IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN.

Reportable

Case No: CA 5/2019

In the matter between:

MINISTER OF JUSTICE AND	
CORRECTIONAL SERVICES	**First Appellant**
MINISTER OF PUBLIC SERVICE	
AND ADMINISTRATION	**Second Appellant**
DIRECTOR – GENERAL: JUSTICE	
AND CONSTITUTIONAL DEVELOPMENT	**Third Appellant**

and

SEKHOSHE DAYS RAMAILA	**First Respondent**
DEMOCRATIC NURSING ORGANISATION	
OF SOUTH AFRICA	**Second Respondent**
HEALTH AND OTHER SERVICE PERSONNEL	
TRADE UNION OF SOUTH AFRICA	**Third Respondent**

NATIONAL PROFESSIONAL TEACHERS' ASSOCIATION OF SOUTH AFRICA	**Fourth Respondent**
NATIONAL EDUCATION, HEALTH AND ALLIED WORKERS UNION	**Fifth Respondent**
POLICE AND PRISONS CIVIL RIGHTS UNION	**Sixth Respondent**
PUBLIC SERVANTS ASSOCIATION	**Seventh Respondent**
SOUTH AFRICAN DEMOCRATIC TEACHERS UNION	**Eighth Respondent**
SOUTH AFRICAN POLICE UNION	**Ninth Respondent**

Heard: 05 May 2020

Delivered: 09 November 2020

Coram: Phatshoane ADJP, Davis JA and Murphy AJA

JUDGMENT

PHATSHOANE ADJP

Introduction

[1] This appeal, which is with leave of the Labour Court, draws its origin from three instruments: A Collective Agreement titled the Public Service Coordinating Bargaining Council (PSCBC) Resolution 1 of 2012; the Incentive Policy Framework issued by the Minister of Public Service and Administration, the second appellant; and the Performance Management Policy issued by the Department of Justice and Constitutional Development ("the department"). The instruments in contention provide, *inter alia*, that first-time appointees in the public service qualify for pay progression upon completion of 24 months' period of service. The differentiation between first-time entrants in the public service and the other employees, in

respect of their periods of eligibility to receive the pay progression, has set the scene for dissonance central to this appeal.

[2] Following the LAC Practice Directive of 21 April 2020, in respect of Access to the Court in light of Extended COVID-19 National Lockdown, parties agreed to have the appeal disposed of on paper without oral argument. Mr Sekhoshe Days Ramaila ("Mr Ramaila"), the first respondent, has conducted his own litigation from inception to date.

[3] The appeal is against the whole of the Judgment and order of the Labour Court (*per* Steenkamp J), handed down on 28 February 2019, substantially in the following terms:

3.1 the differentiation as contained in Clause 6 of the Incentive Policy Framework for employees on salary Levels 1 to 12 and those covered by the Occupation Specific Dispensation (OSD), which extended the qualifying period for pay progression for first-time participants from 12 months to 24 months, is irrational, arbitrary and unfairly discriminatory against the first respondent, Mr Ramaila, and other first time participants;

3.2 the differentiation in the provisions of Clause 6 of the Performance Management Policy of the department, which provides that a newly appointed employee in the public service is eligible for pay progression only after serving a continuous period of 24 months, is irrational, arbitrary, and unfairly discriminatory against Mr Ramaila and other newly appointed employees;

3.3 Clauses 4.1 to 4.3 of Public Service Coordinating Bargaining Council (PSCBC) Resolution 1 of 2012, extending the qualifying period for pay progression for first time participant from 12 to 24 months, is reviewed and set aside;

3.4 the decision of the department not to grant Mr Ramaila pay progression is declared invalid;

3.5 the Minister of Justice and Correctional Services and the Minister of Public Service and Administration ("the Minister of DPSA"), the first and second appellants, are to direct that the relevant functionary in the department effect the necessary adjustments to Mr Ramaila's salary in order to reflect the pay progression he is entitled to pursuant to the performance assessment for the financial year 01 April 2015 to 31 March 2016 and all consequent pay progression adjustments.

[4] The appeal has lapsed because the record was served and filed 11 days out of time.[1] The parties devoted much attention in their written argument for its reinstatement. It is trite that condonation cannot be had for the mere asking. A party seeking the Court's indulgence must establish good cause. The appellants' attorney intimates, in the main, that her indisposition had impeded the timeous filing of the record. The period of delay is not excessive and the application for condonation was brought at the earliest opportunity. The appeal raises serious issues of public importance. It is in the interest of justice that the appeal be reinstated and the requested condonation be granted. There can be no prejudice.

