



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Reportable

Case nos: 353/2020 and 354/2020

In the matter between:

THE NATIONAL PROSECUTING AUTHORITY

APPELLANT

and

PUBLIC SERVANTS ASSOCIATION obo

MEINTJIES & 55 OTHERS

FIRST RESPONDENT

**MINISTER OF JUSTICE AND CORRECTIONAL
SERVICES**

SECOND RESPONDENT

**DIRECTOR-GENERAL: DEPARTMENT OF JUSTICE
AND CONSTITUTIONAL DEVELOPMENT**

THIRD RESPONDENT

**MINISTER OF PUBLIC SERVICE
AND ADMINISTRATION**

FOURTH RESPONDENT

MINISTER OF FINANCE

FIFTH RESPONDENT

GOVERNMENT EMPLOYEES PENSION FUND

SIXTH RESPONDENT

AND

**THE MINISTER OF JUSTICE AND CORRECTIONAL
SERVICES**

FIRST APPELLANT

DIRECTOR-GENERAL: DEPARTMENT OF JUSTICE

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FIFTH RESPONDENT

Neutral citation: *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)

Coram: SALDULKER, VAN DER MERWE, MOLEMELA, MOKGOHLOA and HUGHES JJA

Heard: 23 August 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 14h30 on 17 November 2021.

Summary: Court – jurisdiction of High Court in employment-related matter – proper analysis of applicant's pleadings (notice of motion and founding affidavit) required to ascertain legal basis of claim – legal basis of applicant's claim unfair labour practice – not justiciable in High Court – it should have struck matter from roll for want of jurisdiction.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Van der Westhuizen J sitting as court of first instance):

- 1 The appeal is upheld with costs, including the costs of two counsel where so employed.
- 2 The order of the high court is set aside and replaced with the following:
'The application is struck from the roll with costs, including the costs of two counsel where so employed.'

JUDGMENT

Molemela JA

Introduction

[1] Central to this appeal is 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).¹ 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 Gauteng Division of the High Court, Pretoria (the high court). The NPA was cited as the first respondent; the Minister of Justice and Correctional Services as the second respondent; the Minister of Public Service and Administration as the third respondent; the Minister of Finance as the fourth respondent; the Government Employees Pension Fund, a pension fund scheme for government employees, as the fifth respondent; and the Director-General of the Department of Justice and Constitutional Development (Director-General) as the

¹ It appears that three members represented by the PSA were CPs. The rest of the members were DDPPs. The appellants contended that neither the DDPPs nor the CPs were covered by 2010 Determination.

sixth respondent. Only the NPA, the Minister of Justice and Correctional Services (the Minister) and the Director-General opposed the application. The application served before van der Westhuizen J.

Background facts

[2] It is common cause that negotiations on wage and other collective bargaining issues had taken place at the Public Service Co-ordinating Bargaining Council (PSCBC) in 2007. These negotiations culminated in several collective agreements being concluded. Since the PSA alleges that those collective agreements are the genesis of this dispute and that the erstwhile National Director of Public Prosecutions, Mr Nxasana, (NDPP) approved the translation of the OSD salary structure to the DDPPs and CPs. It is therefore necessary to give a brief overview of what those collective agreements entailed.

[3] In terms of PSCBC Resolution 1 of 2007, the OSD salary structure was to be implemented to employees in the legal profession within the justice cluster with effect from 1 July 2007. In terms of that Resolution, the translation measures for the movement to the new structure would be dealt with at the relevant sectoral bargaining council.

[4] In compliance with PSCBC Resolution 1 of 2007, during or about 7 February 2008, the General Public Service Sector Bargaining Council (GPSSBC) negotiated and concluded a collective agreement between the State as employer and various trade unions representing government employees, regarding the implementation of the OSD for legally qualified categories of employees. This agreement is commonly referred to as GPSSBC Resolution 1 of 2008. Its stated objective was to introduce the OSD salary structure for legally qualified professionals falling within the occupational categories of State Attorney, Family Advocate, State Law Advisor, Legal Administration Officer, Master, Registrar, Maintenance Officer and Estate Controller. According to the PSA, GPSSBC Resolution 1 of 2008 was meant for civil servants of certain categories who were legally qualified and rendered in-house legal services.

[5] The OSD provided for in GPSSBC Resolution 1 of 2008 not only created a unique remuneration structure, but also introduced different career streams. In order to enhance career pathing, it introduced the following work streams: training (LP1 to LP2); entry level production (LP3 to LP8; EC1 to EC4 and MR1 to MR5); advanced production level (LP5 to LP9); specialist level (LP10); and supervisory level (MR8). It was made clear that in relation to the production specialist stream, the number of posts created would be subject to norms to be determined by the Departments. GPSSBC Resolution 1 of 2008 further stipulated that a dispute resolution mechanism in terms of which any dispute about the interpretation or application of that collective agreement was to be referred to the Bargaining Council² for resolution.

