



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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The National Prosecuting Authority v PSA obo Meintjies and 55 others and Others (Case no: 353/2020) And The Minister of Justice and Correctional Services and Director-General: DoJCD v PSA obo Meintjies and 55 others and Others (Case no: 354/2020) [2021] ZASCA 160 (SCA) (17 November 2021)

The Supreme Court of Appeal (SCA) today upheld appeals brought by the National Prosecuting Authority (NPA) as well as the Minister of Justice and Correctional Services and the Director-General: Department of Justice and Constitutional Development (the appellants) against the decision of the Gauteng Division of the High Court, Pretoria (the high court). The appeal was upheld with costs, including the costs of two counsel where so employed. The decision of the high court was thereby set aside and replaced with an order to strike the application from the roll with costs.

Central to the appeal was whether the Occupational Specific Dispensation (OSD) structure of remuneration was, as contended for by the first respondent, introduced to the National Prosecuting Authority (NPA) and made applicable to the posts held by the Deputy Directors of Public Prosecution (DDPPs) and Chief Prosecutors (CPs). A dispute regarding this aspect resulted in the Public Servants Association (PSA), a trade union, launching an application on behalf of 56 DDPPs and CPs at the high court. The NPA, the Minister of Justice and Correctional Services (the Minister) and the Director-General: Department of Justice and Constitutional Development opposed the application.

The PSA contended that its members were entitled to specific performance in respect of collective agreements concluded in bargaining councils regarding the implementation of the OSD for legally qualified categories of employees. It asserted that the failure by the NPA to implement the collective agreements and the Government Notice published by the Minister pertaining thereto (the 2010 Determination) constituted an unfair labour practice. In addition to those assertions, the PSA contended that, following the publication of the 2010 Determination, various

meetings were held and correspondence exchanged with a view to finalising the translation of the DDPPs and CPs to the OSD remuneration structure. According to the PSA, these engagements culminated in the NDPP, on 29 July 2014, approving the recommendations made by the NPA's Chief Director: Human Resources and Development (Chief Director), in his memorandum dated 18 July 2014, regarding the implementation of OSD structure in respect of NPA employees employed at salary levels 13 and 14. The PSA averred that the NDPP's approval evidenced an intention to bring the 56 DDPPs and CPs represented by the PSA within the ambit of GPSSBC Resolution 1 of 2008, and that insofar as the individual employees consented to being translated, that resolution became applicable to them. Having taken the stance that the NDPP's approval was binding on the NPA, the PSA inter alia sought an order declaring the NDPP's approval lawful and enforceable. In addition to relying on the NDPP's approval, the PSA also placed reliance on a memorandum from the Chief Executive Officer of the NPA, Ms Karen van Rensburg (the CEO) dated 24 November 2014, in terms of which the DDPPs were inter alia informed that the proposed implementation date for migration to LP10 in the NPA was 1 April 2015.

The appellants contended that the high court did not have the jurisdiction to adjudicate the matter because the PSA's application was a quintessential labour dispute which was to be processed through the mandatory dispute resolution procedures set out in the Labour Relations Act 66 of 1995 (the LRA). The appellants also contended that the high court could not exercise jurisdiction over the dispute within the contemplation of s 77(3) of the Basic Conditions of Employment Act 75 of 1997 (BCEA) because the various collective agreements relied upon by the PSA were inapplicable to them.

The fundamental question to be determined was whether the high court and the Labour Court enjoyed concurrent jurisdiction over the causes of action relied upon by the PSA in its application.

Saldulker and Van der Merwe JJA (Mokgohloa JA concurring) (the majority judgment) held that the high court did not have jurisdiction to hear the matter. It had no power or authority to determine the disputes and should have struck the matter from its roll. The majority judgment found that on the facts of this case, the high court could only have been clothed with jurisdiction if the implementation of the 2010 Determination by the 'translation' of the DDPPs and CPs to the OSD had been claimed on the ground that the terms of the individual employment contracts between the DDPPs and CPs and the NPA obliged the NPA to act accordingly. The NPA's notice of motion and founding affidavit had to be analysed to ascertain whether the enforcement of employment contract terms was relied upon. The majority judgment found that the notice of motion and the averments in the founding affidavit in no way conveyed a reliance on employment contracts. Rather, what was in fact relied upon in the founding affidavit, at length, was that the failure to implement the OSD in respect of the DDPPs and CPs had constituted an unfair labour practice relating to promotion and benefits, as defined in s 186 of the LRA. In terms of s 191 of the LRA such unfair labour practice disputes must be dealt with in terms of the LRA. Further, it was clear from the papers that the

PSA's reference to an alleged legitimate expectation formed part and parcel of its case for an unfair labour practice.

Molemela JA disagreed with the majority judgment and was of the view that the pleaded case as elicited in the PSA's averments sufficiently clothed the high court with jurisdiction. Molemela JA found that the point *in limine* relating to jurisdiction was rightly dismissed by the high court. This was because it was clear that the PSA founded its case on a range of causes of action. Molemela JA was satisfied that the averments made in the pleadings in relation to the order of specific performance and the declaratory order in relation to the NDPP's approval were not at odds with the assertion of a contractual obligation and thus fell within the ambit of s 77(3) the BCEA. This sufficed to bring the matter within the jurisdiction of the high court. Molemela JA found further that the existence of the agreement to translate the DDPPs and CPs represented by the PSA was an issue that spoke to prospects of success on the merits and not jurisdiction. Similarly, a consideration as to whether the PSA had succeeded in proving the existence of the agreement by attaching the relevant contracts in substantiation of its allegations, was an aspect that spoke to the merits and not to jurisdiction. In this regard, Molemela JA was of the view that even on the PSA's own version of events, none of the documents furnished in the application pointed to a consensus on the manner of implementation of the OSD for the DDPPs and CPs. This meant that the PSA failed to prove the existence of the agreement it sought to rely on. Its claim on the implementation of any agreement premised on the NDPP's approval therefore fell to be dismissed. Accordingly, Molemela JA would have upheld the appeal, set aside the order of the high court and replaced it with an order dismissing the application with no order as to costs.

Hughes JA concurred with the reasoning and conclusions reached by Molemela JA in respect of the point *in limine* of jurisdiction. This was on the basis that it was permissible for a party to rely on more than one cause of action, and it was therefore noteworthy that in addition to seeking enforcement of the collective agreements, the PSA also located its dispute as a contractual claim within the contemplation of s 77(3) of the BCEA. Hughes JA thus concurred that the high court was competent to hear the application before it. Further, Hughes JA took no issue with the reasoning on the merits. However, Hughes JA respectfully disagreed with the costs order that would have been granted by Molemela JA. Hughes JA's disagreement lay with the conduct of the PSA in pursuing the application for specific performance. Hughes JA was of the view that the application by the PSA in the high court was ill-conceived and manifestly inappropriate. Thus, the PSA fell to be penalised with an adverse costs order. Especially so, regard being had that the PSA was not even certain whether there was an agreement or not to enforce. The PSA's conduct clearly amounted to an abuse of court process and as such warranted an adverse costs order against them.

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