The factual background

[5] Mr Ramaila worked at a law firm in Sandton, Johannesburg. On 02 March 2015 he took up employment in the department, the Office of the Chief State Law Adviser, Cape Town, as a State Law Adviser (LP7-LP8) together with five other State Law Advisers, Mr Kgaogelo Lekoloane and Ms Lucinda Le Roux, who both previously worked for the National Prosecuting Authority ("NPA"), Ms Inge Ontong, who was engaged in the South African Police Services, Ms Veuonia Grootboom, who earlier

[1] In terms of Rule 5(17)- If the appellant fails to lodge the record within the prescribed period, the appellant will be deemed to have withdrawn the appeal, unless the appellant has within that period applied to the respondent or the respondent's representative for consent to an extension of time and consent has been given. If consent is refused the appellant may, after delivery to the respondent of the notice of motion supported by affidavit, apply to the Judge President in chambers for an extension of time. The application must be accompanied by proof of service on all other parties. Any party wishing to oppose the grant of an extension of time may deliver an answering affidavit within 10 days of service on such party of a copy of the application.

worked for the Judicial Inspectorate for Correctional Services, and Ms Refilwe Mhlwatika, who served the Provincial Treasury, Northern Cape. Save for Mr Ramaila, Ms Grootboom, and Ms le Roux, the other State Law Advisers terminated their services with the Office of the Chief State Law Adviser.

[6] Mr Ramaila, Ms Ontong and Ms Grootboom signed performance agreements which were the same and contained identical Key Results Areas (KRAs). Their job requirements were also similar. They wrote the same competency assessment test and underwent an interview process. They were appointed on the same minimum salary notch as reflected in the job advertisement.

[7] Mr Ramaila, Ms Ontong, Ms Grootboom and Ms Mhlwatika were placed on a 12 months probation period. However, Mr Lekoloane and Ms le Roux were not subjected to this because they had already completed their probation when they rendered their services to the NPA. The contract of employment that Mr Ramaila signed encapsulates the same terms as those applicable to other State Law Advisers. Clause 3.1.11 of Annexure A to the contract stipulates:

> 'Clause 3.1.11
>
> Public servants entering the state, regardless of their different backgrounds, skills and experience need to be orientated around a common programme to understand and implement the agenda of the state.
>
> The Compulsory Induction Programme (the "CIP") is applicable with effect from 01 November 2012 to, amongst others, the following employees:
>
> (a) Appointed on salary levels 1 to 14 in a production or supervisory/managerial, Occupation Specific Dispensation (OSD) and non-OSD post in the Public Service with effect from 1 July 2012 including employees appointed on a fixed-term contract exceeding 2 years; or
>
> (b) Who have resigned and are re-appointed into the public service with effect from 1 July 2012.

> The CIP is a one-year programme. An employee shall within six (6) months of his/her date of appointment to the public service enrol for CIP. An employee has twenty-four months (24) from her or his date of appointment to the Public Service to successfully complete the CIP. Only upon successful completion of the CIP will an employee qualify for an annual pay progression commencing with effect from 1 April of the new cycle.
>
> The probation period of an employee shall not be confirmed unless an employee has successfully completed at least one of the CIP. If an employee fails to successfully complete one of the CIP after three (3) attempts, the Head of the Department shall manage the employee in terms of the code and procedure on the management of poor performance or discipline, whichever is applicable.
>
> To apply the system effectively, quarterly probation reports, which will be provided to you for cognisance and signature, will be completed by your supervisor/manager and submitted to HR Component. Please note that your probation period will automatically be extended by the number of days, vacation, sick or special leave that you take during such probation period. As indicated above, your probation cannot be confirmed unless one of the CIP has been completed within 12 months.'

[8] Prior to the trial it was common cause that Mr Ramaila attended CIP training, as set out in his contract of employment, which was required prior to the confirmation of his probation. As it turned out during the trial, the appellants amended their statement of response to dispute that he attended the CIP. Mr Anthony James Canham, an employee of the department, engaged at the Justice College as a lecturer on management courses which includes CIP, conceded that the department bore a duty to enrol Mr Ramaila for the CIP training and had failed to discharge this.

[9] Mr Ramaila, Ms Ontong and Ms Grootboom attended an induction programme from 19 to 20 November 2015. At the end of the 12 months probation period, the department forwarded an email to Mr Ramaila confirming the completion of the probation and his permanent appointment.

[10] During the performance assessment for the financial year commencing 01 April 2015 and ending on 31 March 2016 Mr Ramaila achieved an overall annual performance rating of 100% which the department confirmed through a letter dated 16 February 2017 which reads:

> 'OUTCOME OF PERFORMANCE ASSESSMENT FOR FINANCIAL YEAR: 1 APRIL 2015 TO 31 MARCH 2016
> During the moderation process on your performance for the abovementioned assessment period you achieved an overall annual rating of 100%. Please note that the Department could not process any payments in respect of the Performance Management Policy as a result of the following:
> 24 months on the salary level not completed (new appointee to Public Service).'

[11] This gave rise to this dispute. At the heart of Mr Ramaila's complaint is that his comparators, Ms Grootboom and Ms Le Roux, achieved the same performance assessment outcome which was an overall annual rating of 100% in respect of the financial year 2015/2016. However, they were awarded an annual pay progression for that fiscal year whereas he was not.

[12] On 07 and 10 March 2017 Mr Ramaila directed detailed letters to the department and the Department of Public Service and Administration (DPSA) protesting the differentiation brought about by the period of eligibility for pay progression as captured in various impugned instruments. The department responded that the Incentive Policy Framework was a directive from the Minister of DPSA which had to be complied with; and that it could not unilaterally change the terms of the PSCBC Resolution 1 of 2012 without the concurrence of the Minister of DPSA. Dissatisfied with the responses received Mr Ramaila referred a dispute concerning unfair discrimination to the Commission for Conciliation, Mediation and Arbitration ("CCMA") for conciliation on 09 May 2017 which remained unresolved and finally came before the Labour Court for adjudication.