[6] On 14 February 2008, the Minister, in contemplation of s 18(1) of the National Prosecuting Authority Act 32 of 1998 (NPA Act), issued a determination pertaining to the revised salaries for DDPPs, CPs and Chief Specialist Investigators.³ No mention of the OSD was made in that determination. It is common cause that the DDPPs are appointed in terms of s 15 of the NPA Act and that the NPA Act does not specifically deal with the appointment of CPs and Chief Specialist Investigators. Section 18(1) provides that the DDPPs and prosecutors shall be paid a salary in accordance with the scale determined, from time to time by notice in the government gazette, by the Minister, after consultation with the NDPP and the Minister for Public Service and Administration, with the concurrence of the Minister of Finance. Section 18(2) of the same Act stipulates that 'different categories of salaries and salary scales may be determined in respect of different categories of [DDPPs] and prosecutors'.

[7] On 7 October 2008, the Minister, acting in terms of s 18(1) of the NPA Act, determined a first phase translation (on the same basis as provided for in the OSD for legally qualified professionals as per GPSSBC Resolution 1 of 2008) and setting out new salary ranges for prosecutors with effect from 1 July 2007.⁴ On 2 December 2010, the Minister, within the contemplation of the same provision, published a determination (the 2010 Determination) in terms of which he announced that a

² The applicable Bargaining Council was the GPSSBC.

³ 'GN R. 173, GG 30722, 14 February 2008.' In Annexure A, it was stated that the determination dealt with 'inclusive flexible remuneration dispensation for senior management service (SMS) in the NPA'. On 6 July 2012, the Minister published a further determination in 'GN 521, GG 35494, 6 July 2012', in terms of which the inclusive flexible remuneration packages of DDPPs, CPs and Chief Special Investigators were revised.

⁴ 'GN 1088, GG 31486, 1 July 2007.'

second stage translation had been negotiated and that the determination of the OSD and second phase translation for prosecutors was in line with the OSD determined in GPSSBC Resolution 1 of 2008.⁵ The 2010 Determination, as published in the government gazette, was couched as follows:

'DETERMINATION OF SALARIES OF PROSECUTORS UNDER SECTION 18(1) OF THE NATIONAL PROSECUTING ACT, 1998

WHEREAS the former Minister for Justice and Constitutional Development, as per Government Notice No 1088 published in Government Gazette No 31486 of 7 October 2008, determined as the first phase translation, *on the same basis as provided for* in the Occupation Specific Determination for legally qualified professionals as per GPSSBC Resolution 1 of 2008 and pending a final determination, new salaries for prosecutors with effect from 1 July 2007;

AND WHEREAS a second phase translation and determination has been negotiated with the Department of Public Service and Administration *in line with* abovementioned Occupation Specific Dispensation;

NOW THEREFORE, I, Jeffrey Thamsanqa Radebe, Minister for Justice and Constitutional Development, acting under section 18(1) of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998), and after consultation with the National Director of Public Prosecutions and the Minister for the Public Service and Administration, and with the concurrence of the Minister of Finance, hereby determine an Occupation Specific Dispensation and second phase translation for prosecutors as per Schedule, with effect from 1 July 2007.' (My emphasis.)

[8] The Schedule attached to the 2010 Determination (the Schedule) stipulated that the objective of that determination was to provide for a unique remuneration structure and to introduce the OSD and career progression system for legally qualified professionals 'as defined in this determination'. It identified the desire to provide for career-pathing opportunities based on competencies, experience and performance as well as 'the creation of a specialist dispensation' as some of the objectives of that determination. Under the caption 'scope', it was stated that 'this determination applies to qualified legal professionals in terms of section 16⁶ of the NPA Act'.

⁵ 'GN 1146, GG 33826, 2 December 2010.'

⁶The NPA Act makes provision for various categories of appointments. The National Director is appointed in terms of s 10; the Deputy National Directors in terms of s 11; the Directors and Acting Directors in terms of s 13; DDPPs in terms of s 15; and prosecutors are appointed to the office of the NDPP, at the seats of the High Courts as envisaged in s 6 of that Act, at the Investigative Directorate, as well as at the lower courts, in terms of s 16 of the NPA Act.

[9] The PSA contended that its members were entitled to specific performance in respect of the collective agreements concluded in the bargaining councils. It asserted that the failure by the NPA to implement the collective agreements and 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.

[10] 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 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 DDPP's were inter alia informed that the proposed implementation date for migration to LP10 in the NPA was 1 April 2015.

[11] During the hearing of the application at the high court, 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 (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.

[12] In dealing with the point *in limine* raised in relation to jurisdiction, the high court took into account that the PSA not only sought compliance with collective agreements but, in addition, also sought compliance with the 2010 Determination issued by the Minister, the NDPP's approval (regarding the implementation of the OSD) and the memorandum compiled by the CEO dated 24 November 2014.⁷ It accepted that the PSA's prayer for specific performance was premised on s 77(3) of the BCEA, which grants concurrent jurisdiction to both the Labour Court and the High Court in relation to any matter concerning a contract of employment. The high court therefore considered itself to have the jurisdiction to adjudicate the application and dismissed the point *in limine*. It also dismissed the points *in limine* raised in relation to *lis pendens* and prescription. These are aspects that will be dealt with at the end of this judgment.

