support before the OSD was implemented it might appear that he qualified for the translation to the post he contended for;
- 8.9 However, clause 7.2. of the agreement provided that officials had to translate to the appropriate salary scales in accordance with the post that they occupied before the OSD was implemented and the agreement did not state that the previous job title played any role in the translation process;

- 8.10 To facilitate translation from the pre-OSD dispensation to the appropriate salary scales under the post OSD dispensation, parties had agreed to a minimum translation which was set out in annexures to the agreement. Annexure B1 is entitled "Translation key: the OSD for Correctional Service Act Appointees (Centre Based Correctional Officials)-July 2009". The arbitrator identified this as being the key to give effect to translation from the old to the new dispensation. It stipulated that a salary level 8 correctional service official translated to OSD band CB 4. Pool was translated in accordance with the translation key in annexure B 1 to CB 4, as a result of which is remuneration did increase by approximately R 30,000 per annum.
- 8.11 Nothing in the collective agreement indicated that it was the intention of the parties to provide for "post to post" translations or for officials on salary level 8 to be translated to OSD band CB 5
- 8.12 Accordingly, Annexure B 1 did not permit Pool to be translated to band CB 5, which was reserved for officials who were previously on salary level 9, and the arbitrator was satisfied that the minimum translation measures contained in clause 7.2.3 of the agreement were correctly implemented and the broader objectives of the agreement set out in clause 3 were also achieved.

#### Grounds of review

- [9] Pool's main ground of review is that the arbitrator applied an "outdated legal test" to interpret the agreement which resulted in him arriving at an unreasonable award. More specifically, he claims that the arbitrator applied a literal interpretation of the agreement in holding that "If the parties to the agreement intended for post to post translations or for correctional officials on salary level 8 to translate to OSD band CB 5, then the parties would have included in the translation key that officials on salary level 8 can translate to CB 5". Instead, the arbitrator should have considered the meaning of the words in the light of the relevant contextual factors. Had he properly interpreted annexure B 1 together with clause 7.3.2 of the agreement he would have concluded that provided an employee occupied a post and performed the functions of that post the employee was to be translated "to

the appropriate salary scales in accordance with the post that he previously occupied pre—OSD”. The fact that the annexure did not provide a direct translation key from salary level 8 to CB 5 is irrelevant because of the wording of clause 7.3.2.

- [10] Further, Pool contends that his case is on all fours with the case of *National Commissioner of Correctional services and Another v PSA obo Snyman and Others* (C98/2017) (2018) ZALCCT 5; (2019) 1 BLLR 62 (LC) (28 February 2018) in which Steenkamp J upheld the arbitrator’s finding that the post of centre coordinator attracted a CB 5 salary band and it was fair to pay that to the employee in that case. Accordingly, Pool argues effectively that the arbitrator misinterpreted *Snyman’s* case when he distinguished it from his case.

### Evaluation

- [11] The crux of the difference between the competing interpretations of the parties of clause 7.3.2 lies at the heart of the dispute. In essence, the arbitrator and the department take the translation table in Annexure B as the determinative factor in disqualifying Pool from being placed on OSD band CB 5 because they interpret the table to mean that only an official on the pre-OSD salary level 9 could be translated to OSD band CB 5.
- [12] The department also strenuously argues that phase 1 of the OSD process set out in clause 7 of the agreement was concerned with the creation of a salary structure and the first phase was concerned with the alignment of the salaries of incumbents from pre-OSD to post OSD to ensure that employee salaries were aligned to what they received previously and that they were not worse off. The arbitrator also reasoned that the translation process was really a matter of aligning previous salaries with the new salary structure and not about the posts occupied. They argue that the arbitrator’s interpretation was correct taking account of clauses 3, 6.1 (3) and 7.3.
- [13] The heart of the arbitrator’s reasoning in this regard was that if it had been intended that someone like Pool who was employed on salary level 8 could be translated to OSD band CB 5, then the agreement would have specifically provided for that. The applicants, argue that it is the post



occupied by Pool which was supposed to be the primary determinant of the appropriate OSD salary band. They emphasize the point that the post which Pool occupied before implementation of the OSD is a CB 5 salary band post in terms of the classification of posts.

- [14] In *Snyman's* case, although the dispute was more protracted in its evolution, the ultimate question the court had to consider was whether the arbitrator's decision was reviewable. The court expressed the arbitrator's decision thus:

'[14] The arbitrator found that the Department had not correctly applied and interpreted the OSD when it appointed Snyman in the Centre Coordinator post on OSD salary band CB4 instead of CB5. He ordered the Department to place Snyman on OSD salary band CB5 with effect from 1 October 2011.'

- [15] It was accepted in that matter that he occupied the post of Centre Coordinator and not Security Manager and the arbitrator it was reasonable for the arbitrator "...interpreted the OSD and applied it to the facts of this dispute; and he found that the post of Centre Coordinator attracted a CB5 salary, and that it was fair to pay Snyman that salary."<sup>1</sup> The court concluded this was a conclusion "that a reasonable arbitrator could reach in interpreting and applying the OSD." On the basis that both Snyman and Pool occupied Centre Coordinator posts at the time the OSD was implemented but both were placed on OSD band CB 4 and classed as Security Managers there is nothing material which distinguishes the two cases.

- [16] It was never put to Pool that he did not occupy the post of Centre Coordinator when he was cross-examined. It was only in the evidence of the department's witnesses that an attempt was made to cast doubt on his post designation and to discount the significance of the letters appointing him to the post of Centre Coordinator. Similarly no evidence was put to him that the work he actually did was not that of Centre Coordinator but of a Security Manager.

- [17] This also highlights the critical omission in the arbitrator's reasoning. He never addressed why the two essential pre-requisites for translation, set out

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<sup>1</sup> At para [34].

in clauses 7.1.1 and 7.1.2, namely that the employee must be an incumbent in the post and must be performing the functions of the post. Determining the answer to these issues should have been the first step in the arbitrator's enquiry and his failure to do so was a serious misdirection and a material error of law. It is only by ignoring this that he could have become fixated with the idea that translation was only a question of salary alignment. In addition to that clause 7.2 states that the translation to the appropriate salary scale must be 'in accordance with the post that they currently occupy'. Accordingly, if the salary scale an employee was placed on did not accord with the post the employee occupied when the translation was done, it was not done in accordance with that provision.

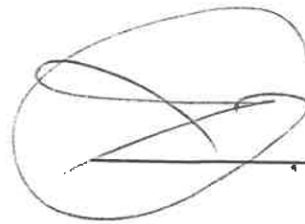
- [18] In the circumstances applying the correct principles to the undisputed facts, Pool should have been translated to the CB 5 salary scale when the OSD was implemented.

#### Costs

- [19] If this was the first time an award on the application of the OSD based on these essential facts had been the subject of a review application, I would not be inclined to award costs against any party. However, I see no good reason why the department could have thought this case was materially distinguishable from *Snyman's* case and it was really unnecessary for this matter on essentially the same issues to have come before the court again.

#### Order

- [1] The late filing of the First Respondent's answering affidavit is condoned.
- [2] The award of the Third Respondent dated 29 March 2018 issued under case number GPBC 635/2017 is reviewed and set aside.
- [3] The said award is substituted with a finding that Mr D Pool must be translated to OSD salary band CB 4 with retrospective effect to 1 July 2009.
- [4] The First Respondent must pay the Applicant's costs.



**Lagrange J**  
**Judge of the Labour Court of South Africa**

**Representatives -**

**For the Applicant:**

C J May of BDP Attorneys

**For the First**

**Respondent:**

C J M Daniels instructed by the  
State Attorney