The Collective agreements and other instruments/policies pertinent to the appeal:

[13] A precursor to the three instruments in issue is the PSCBC Resolution 9 of 2001: "AGREEMENT ON IMPROVEMENT IN CONDITIONS OF SERVICE OF PUBLIC SERVICE FOR THE PERIOD 2001/2002, 2002/2003 AND 2003/2004 AND OTHER MATTERS OF MUTUAL INTEREST". It did not make any distinction between first-time entrants and those employees already in the public service with regard to the period of eligibility for pay progression. The duration for the eligibility which applied to all employees in the public service was 12 months. Clause 4.6 of the PSCBC Resolution 9 of 2001 provided as follows:

> '4. PAY PROGRESSION
>
> 4.6 payments in terms of the pay progression system shall be effected for the first time on 1 July 2002 and thereafter on 1 July each year.'

[14] More central to this appeal is Clause 4 of the PSCBC Resolution 1 of 2012: "AGREEMENT ON SALARY ADJUSTMENTS AND IMPROVEMENTS ON CONDITIONS OF SERVICE IN THE PUBLIC SERVICE FOR THE PERIOD 2012/13-2014/2015" which provides:

> '4. PAY PROGRESSION
>
> 4.1 Parties agree to amend clause 4.6 of PSCBC Resolution 9 of 2001 **in order to develop and professionalise the public service.**
>
> 4.2 **The qualifying period for first-time participants will be extended from 12 to 24 months. The amendment will take effect from 1 July 2012.**
>
> 4.3 **Upon completion of the 24 months period, an eligible first-time participant will qualify for pay progression annually.'**

[15] Following the coming into effect of the PSCBC Resolution 1 of 2012, the Minister of DPSA issued the Incentive Policy Framework for Employees on Salary Levels 1 to 12 and those covered by OSD (full-time and part-time employees including employees appointed on a 5/8 and 6/8 capacity) who fall within the registered

scope of the PSCBC (the "Incentive Policy Framework"). The State Law Advisers fall within the scope of its application. It has four parts, A to D. Of relevance for present purposes is part A, *Pay (Notch) Progression*. It amplifies clauses 4.1 to 4.3 of the PSCBC Resolution 1 of 2012, pay progression provisions.

[16] Clause 4.4 of the Incentive Policy Framework defines first-time participants as new appointees to the public service in a production or supervisory or managerial OSD or non-OSD post, which includes employees who previously resigned from the public service and who are re-appointed in the public service. Part A thereof regulates pay progression as follows:

> '5 Employees are eligible for pay progression, effective from 1 July of a year.
>
> 6. With effect from 1 July 2012, the qualifying period for pay progression for First (1st) time participants, is twenty–four (24) months. In practice, the qualifying period for first-time participants will commence with effect from 1 April 2013 and run until 1 March 2015, with the awarding of the pay progression for qualifying employees on 1 July 2015.
>
> 7. The Pay progression cycle for employees other than the 1st time participants is (12) months. In practice the qualifying period for these employees will commence on 1 April 2013 and run until 1 March 2014 with the awarding of the pay progression for qualifying employees on 01 July 2014.
>
> 8. The pay progression cycle for first-time participants does not affect employees' probation periods.
>
> 9. Pay progression is not automatic, but based on actual service in a particular salary level for the respective periods as determined in terms of this policy and based on achievement of at least a satisfactory performance rating for the said period in line with departmental specific performance management systems.
>
> 10. Pay progression shall not be effected automatically by PERSA/PERSOL.

11. Pay Progression is awarded to qualifying employees in addition to possible annual costs-of-living adjustments.

12. Departments shall ensure that the cost of awarding pay progression in terms of this policy will not exceed 2% of the specific Department's wage bill for any given financial year.'

[17] The Performance Management Policy, dated and approved by the Chief Directorate Human Resource of the department on 21 May 2014, has a similar 24 months pay progression eligibility caveat with regard to first-time appointees in the public service. Its Part C – "Legislative Framework" provides that the Performance Management Policy is authorised, influenced, affected and bound by, amongst others, the following legislative instruments: the Constitution,[2] the Labour Relations Act, 66 of 1995 ("LRA"), the relevant Collective Agreements of the PSCBC and General Public Service Sectoral Bargaining Council (GPSSBC). The impugned clauses of the Policy provide:

'6 RECOGNITION OF PERFORMANCE

6.3 Performance Bonuses (Merit Award)

(ii) A newly appointed employee in the public service shall be eligible for the pay progression after serving a continuous period of 24 months…"

6.4 Pay Progression

(ii) Newly appointed employees in the Public Service to a post as from 01 July 2012 onwards shall qualify for a pay progression only after 24 months of unbroken service…'

The proceedings in the Labour Court and summary of the Court's findings

[18] Mr Ramaila's contention both in the Labour Court and this Court is that the disparate treatment with regard to the duration for eligibility for pay progression as

[2] The Constitution of the Republic of South Africa 1996.

contained in Clauses 4.1 to 4.3 of the PSCBC Resolution 1 of 2012 and Clause 6 of both the Incentive Policy Framework and the Performance Management Policy of the department were arbitrary, irrational and constituted unfair discrimination against new appointees in the public service.