[13] The reasoning of the high court regarding the merits of the application, properly construed, was that inasmuch as s 18(2) of the NPA Act recognises that different categories of salaries and salary scales may be determined for different categories of DDPPs and prosecutors, that provision does not make any distinction in relation to the particular structure of remuneration. Thus, there was no bar precluding the translation of the DDPPs and CPs to the OSD structure. The high court found that on a purposive interpretation of the 2010 Determination, there was nothing unlawful about the NDPP approving a recommendation that suggested that the DDPPs and CPs be translated to the OSD salary structure. It also found that the DDPPs and CPs had, in line with the NDPP's approval, completed and signed the relevant documents, thus indicating their consent to translate from the salary structure known as Senior Management Service dispensation (SMS) to the OSD. It accordingly held that the PSA was entitled to the relief of specific performance relating to the implementation of the 2010 Determination, as approved by the NDPP on behalf of the NPA on 29 July 2014. The high court declared that the NDPP's approval regarding the implementation of OSD was 'lawful and enforceable' and had to be complied with.

[14] Dissatisfied with the orders granted by the high court, the NPA, the Minister and the Director-General sought the high court's leave to appeal its judgment but

⁷ Paragraph 35 of the high court's judgment.

were unsuccessful. The same parties then lodged two separate applications (with the NPA being an applicant in one application and the Minister and the Director-General being the applicants in the other), petitioning this Court to grant them leave to appeal the high court's judgment. Having considered the two applications, this Court, for the sake of convenience, issued one order in terms of which all the applicants (hereafter jointly referred to as the appellants) were granted leave to appeal to this Court against the order of the high court. Although there are in essence two appeals before us, these were dealt with simultaneously.

Did the high court have jurisdiction to adjudicate the application?

[15] It is trite that both the LRA and the BCEA grant the Labour Court exclusive jurisdiction in respect of certain matters. Moreover, some disputes must be finally resolved through arbitration.⁸ However, the High Court's jurisdiction is not ousted by s 157(1) of the LRA merely because a dispute falls within the overall sphere of employment relations. This is because in terms of s 157(2) of that Act, the High Court and the Labour Court share concurrent jurisdiction in respect of employment-related disputes over which the Labour Court does not have exclusive jurisdiction.⁹ Similarly, s 77(3) of the BCEA, grants the Labour Court and High Court concurrent jurisdiction in respect of any matter concerning a contract of employment irrespective of whether any basic condition of employment constitutes a term of that contract.

[16] The fundamental question is whether the high court and the Labour Court enjoyed concurrent jurisdiction over the causes of action relied upon by the PSA in its application. A plethora of judgments have held that jurisdiction is determined on the basis of the pleadings and not the substantive merits of the case.¹⁰ This Court in *Lewarne v Focem International (Pty) Ltd*,¹¹ held that when a court's jurisdiction is challenged, the court should base its conclusion on the applicant's pleadings, as they contain the legal basis of the claim under which the applicant had chosen to invoke the court's competence. In *Boxer Superstores Mthatha and Another v*

⁸ Section 157(1) of the Labour Relations Act 66 of 1995 provides: 'Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.'

⁹ See s 157(2)(a) of the LRA.

¹⁰ *Gcaba v Minister for Safety and Security and Others* [2009] ZACC 26; 2010 (1) SA 238 (CC) para 66; *My Vote Counts NPC v Speaker of the National Assembly* 2016 (1) SA 132 (CC) para 132–134.

¹¹ *Lewarne v Focem International (Pty) Ltd* [2019] ZASCA 114 para 7.

Mbenyal,¹² this Court held that ‘the high court has jurisdiction even if the claim could also have been formulated as an unfair labour practice’.

[17] The approach recently laid down by the Constitutional Court in *Baloyi v Public Protector*¹³ (*Baloyi*) is instructive in relation to this appeal. That Court reaffirmed that an assessment of jurisdiction must be based on an applicant’s pleadings, as opposed to the substantive merits of the case.¹⁴ It also observed that ‘the same set of facts may give rise to several different causes of action’.¹⁵ Where other potential causes of action exist, the employee is not confined to only one.¹⁶ The Constitutional Court also observed that the mere potential for a cause of action, like an unfair dismissal claim, does not obligate a litigant to frame her claim as one of unfair dismissal and to approach the Labour Court notwithstanding that other potential causes of action exist.¹⁷ It also pointed out that the fact that a cause of action is limited to certain fora must not be interpreted as obliging an applicant only to pursue that cause of action.¹⁸

[18] With all those principles in mind, I now consider whether the PSA’s pleaded case elicited a cause of action that is justiciable in the high court. The question is whether PSA’s pleadings as gleaned from the notice of motion and the founding affidavit in its entirety, revealed a claim requiring the high court to determine a matter concerning a contract of employment as envisaged in the BCEA. For a proper perspective, it is necessary to preface a discussion on jurisdiction by sketching out the relief which the PSA sought at the high court. The prayers were set out as follows in the Notice of Motion:

- ‘1. The [NPA] to comply with the collective agreement dated 5 July 2007 being PSCBC¹⁹ Resolution 1 of 2007;
2. The [NPA] to comply with the collective agreement dated 7 February 2008 being GPSSBC Resolution 1 of 2008;

¹² *Boxer Superstores Mthatha and Another v Mbenya* 2007 (5) SA 450 (SCA) para 5.

¹³ *Baloyi v Public Protector and Others* [2020] ZACC 27; 2021 (2) BCLR 101 (CC); [2021] 4 BLLR 325 (CC); (2021) 42 ILJ 961.

¹⁴ *Ibid* para 33.

¹⁵ *Ibid* para 38.

¹⁶ *Ibid* para 40.