[19] Mr Ramaila based his claim of unfair discrimination on "any other arbitrary grounds". The Labour Court was of the view that the differentiation had to be rationally connected to the purpose or the object for which it was designed to achieve which was to "develop and professionalise the public service". The Court reasoned that the annual pay progression served to reward employees who met a certain expected level of performance. It was not in recognition of the employees' length of service as the appellants sought to argue. The decision in *Pioneer Foods v Workers Against Regression & others,*[3] where it was held that the differentiation in respect of terms and conditions of employment on the basis of length of service was rational and legitimate, was distinguishable.

[20] The Court reasoned that the fact Mr Ramaila was defined as a new appointee in the public service triggered the differentiation. This attribute, the Court found, albeit appeared neutral, had the potential to affect Mr Ramaila adversely in a comparably serious manner in the award of or qualification for the pay progression. What distinguished Mr Ramaila from his comparators, the Court held, was the environment where he acquired his legal experience, being private practice.

[21] The Court further held that the differentiation with regard to the duration for the eligibility for pay progression was not rationally related or connected to the object sought to be achieved and consequently unfairly discriminated against Mr Ramaila and new appointees in the public service.

[22] Pertaining to Mr Ramaila's second cause of action, review under s 6(2) of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA"), the Labour Court reviewed and set aside Clauses of 4.1 to 4.3 of the Collective Agreement: PSCBC

[3] (2016) 37 ILJ 2872 (LC).

Resolution 1 of 2012, on the grounds that the differentiation provided for therein, with regard to the duration for eligibility for annual pay progression to which new appointees were subjected to, was not rationally connected to the object sought to be achieved, which was "to develop and professionalise the public service". Insofar as Clauses 4.1 to 4.3 of the Collective Agreement: PSCBC Resolution 1 of 2012, constituted "a deemed ministerial determination" by virtue of s 5 of the Public Service Act, the Court held that there was no rational relationship between the exercise of the relevant power and the purpose for which it was given for its application.

The basis of the appeal and analysis

[23] The appellants' attack of the Labour Court's findings is premised on multiple grounds. In my view, it is not necessary to traverse a number of them at any great length. Both parties filed prodigious heads of argument canvassing various issues but deal to a very limited extent with two condensed questions of relevance to the adjudication of the appeal. Properly distilled the germane issues arising are:

23.1 First, whether Mr Ramaila's claim of unfair discrimination "on any other arbitrary ground" is justiciable under s 6(1) of the Employment Equity Act, 55 of 1998 ("EEA") which provides that:

> 'No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or **any other arbitrary ground**.'

23.2 Second, whether Clauses 4.1 to 4.3 of the Collective Agreement, PSCBC Resolution: 1 of 2012; Clause 6 of both the Incentive Policy Framework issued by the Minister of DPSA and the Performance Management Policy issued by the department constitute administrative action and thus reviewable under s 6 of PAJA.

The alleged unfair discrimination claim

[24] This Court has recently in *Naidoo & others v Parliament of the Republic of SA*[4] comprehensively dealt with the construction to be placed on the phrase "any other arbitrary ground" as set out in 6(1) of the EEA. The fundamental question before the Court in *Naidoo* was whether a "narrow" or a "broad" interpretation of the compass of the phrase "any other arbitrary ground" should prevail. The distinction suggested, on the one hand, that the compass is limited to a ground which is analogous to the listed grounds, and on the other, posited conduct required to be arbitrary, in the sense of being "capricious". This Court, after a careful examination of the jurisprudence of the Constitutional Court decisions of this Court and the Labour Court and some academic writings, endorsed a narrow compass interpretation thereof. It held that the expression was not meant to be a self-standing ground, but rather one that referred back to the specified grounds, so that a ground of a similar kind would fall within the scope of s 6.[5]

[25] Insofar as Mr Ramaila's claim of alleged discrimination fell within the ambit of "any other arbitrary ground" the onus was on him to prove on a balance of probabilities that the period of eligibility to receive the annual pay progression is not rational and amounts to unfair discrimination.[6] In *Harksen v Lane NO*[7] Goldstone J formulated the test for discrimination[8] as follows:

> '*(a)* Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of s 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.

[4] (2020) 41 ILJ 1931 (LAC).
[5] (2020) 41 ILJ 1931 (LAC) at 1942 para 26.
[6] EEA s11(2)(a)(b)(c).
[7] 1998 (1) SA 300 (CC).
[8] *Harksen v Lane NO* 1998 (1) SA 300 (CC) para 53.

(b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:

(i) Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established**. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.**

(ii) If the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of s 8(2).

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (s 33 of the interim Constitution). (My emphasis)

[26] Mr Ramaila contends that he has pleaded sufficiently the facts required to establish a cause of action and has thus discharged the onus in terms of s 11(2) of the EEA. The arbitrary ground, he contends, is *"clearly defined and borne of the facts of the case."* In his statement of claim, with reference to his performance assessment outcome, he states :[9]

'23. It is apparent from the contents of annexure "SDR7" that the reason I did not receive a pay progression is that in terms of the Performance Management Policy …of the DoJ I-

[9] Ad para 23 statement of claim.

23.1 am characterised as a “new appointee to the public service” and

23.2 had not yet completed 24 (twenty-four) months at the time of the outcome of the performance assessment for the assessment period in question *i.e.* financial year: 1 April 2015 to 31 March 2016.’

He also states:[10]

‘50.4 The first time participants are subjected to the 24 (twenty-four) months simply because of their characterisation or status as “not having being employed in the public service before” or “having previously resigned from the public service”. This characterisation has the effect of further subjecting the first time participants to unequal treatment which is irrational and devoid of fairness.’

[27] He testified that he was treated differently for not having being associated with the “public sector environment” prior to his appointment and said:

‘It is a kind of a characteristic that is attached to me or an attribute that is attached to me that is now being to distinguish or differentiate me from the other people and so there is no any other, it is not to say if they get, they got this pay progression because outstanding or ja extraordinary performance it is simply on the basis of the fact that I am the newcomer and they are they old guys in the public sector so am new that is.(sic)’

[28] The prohibition which the equality provision in the Constitution, and by parity of reasoning the EEA, is directed at is the differentiation which impairs the fundamental dignity of human beings or in some other way affect persons adversely in a comparably serious manner.[11] In *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others,*[12] the Constitutional Court distinguished the violation of dignity and self-worth under the equality provisions from a violation of dignity under section 10 of the Bill of Rights. It held that the former is based on the impact that the measure has on a person because

[10] Ad para 50.4 statement of claim.
[11] *Prinsloo v Van der Linde and Another* 1997 (6) BCLR 759 (CC) at 774 para 331.
[12] 1998 (12) BCLR 1517 (CC) at para 124.

of membership of an historically vulnerable group that is identified and subjected to disadvantage by virtue of certain closely held personal characteristics of its members; it is the inequality of treatment that leads to and is proved by the indignity. The violation of dignity under section 10, on the other hand, contemplates a much wider range of situations. It offers protection to persons in their multiple identities and capacities. Inequality is established not simply through group-based differential treatment, but through differentiation which perpetuates disadvantage and leads to the scarring of the sense of dignity and self-worth associated with membership of the group. Conversely, an invasion of dignity is more easily established when there is an inequality of power and status between the violator and the victim.[13]

[29] What is instructive from *Naidoo supra* is that the insertion of the word "*other"* supports the conclusion that the phrase "any *other* arbitrary ground" was not meant to be a self-standing ground, but rather one that referred back to the specified grounds, so that a ground of a similar kind would fall within the scope of section 6.[14] Being a newcomer in the public service or "newness" as Mr Ramaila termed it, as an attribute which he argued was used by the appellants to differentiate him, is far removed from any of the specified grounds or any ground akin or analogous to them. I am unpersuaded that the conduct of the appellants, objectively analysed on the ground of Mr Ramaila's attribute, that of being new in the public service, had the potential to impair his fundamental human dignity in a comparably serious manner. He, therefore, failed to discharge the onus. To this end, I am of the view that, the Labour Court erred in concluding that he was discriminated against as envisaged in s 6(1) on "any other arbitrary grounds."

[30] The pay progression system is not without its own difficulty. The impact of the injunction is that employees other than those defined as new appointees, qualify for annual pay progression upon achieving performance assessment outcome of

[13] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*1998 (12) BCLR 1517 (CC) at para 125.
[14] *Naidoo* para 25.

a particular fiscal year and do not serve the same 24 months qualifying period as the new appointees. This is despite the fact that the employees other than the new appointees would have been appointed into the posts of the same grades and levels; at the same time as the new appointees; would have commenced at the same salary notches; performing the same work of equal value; and having the same KRA as the new appointees, and achieved the same required performance rating of 100%. It is not surprising that the impugned instruments brought about a considerable degree of despondency because it resulted in pay disparity between Mr Ramaila and his comparators. This notwithstanding, as this Court observed in Naidoo *supra*, not all wrongful conduct is justiciable under s 6(1) of the EEA because there is no self-standing ground of arbitrariness or capriciousness. In summary, whatever the possible adverse consequences caused by the pay progression system, these consequences did not constitute discrimination of a kind that could justify a claim in terms of s 6 of the EEA.

The review under PAJA

[31] Mr Ramaila's second cause of action hinges on PAJA and the alleged irrationality of the pay progression system. As already discussed the parties to the collective agreement, PSCBC Resolution 1 of 2012, agreed to amend Clause 4.6 of PSCBC Resolution 9 of 2001 in order **"to develop and professionalise the public service"** by *inter alia*, extending the qualifying period in respect of eligibility to receive pay progression for the first-time participants from 12 to 24 months. It was common cause that "to develop and professionalise the public service" constituted the object sought to be achieved which Mr Ramaila conceded was legitimate.