¹⁷ *Ibid*.

¹⁸ *Ibid* para 39.

¹⁹ Public Service Co-ordinating Bargaining Council established in terms of s 27 of the LRA.

3. The [NPA] to comply with the government notice dated 2 December 2010 issued and published by the Second Respondent acting in accordance with s 18(1) of the Act;

DECLARING

- [4] That the NDPP's approval regarding the implementation of the OSD dated 29 July 2014 was lawful and enforceable and must be complied with; and
- [5] That the memorandum dated 24 November 2014 from the Chief Executive Officer of the First Respondent, Ms Karen van Rensburg regarding the "proposal on the implementation of the LP 1P in the NPA" is lawful, enforceable and created reasonable legitimate expectation and must be complied with.
- [6] Ordering the [NPA] to pay the costs of this application;
- [7] Granting the Applicant further and/or alternative relief.'

[19] It is clear from the Notice of Motion that the PSA founded its case on a range of causes of action. The first two prayers were for the enforcement of the 2007 and 2008 collective agreements. It is of significance that in terms of s 18 of the NPA Act, the remuneration of DDPPs and prosecutors is to be determined only in terms of that Act. In that sense, their remuneration is not collectively bargained. The PSA emphasised that even though the genesis of the dispute was GPSSBC Resolution 1 of 2008, the dispute was not about the interpretation or application of that collective agreement. Rather, its reliance on the 2008 resolution was premised on the NDPP having approved that the new scheme (the OSD) mentioned in the 2008 resolution, which was reaffirmed in the 2010 Determination, be made applicable to the DDPPs and CPs. It is of significance that the high court did not grant prayers 1 and 2 (ie the relief pertaining to the collective agreements). As there is no cross-appeal, there is no need for those two prayers to detain us any further in this appeal.

[20] On the authority of *Baloyi*, it is permissible for a party to rely on more than one cause of action.²⁰ It is therefore noteworthy that in addition to seeking enforcement of collective agreements, the PSA also located its dispute as a contractual claim within the contemplation of s 77(3) of the BCEA. The PSA also sought an order declaring the NDPP's approval, lawful and enforceable. In order to determine whether any averments were made to support the relief sought, it is important to consider the Notice of Motion and the founding affidavit.

²⁰ *Baloyi v Public Protector and Others* [2020] ZACC 27; 2021 (2) BCLR 101 (CC); [2021] 4 BLLR 325 (CC); (2021) 42 ILJ 961 para 40.

[21] As I understand the PSA's founding affidavit, the contractual basis for the specific performance relief it is seeking is hinged on the 2010 Determination as well as the consultation that preceded it. The PSA avers that, pursuant to the Minister's 2010 Determination, several engagements took place, culminating in the NDPP approving the recommendation of the Chief Director, which essentially suggested the steps that needed to be followed in order for the DDPPs and CPs to be translated to OSD. According to the PSA, the NDPP agreed that the OSD would be implemented to the DDPPs and CPs who consented to the migration from SMS to the OSD.

[22] The PSA averred that the translation of the DDPPs and CPs had in effect taken place because the employees in question had, through their signature of performance agreements which were premised on the translation to the OSD band level LP10, indicated their acceptance to migrate from SMS to the OSD. This, it was contended, is what brought the dispute within contractual claims as envisaged in s 77(3) of the BCEA. As mentioned before, that provision grants the Labour Court concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, regardless of whether any basic condition of employment constitutes a term of that contract. The prayers in the Notice of Motion speak for themselves. To my mind, prayer F is not at odds with the assertion of a contractual obligation and thus falls within the ambit of s 77(3). The contractual nature of the claim can also be gleaned from various averments made by its deponent in the founding affidavit. In paragraph 18 of the founding affidavit, which sets out the purpose of the application, it is inter alia stated that 'the principal purpose of this application is to seek specific performance and to compel the [NPA] to comply with . . . the NDPP's approval regarding the implementation of OSD dated 29 July 2014 . . . and the memorandum dated 24 November 2014 from the Chief Executive Officer . . . '.

[23] At para 45 the deponent asserted that she had, on the instructions of the NPA, by inter alia 'completion of a choice to translate, which I did choose by signing a performance agreement'. She also averred that her colleagues had also completed documentation exercising the same choices as she did. I am 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 sufficed to bring the matter within the jurisdiction of the high court.

[24] The existence of the agreement to translate the DDPPs and CPs represented by the PSA is an issue that speaks 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, is an aspect that speaks to the merits and not to jurisdiction. That this is so is plain from the instructive approach set out in *Baloyi*, where the Constitutional Court aptly stated as follows:

'When assessing whether its jurisdiction is engaged, a court might be of the view that a litigant should have pursued a different cause of action, or that she would have had a better chance of success had she done so. However, these views are irrelevant to the courts' competence to hear the matter.'²¹

[25] Being mindful of the warning sounded by the Constitutional Court (in *Baloyi*) against the conflation of the determination of a court's jurisdiction with prospects of success, I am of the view that the pleaded case as elicited in the PSA's averments mentioned in the foregoing paragraphs, sufficiently clothed the high court with jurisdiction in relation to compliance with the 2010 Determination and the NDPP's approval dated 29 July 2014. The point *in limine* relating to jurisdiction was rightly dismissed. I turn now to the merits of the pleaded causes of action.