[32] Mr Ramaila contended in the Labour Court that PSCBC Resolution 1 of 2012, the Incentive Policy Framework, and the Performance Management Policy, constituted administrative action in terms of s 1(a)(ii) of PAJA and thus reviewable on the basis that the differentiation against the new appointees, with regard to the duration for the eligibility for annual pay progression:

[32.1] is not rationally connected to the stated objective sought to be achieved, namely, to develop and professionalise the public service (s 6 (2)(f)(ii)(aa) of PAJA) or

[32.2] is unconstitutional or unlawful in that it unfairly discriminated against the new appointees in the public service (s 6 (2)(i) of PAJA).

As a consequential relief, Mr Ramaila urged the Labour Court to reviewed and set aside the impugned instruments.

[33] The Labour Court was persuaded that Clauses 4.1 to 4.3 of the PSCBC Resolution 1 of 2012 are deemed to be a determination made by the Minister in terms of s 5(6)(a) of the Public Service Act. In addition, the Court found that the Incentive Policy Framework constituted a directive issued by the Minister of DPSA in terms of s 5(6)(b) of the Public Service Act. As already alluded to, the Court held that the impugned instruments constituted administrative action as defined in s 1(a)(ii) of PAJA and were reviewable on the basis that the differentiation provided therein is not rationally connected to the stated objective sought to be achieved. Insofar as Clauses 4.1 to 4.3 of the Collective Agreement: PSCBC Resolution 1 of 2012, constituted "a deemed ministerial determination", by virtue of s 5 of the Public Service Act, the Court held that there was no rational relationship between the exercise of the relevant power and the purpose for which it was given for its application.

[34] The Labour Court relied on the decision of the Full Bench in *Free Market Foundation V Minister of Labour and Others*[15] as support for its finding that the impugned instruments were reviewable. Murphy J expressed himself in these terms:

> '[81] From the foregoing discussion it is evident that any determination of whether a bargaining council resolution is administrative action in terms of PAJA will depend in the final analysis on the peculiar facts. I incline to agree with Cosatu,

[15] 2016 (4) SA 496 (GP).

> Numsa, the Minister and the bargaining councils that PAJA ordinarily will apply and thus that the decision of the bargaining council will be subject to PAJA review. The strongest argument against such a conclusion may be that the resolution, being deliberative, is not a decision of an administrative nature. Unfortunately, as said, no argument was presented in relation to this issue, which was not specifically raised in the affidavits. If the decision is administrative action, then it will be reviewable on grounds of reasonableness (at least rationality), legality and due process. If, on the other hand, the bargaining council resolution is not administrative action under PAJA, it still will be subject to rationality and legality review under the rule of law provision in s 1 of the Constitution. Review in terms of the principle of legality may involve a lower standard of scrutiny than a reasonableness review under PAJA, but it still can be far-reaching and includes the requirements of rationality, legality and a duty not to act arbitrarily, capriciously or with ulterior purpose. There must be a rational relationship between the exercise of the power and the purpose for which the power was given. Moreover, there is explicit statutory protection against discrimination. In terms of s 32(3)*(g)* of the LRA the collective agreement may not discriminate against non-parties, a matter I will discuss later. And hence the charge of inconsistency with the Constitution for want of adequate judicial supervision of the bargaining council process is not sustainable.'[16]

[35] I do not read *Free Market Foundation* (FMF) to be definitive of the question that a bargaining council collective agreement is reviewable under PAJA. The views articulated by Murphy J *supra* were *obiter* and show that collective agreements are not free from judicial checks and supervision. FMF in the main resolved into two related decisive questions. The first was the nature and scope of judicial review available in relation to the decisions and actions involved in the extension of bargaining council collective agreements to non-parties. The second, was whether the bargaining councils and the Minister were obliged to act in the public interest when extending such agreements. The answer to the first question depended, to some extent, upon whether the decisions and actions in question constituted

[16] at 526-527 para 81

"administrative action" in terms of PAJA and were in consequence reviewable on the grounds specified in s 6 of PAJA. At para 118 of FMF Murphy J said:

> '[118]…**There is a possibility that bargaining council decisions may be reviewed on PAJA or rationality grounds, but, even if they cannot be**, the discretionary power of the 'Minister to extend minority collective agreements certainly is reviewable on PAJA grounds or for rationality, and the attenuated power to review the extension of majority collective agreements is a reasonable and justifiable limitation upon the rights of administrative justice, by reason of the legitimate and rational basis for the application of the majoritarian principle in collective bargaining, the proportional safeguards afforded by the exemption system, the protection against discrimination granted by s 32(3)*(g)*, and the common law.' (My emphasis)

[36] It is therefore necessary to examine the question of the scope of the definition of administrative action. An administrative action is defined in s 1 of PAJA as:

> '(A)ny decision taken, or any failure to take a decision, by —
>
> *(a)* an organ of state, when —
>
> (i) exercising a power in terms of the Constitution or a provincial constitution; or
>
> (ii) exercising a public power or performing a public function in terms of any legislation; or
>
> (c) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect. .'

[37] A decision means:

> '(A)ny decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision.'

[38] The terms “administrative power”, “public power” or “public function” are to a great extent synonymous or have the same import in that they refer to the power conferred upon an administrator or official to perform a specific function in the public interest. The source of this administrative power/public power or public function is the legal instrument (empowering statute or empowering provision) from which the administrator or official derives his or her power to perform the function in question.[17] The key question is whether the task itself is administrative in nature. The test turns not on identification of the functionary but on the function exercised.[18] A bargaining council vested with legal personality by the provisions of the LRA, exercising public powers and performing public functions, is an organ of state.[19]

[39] One of the purposes of the LRA is to provide a framework within which employees and their trade unions, employers and employers' organisations can-collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest.[20] A collective agreement is a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered *trade union*, on the one hand and, on the other, one or more employers; one or more registered *employers' organisations*; or one or more employers and one or more registered *employers' organisations.*[21]

[40] When a bargaining council concludes a collective agreement regulating conditions of services it does so as an organ of state or as a juristic person exercising a public power or performing a statutory public function under the LRA. However, a collective agreement remains a product of collective bargaining described *in Metal & Allied Workers Union v Hart Ltd,* as being “a haggle or wrangle” process so as

[17] See Administrative Law Yvonne Burns 4th Edition LexixNexis at 137- an authority cited therein.
[18] *President of the Republic of SA & others v SA Rugby Football Union & others* 2000 (1) SA at 67 para 141.
[19] FMF supra at 541 para 121; see also *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2007 (1) SA 343 (CC) at 364-3566 paras 40-45; *Grey’s Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works andOothers* 2005 (6) SA 313 (SCA) at 323 para 24.
[20] Section 1 of the LRA.
[21] Section 213 of the LRA.

to arrive at some agreement on terms of 'give and take".[22] It has deliberative characteristics. The subject matter for negotiations with a view to sealing a collective deal is of a private nature.

[41] Section 31 of the LRA sets out the binding nature of a collective agreement concluded in a bargaining council as follows:

> **'**Subject to the provisions of section 32 and the constitution of the bargaining council, a collective agreement concluded in a bargaining council binds—
>
> (a) the parties to the bargaining council who are also parties to the collective agreement;
>
> (*b*) each party to the *collective agreement* and the members of every other party to the *collective agreement* in so far as the provisions thereof apply to the relationship between such a party and the members of such other party; and
>
> (*c*) the members of a registered *trade union* that is a party to the *collective agreement* and the employers who are members of a registered *employers' organisation* that is such a party, if the *collective agreement* regulates—(i
>
> (i) terms and conditions of employment; or
>
> (ii) the conduct of the employers in relation to their *employees* or the conduct of the *employees* in relation to their employers.'

[42] The Collective Agreement: PSCBS Resolution 1 of 2012 binds the employer and employees who are employed by the State and fall within the registered scope of the bargaining council.[23] Mr Ramaila acknowledged that, although he is not a union member, this was binding upon him. In addition to pay progression, it provides, *inter alia,* for salary adjustments, long service recognition, night shift allowance, shop steward leave, decent work and other conditions of service. It was signed by

[22] (1985) 6 ILJ 478 (IC) at 493 para 35.
[23] Clause 2 of PSCBC Resolution 1 of 2012 records the scope of its application.

the State as the employer and the Trade Unions: DENOSA, NEHAWU, POPCRRU, SADTU, and SAPU.

[43] The "right" articulated in the meaning of an administrative action under s 1 of PAJA is a "right" in a wide sense.[24] Employees covered by the PSCBC Resolution 1 of 2012 would ordinarily acquire the right to receive pay progression on the basis of this collective agreement upon fulfilment of the conditions precedent. The period of eligibility to receive pay progression for first-time entrants into the public service as contained in PSCBS Resolution 1 of 2012 adversely affects Mr Ramaila's right and those similarly situated. This is so because Mr Ramaila was denied an annual pay progression when he had achieved the same performance assessment outcome for the financial year 2015/2016 as his comparators; he met the same job requirements; he was subjected to the same probation period; he had signed the performance agreement with the same KRAs; he had been appointed on the same salary scale and started at the same minimum salary notch of as his counterparts and are doing the same work of equal value.

[44] Against the background sketched, a collective agreement, regulating conditions of service of employees falling within its coverage, although adversely affecting Mr Ramaila, is purely contractual in nature and has no external legal effect outside the bargaining council. Therefore, it does not constitute an administrative action reviewable under PAJA. It does not end here because Mr Ramaila argued that Clauses 4.1 to 4.3 of the PSCBC Resolution 1 of 2012 are deemed to be determination made by the Minister in terms of s 5(6)(*a*) of the Public Service Act whereas the Incentive Policy Framework is a directive issued by the Minister of DPSA in terms of s 5(6)(*b*) of the Public Service Act. Consequently, he contended, the impugned instruments are administrative action subject to review under s 6 of PAJA.

[24] *Bullock NO and Others v Provincial Government, North West Province, and Another* 2004 (5) SA 262 (SCA); ([2004] 2 All SA 249) at 271 para 19 where it was held with reference to authorities cited therein that('It may be that a broader notion of "right" than that used in private law may well be appropriate.')