Analysis of the merits

[26] As stated before, the PSA's relief of specific performance inter alia sought to compel compliance with the provisions of the NDPP's approval of the OSD scheme pursuant to the 2010 Determination. The 2010 Determination should therefore not be considered in isolation; due regard must be paid to the NDPP's approval and other documents issued pursuant thereto. These include letters and minutes of meetings.

[27] The appellants contended that the NDPP did not have any say over the salaries of DDPPs and CPs because the clear provisions of s 18(1) of the NPA Act

²¹ *Baloyi v Public Protector and Others* [2020] ZACC 27; 2021 (2) BCLR 101; [2021] 4 BLLR 325; (2021) 42 ILJ 961 para 42.

clothe the authority to determine the salaries of DDPPs and prosecutors only on the Minister. They further contended that the 'production specialist' post was never created in the NPA because of a lack of funding. The appellants stressed that the NDPP's endorsement of the LP10 translation in respect of the DDPPs and CPs could not have granted him the right to exercise a power expressly granted by legislation to the Minister. At best, the NDPP's approval and the CEO's memorandum dated 24 November 2014 was the first level of a government procedure which requires the approval of the NDPP to be placed before the Director-General and ultimately before the Minister as part of the consultation process, so the contention went.

[28] I am mindful of the fact that s 18(2) of the NPA Act allows for different categories of salaries and salary scales to be determined in respect of different categories of DDPPs and prosecutors. While noting that the salary levels of the DDPPs and CPs were not included among the various categories of salary-levels mentioned in Annexure C of the 2010 Determination, I am unable to agree with any submission that suggests, as a general proposition, that the OSD was not envisaged for DDPPs. A purposive reading of the 2010 Determination in its entirety certainly does not support that conclusion. It bears noting that in the preamble of the 2010 Determination, the Minister acknowledged that the determination was preceded by consultations with the NDPP and the Minister of Public Service and Administration. The occurrence of such consultations is attested to by a memorandum issued by the Director-General, dated 13 August 2009, in terms of which it was stated that 'all qualifying legally qualified employees employed on salary levels 13 and 14 must translate to OSD'. It is common cause that the DDPPs and CPs were at salary level 14.

[29] Although the DDPPs and CPs are not mentioned in the categories of prosecutors listed in the translation key for the first and second phase translation (Annexures B and C to the 2010 Determination), this does not detract from the fact that the Schedule to the 2010 Determination introduced a work-stream referred to as 'production specialist'. Moreover, in Annexure A to that Schedule, the job titles of 'litigation specialist' and 'Deputy Director of Public Prosecutions (Production)' are listed under the LP10 band. Paragraph 4.2 of that Schedule spells out that the

production specialist stream was created to assist the NPA to recruit and retain specialists in the legal profession whose posts require active involvement in court work. The suggestion, in the NDPP's approval, about DDPPs and CPs qualifying for approval if they, inter alia, performed not less than 80% of court-related work must be seen against that background.

[30] It is noteworthy that GPSSBC Resolution 1 of 2008 granted the Departments the latitude to deal with the number of posts created in the litigation specialist stream subject to their own norms. Similarly, the 2010 Determination granted the NPA the latitude to establish its own norms regarding the litigation specialist stream. From my point of view, the series of engagements with the DDPPs and CPs regarding the OSD following the publishing of the 2010 Determination, the Chief Director's recommendations which were duly approved by the NDPP on 29 July 2014, are all consistent with the exercise of determining how the litigation specialist stream could be aligned to the NPA norms. The NDPP's endorsement of the OSD must be seen in that light. For that reason, I am unable to agree with the appellants' contention that the NDPP's approval was unlawful.

[31] As regards the enforceability of the NDPP's approval, I agree with the appellants' contention that the NDPP's endorsement of the translation to the OSD could not be elevated to a binding decision that could finally determine the salaries of the DDPPs and CPs. That this is so is manifest from the clear provisions of s 18(1) of the NPA Act, which not only requires the Minister's determination to be in consultation with the NDPP but also requires the concurrence of the Minister of Finance. Since the NDPP was not authorised to determine the salaries of the DDPPs and CPs, it follows that the PSA's assertion that the NDPP's approval created a legitimate expectation that its aggrieved members were entitled to be translated to OSD, was misplaced.²² This finding, however, is not dispositive of the appeal.

[32] Another important consideration which was debated with counsel during the hearing is as regards the assertion that the DDPPs and CPs evidenced their consent to the implementation of the OSD by signing performance agreements. For the

²² See *Duncan v Minister of Environmental Affairs and Tourism and Another* [2010] 2 All SA 462 (SCA) para 15.

reasons that follow, I am of the view that the PSA's claim on the implementation of any agreement premised on the NDPP's approval fell to be dismissed.

[33] It is clear that the NDPP's approval of the Chief Director's recommendations was not without conditions. It suggested that (i) the Deputy Directors of Public Prosecution (DDPPs) on salary level 13 and 14 were to be regarded as production specialist on the basis that they performed not less than 80 percent production work; and, (ii) the qualifying DDPPs on level 13 and 14 were to be migrated out of the Senior Management Service (SMS) salary dispensation to the OSD on salary level LP10, should they consent. The NDPP clearly envisaged that the individual employees would have to consent to the translation. Similarly, the CEO's memorandum dated 24 November 2014, addressed to all Deputy National Directors and copied to the NDPP, also made it clear that the DDPPs and CPs would be 'required to relinquish their positions as members of the SMS dispensation and be classified as production units as opposed to management echelon'.