[45] Section 5 of the Public Service Act provides in part:

> '(4) 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.
>
> (6) *(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.'

[46] A deeming provision must always be construed contextually and in relation to the legislative purpose.[25] In *S v Rosenthal*[26] it was said that:

> 'The words 'shall be deemed' ('word geag' in the signed, Afrikaans text) are a familiar and useful expression often used in legislation in order to predicate that a certain subject-matter, eg a person, thing, situation, or matter, shall be regarded or accepted for the purposes of the statute in question as being of a particular, specified kind whether or not the subject-matter is ordinarily of that kind. The expression has no technical or uniform connotation. Its precise meaning, and

[25] *Eastern Cape Parks and Tourism Agency v Medbury (Pty) Ltd t/a Crown River Safari* 2018 (4) SA 206 (SCA) at 218A para 34.
[26] 1980 (1) SA 65 (A) at 75G - H.

especially its effect, must be ascertained from its context and the ordinary canons of construction.'

[47] From the preamble one of the purposes of the Public Service Act is to regulate the conditions of employment. In terms of s 3 of the Public Service Act, the Minister of DPSA is responsible for establishing norms and standards relating to the conditions of service and other employment practices for employees and labour relations in the public service.[27] To give effect to this, the Minister is required to make regulations, determinations, issue directives, and perform any other acts provided for in the Act.[28] Subject to the LRA and any collective agreement he may make determinations regarding any conditions of service of employees generally or for categories of employees, including determinations regarding salary scales for all employees or salary scales for particular categories of employees and allowances for particular categories of employees.[29] This, in my view, is the textual context upon which the deeming provision ought to be construed.

[48] To my mind, the import of the words "shall…. be deemed to be" in s 5(6)(*a*) is "shall… be regarded as". The provisions of Clauses 4.1 to 4.3 of the PSCBC Resolution 1 of 2012 are therefore, in every practical sense, a determination made by the Minister of DPSA in terms of s 3(5) of the Public Service Act.

[49] The impugned provisions of the Incentive Policy framework expand the PSCBC Resolution 1 of 2012 and seeks to elucidate its pay progression provisions. It does not derogate from the terms of the resolution but regurgitates its Clauses 4.1 to 4.3 insofar as it provides that the qualifying period for pay progression for the first time participants is 24 months whereas of the other employees 12 months.

[50] Section 5(4) of the Public Service Act would require that the acts of any functionary subscribe to the sanctity and primacy of the collective agreements in that a functionary may not act contrary to the provision of the collective agreement. What

[27] Section 3 (1)(*c*) (*d*).
[28] Section 2 of the Public Service Act.
[29] section 3(5)(*a*) of the Public Service Act.

s 5(6)(*a*) does is to give more impetus to the terms of collective agreements without derogating from its essential provisions. The Minister of DPSA has, by means of the Incentive Policy Framework, sought to elucidate or supplement terms of the collective agreement as envisaged in s 5 (6)(*b*).

[51] The ministerial determination and the directive referred to s 5(6)(*a*) and (*b*) has their basis or source in the collective agreement. Put differently, the juridical act introducing the differentiation is founded in the collective agreement. As I see it, although s 5 changes the complexation of a collective agreement into a ministerial determination neither the deeming provision nor the Minister of DPSA's directive would mutate the contractual nature of a collective agreement, which regulates purely employees' conditions of service, into administrative action. To hold otherwise would be a bridge too far. Not much needs to be said about the administrative nature of the Performance Management Policy. It remains purely an employment and labour relationship issue which does not fall within the ambit of administrative action.

Conclusion

[52] In conclusion, Mr Ramaila's unfair discrimination claim based on "any other arbitrary ground" is not justiciable under s 6 of the EEA. Clauses 4.1 to 4.3 of the PSCBC Resolution 1 of 2012; and Clauses 6 of the Incentive Policy Framework and the Performance Management Policy are not administrative action within the meaning of PAJA and therefore not reviewable under s 6 of PAJA. The ineluctable conclusion is that the Labour Court erred in finding that there had been unfair discrimination against Mr Ramaila and reviewing and setting aside PSCBC Resolution 1 of 2012. The Labour Court's decision falls to be upset.

[53] Mr Mokhari asked for costs consequent upon the employment of two counsel. This would be inappropriate in the circumstances where Mr Ramaila approached this Court to vindicate his constitutional right to equality. Regrettably for him the case he pleaded failed him. In any event, such orders are rarely made particularly where parties are still in pursuit of an employment relationship. I make the following order:

Order

1. The appeal is upheld with no order as to costs.

2. The order of the Labour Court is set aside and in its instead is substituted the following:

'The applicant's claim is dismissed with no order as to costs.'

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MV Phatshoane

Acting Deputy Judge President - The Labour Appeal Court

Davis JA and Murphy AJA concur in the judgment of Phatshoane ADJP

APPEARANCES:

For The First, Second,

and Third Appellants: Adv W.R Mokhare SC assisted by adv L X Dzai

Instructed by State Attorneys (Cape Town)

For The First Respondent: Mr Sekhoshe Days Ramaila (In person)