[34] As mentioned before, even on the PSA's own account of events, the NDPP envisaged that the respective DDPPs and CPs would have to consent to the translation. It is of significance that the PSA in its replying affidavit stated: 'consent to translate to OSD was a prerequisite. Therefore, non-consenting [DDPPs and CPs] were not translated to OSD'. The recommendations in the Chief Director's letter clearly stipulated that the dispensation be migrated to those DDPP's who consented to the translation. In that same letter (dated 18 July 2014) the Chief Director observed that 'the implementation of OSD is not automatic and requires a formal process being undertaken'.

[35] The Chief Director's understanding can be accepted as correct because in Annexure C to the 2010 Determination, which dealt with the second phase of the translation process, the salary levels of the DDPPs and CPs were not included among the various categories of salary-levels listed in that document. It is also worth noting that in her memorandum dated 24 November 2014, the CEO remarked: 'Since the approval of the OSD, the NPA has been grappling with the implementation issues around implementation of LP10. Various approaches and models have been

discussed and up to this point, no formal approval was granted for the implementation of LP10'.

[36] The minutes of the meetings held after the issuance of the CEO's memorandum are also of significance. In the minutes dated 25 May 2015, it is recorded that 'there are requirements that have to be met at individual level. We cannot say that everyone who is currently on level 13 and 14 automatically [qualifies] because that will include people that do not necessarily do the work and don't want to do the work of a specialist litigator'. The importance of the consent of the respective DDPPs and CPs is recognisable from this statement. Similarly, the minutes of the meeting held with the CPs on 4 June 2015 recorded that 'our commitment is such that all people who are currently on salary levels 13 & 14, which includes you (Chief Prosecutors) who meet the requirements can translate to LP10 if they exercise that option, having looked at the implication as individuals'.

[37] Although the PSA averred in various paragraphs of the founding affidavit that the DDPPs and CPs had consented to be translated from SMS level to LP10 and that their consent is self-evident from the performance agreements, the difficulty for the PSA is that no performance agreement attests to this. The specimen performance agreement handed in during oral submissions at the high court makes no allusion to a consent to translation. Insofar as the specimen performance contract does not reflect consent as envisaged in the NDPP's approval, the upshot of this is that the consent of the DDPPs and CPs remains an unsubstantiated term of the very agreement the PSA is seeking to enforce. On that basis alone, the PSA has not shown an entitlement which the high court could enforce as a contractual obligation.

[38] With specific reference to the deponent to the founding affidavit (Ms Meintjies), it is noteworthy that, having averred that she had consented to the translation in accordance with the NDPP's approval, in Annexure A1 dated 3 March 2015, which was attached to her performance agreement for the 1 April 2016-31 March 2016 cycle, she stated the following:

'My signing of this document is *not* to be understood as acceptance of the *manner or date of the translation* as proposed by the CEO in a letter dated 24 November 2014 addressed to Deputy National Directors. It is categorically stated that the contents of this letter only came

to my attention on 2 March 2015 per an email forwarded by the DPP, Mr Mzinyathi. Attached to the email of 2 March 2015 was a letter by the CEO dated 27 February 2015 addressed to all NDPP, DPP, RH and Special Directors in which reference is made to the letter of 24 November 2014 with the said letter attached thereto. The manner and date of the translation *should be* in line with the relevant instruments and prescripts governing OSD and LP10 translations.’ (My emphasis.)

The passage quoted above is a clear indication that her mere signature of the performance agreement could not, without more, have evidenced a consent to be translated, as contended for by the PSA. In my view, there is insufficient information to substantiate her alleged compliance with the requirements set out in the NDPP’s approval, which were subsequently elucidated in the CEO’s letter.

[39] Quite apart from the fact that some of the correspondence from the NPA shows that certain requirements had to be met prior to the LP10 band being applicable to DDPPs and CPs, it is clear from various documents annexed to the PSA’s papers, including the minutes of the meetings alluded to earlier in the judgment, that there was also no unanimity on the implementation date. The following assertion by Ms Meintjies is striking:

‘It is important to note that the implementation date communicated in the meeting of 25 May 2015 and on the memorandum dated 24 November 2014 is *not* the same date that was agreed upon at the bargaining council. It is neither the date the [Minister of Justice] endorsed nor the date communicated by the [Minister of Public Service and Administration] in their respective determinations. The common implementation date *agreed upon* and duly communicated by the bargaining councils, [the Minister of Justice] and [the Minister of Public Service and Administration] for the purposes of OSD is 7 July 2007 and not 1 April 2015.’ (My emphasis.)

[40] It is clear from the afore-mentioned passage that even after the NDPP’s approval of the Chief Director’s recommendation in July 2014, there was still no finality regarding the agreed upon date for the implementation of the OSD to the DDPPs and CPs. The CEO stated that ‘the implementation date cannot be earlier than the 1st of September 2014 as the approval was obtained on the 29th of July 2014’. Ms Meintjies’ disavowal of the dates mentioned in the CEO’s memorandum does not assist the PSA in any way, seeing that she, in para 18.1.5 of her founding affidavit, also sought compliance with that specific memorandum. On the papers as

they currently stand, the PSA's averment that 'the common implementation date agreed upon' was 7 July 2007, cannot be correct.

[41] As stated before, the appellants contended that the production specialist post was never created in the NPA because of a lack of funding. It is quite telling that in their Request for Arbitration, the PSA described the dispute as being about 'whether an agreement was reached to the effect that DDPP on salary level 13 & 14 would be regarded as being production specialists and that qualifying DDPPs at level 13 & 14 will be migrated out of SMS dispensation to OSD on salary level LP10'. Clearly, there had been no consensus on this aspect.

[42] I am therefore of the view that even on the PSA's own version of events, none of the documents furnished in the application point to a consensus on the manner of implementation of the OSD for the DDPPs and CPs. This means 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.

[43] With the benefit of the analysis in the foregoing paragraphs, it is now opportune to deal with the points *in limine* raised in relation to *lis pendens* and prescription. It is trite that a party wishing to raise *lis pendens* bears the onus of proving that there is a pending litigation between the same parties or their proxies, in circumstances where the causes of action are substantially the same.

[44] In the referral form submitted by Ms Meintjies to the Bargaining Council, under the heading "Nature of the Dispute", her dispute was described as an unfair labour practice pertaining to promotion. Given the fact that a litigant is not obliged to rely exclusively on the cause of action it has pursued at its chosen forum, nothing barred the PSA from pursuing other causes of action that are justiciable in the civil courts. It follows that the fact that there is a pending litigation pertaining to a dispute of promotion before the Bargaining Council did not preclude the PSA from seeking specific performance as it did before the high court. This is more so the case in circumstances where the appellants have not denied having raised a point *in limine* of jurisdiction in terms of which they contended that the Bargaining Council does not

have jurisdiction to adjudicate the unfair labour practice dispute referred to it by the PSA, on the basis that it does not qualify as a promotion dispute. In any event, the PSA averred in the founding affidavit that the proceedings at the Bargaining Council have been stayed pending the finalisation of this matter.

[45] As regards the litigation pending at the Labour Court, it is evident from the Notice of Motion issued at the Labour Court that the cause of action in that matter relates only to the appellants' entitlement to cost-of-living adjustments not remuneration; the cause of action pursued in the high court was therefore different from the one relating to the review application that is pending at the Labour Court.²³ It follows that the point *in limine* of *lis pendens* had no merit and were correctly dismissed by the high court. The point *in limine* in relation to prescription was not persisted with before us and need not detain us any further. Suffice it to merely mention that given the fact that the dispute at the Bargaining Council is still pending, there can be no question of the application at the high court having been barred by prescription.

[46] As regards costs, it has been stated in a plethora of cases that labour disputes are constitutional issues. I am of the view that the proceedings in the high court and this Court activated the well-established principle enunciated in *Biowatch Trust v Registrar: Genetic Resources and Others*.²⁴ Given the circumstances I have already explained, I am not persuaded that the PSA's conduct in launching its application at the high court warrants censure in the form of an adverse order of costs. In the result, I would uphold the appeal, set aside the order of the high court and replace it with an order dismissing the application with no order as to costs.

²³ Section 16 of the NPA Act deals with the appointment of DDPPs and prosecutors. Section 16(4) provides that insofar as any law governing the public service pertaining to DDPPs and prosecutors may be inconsistent with the NPA Act, the provisions of the NPA Act shall apply. The remuneration of DDPPs and prosecutors is provided for in s 18(1) of the NPA Act. In terms of s 18(1)(b) of that Act, the cost-of-living adjustments are effected in accordance with the cost-of-living adjustments determined for legally qualified personnel in the Public Service. In terms of s 19 of the NPA Act, conditions of service of DDPPs and prosecutors and prosecutors are determined in terms of the provisions of the Public Service Act.

²⁴ *Biowatch Trust v Registrar, Genetic Resources Others* [2009] ZACC 14; 2009 (6) SA 232 (CC). The principle laid down in that case, which is commonly referred to as the *Biowatch* principle, laid down that an unsuccessful party in proceedings against the State should be spared from paying the State's costs in constitutional matters.

M B MOLEMELA
JUDGE OF APPEAL

Hughes JA

Costs

[47] I have had the benefit of reading the judgment of my colleague, Molemela JA. I concur with the reasoning and conclusions reached in respect of the point *in limine* of jurisdiction ‘. . . it is permissible for a party to rely on more than one cause of action. It is 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’. It is on this basis that I concur that the high court was competent to hear the application before it.

[48] I take no issue with the reasoning on the merits. I however, respectfully disagree with the costs order granted. It is trite that the issue of awarding costs lies within the discretion of the court alone and generally the successful party is entitled to their costs. My disagreement lies with the conduct of the PSA in pursuing the application for specific performance. I am of the view that the application by the PSA in the high court was ill-conceived and manifestly inappropriate. Thus, the PSA falls to be penalised with an adverse costs order. I am mindful of the applicability of *Biowatch* in inherently constitutional matters, however, I am still convinced that a costs order is appropriate against the PSA for the reasons which follow hereafter.

[49] The PSA pursued this application in the high court having referred two disputes on the facts of the OSD issue to the Bargaining Council. The first on 10 February 2016 which remains unresolved in respect of ‘an unfair labour practice relating to promotion . . . respondent [NPA] having failed to translate the . . . applicants from SMS salary dispensation to the OSD, and specifically LP10’. Second, on 13 June 2016 a second dispute was launched with the Bargaining Council requesting an arbitration. In this dispute the PSA sought a determination

‘whether an agreement was reached to the effect that DDPP on salary level 13 and 14 would be regarded as being production specialist and that qualifying DDPPs on level 13 and 14 will be migrated out of SMS dispensation to OSD on LP10’. This dispute has been stayed pending the outcome of the high court application. Notably, the high court application for specific performance was filed on 4 December 2017.

[50] In the analysis of the merits above and on the PSA’s version alone it was well established that there were a host of shortcomings with the conclusion of the agreement which the PSA sought to be enforced. I do not propose to repeat what is set out above on the merits. However, of significance is the fact that the PSA was not even certain whether an agreement had been concluded. Yet, here they were seeking specific performance of an agreement that they were not sure existed.

[51] The proper approach to establish whether an application was manifestly inappropriate was settled in *Lawyers for Human Rights v Minister in the Presidency and Others*:²⁵

‘Whether an application is manifestly inappropriate depends on whether the application was so unreasonable or out of line that it constitutes an abuse of the process of court. In *Beinash*, Mahomed CJ stated there could not be an all encompassing definition of “abuse of process” but that it could be said in general terms “that an abuse of process takes place where the procedures permitted by the rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective”. The Court held:

“There can be no doubt that every Court is entitled to protect itself and others against an abuse of its processes. Where it is satisfied that the issue of a subpoena in a particular case indeed constitutes an abuse it is quite entitled to set it aside. As was said by De Villiers JA in *Hudson v Hudson and Another* 1927 AD 259 at 268:

“When . . . the Court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice, it is the duty of the Court to prevent such abuse.”

What does constitute an abuse of the process of the Court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of “abuse of process”. It can be said in general terms, however, that an abuse of process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective.”

²⁵ *Lawyers for Human Rights v Minister in the Presidency and Others* [2016] ZACC 45; 2017 (1) SA 645; 2017 (4) BCLR 445 (CC) para 20.

[52] Applying the above approach to the circumstances, that being the pending disputes before the Bargaining Council, despite the inherent constitutional element present, in my view the high court application was fundamentally misdirected, unreasonable and inappropriate. 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 amounts to an abuse of court process and as such warrants an adverse costs order against them.

[53] It is for the reasons above that I disagree with the costs order of Molemela JA. However, I concur with the judgment of Molemela JA upholding the appeal and dismissing the application. As regards the costs, I would order the PSA to pay the costs, such costs to include the costs of two counsel where so employed.

W HUGHES
JUDGE OF APPEAL

Saldulker and Van der Merwe JJA (Mokgohloa JA concurring) (Majority judgment)

[54] We have had the benefit of reading the judgment of our Sister, Molemela JA. We respectfully disagree with the finding that the high court had jurisdiction to entertain the matter. For the reasons that follow, we are of the view that the high court should have struck the matter from its roll for want of jurisdiction. We adopt the nomenclature used by our Colleague. We do not regard it necessary to repeat the facts of the matter and refer only to those facts that are necessary for a proper understanding of this judgment.

[55] In *Chirwa v Transnet Limited and Others* [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC), the Constitutional Court explained that the Labour Court and other tribunals created under the LRA are uniquely qualified to handle labour-related disputes. At para 47 it said:

' . . . The purpose of labour law as embodied in the LRA is to provide a comprehensive system of dispute resolution mechanisms, forums and remedies that are tailored to deal with

all aspects of employment. It was envisaged as a one-stop shop for all labour-related disputes. The LRA provides for matters such as discrimination in the workplace as well as procedural fairness; with the view that even if a labour dispute implicates other rights, a litigant will be able to approach the LRA structures to resolve the disputes.'

[56] This does not mean, of course, that no employment-related claim is justiciable in the high court. Section 157 of the Labour Relations Act 66 of 1995 (LRA) provides:

'157. Jurisdiction of Labour Court

(1) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.

(2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from -

(a) employment and from labour relations.

....'

[57] The relevant sections of the Basic Conditions of Employment Act 75 of 1997 (BCEA) provide as follows:

'77(1) Subject to the Constitution and the jurisdiction of the Labour Appeal Court, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters in terms of this Act.

...

77(3) The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.'

[58] In *Gcaba v Minister of Safety and Security* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC), the Constitutional Court made it clear that an assessment of jurisdiction must be based on an applicant's pleadings. At para 75, the following was said:

'... In the event of the Court's jurisdiction being challenged ... the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant seeks to invoke the court's competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the

applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognisable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim under the LRA, one that is to be determined exclusively by the Labour Court, the High Court would lack jurisdiction. . . .'

[59] The recent judgment of the Constitutional Court in *Baloyi v Public Protector and Others* [2020] ZACC 27; 2021 (2) BCLR 101 (CC); [2021] 4 BLLR 325 (CC) , provides an example of the application of these well-known principles. There Ms Baloyi was employed by the office of the Public Protector on a five-year contract, with a six-month probation period, which could be extended. After the expiry of the probation period, she was invited to make representations as to the confirmation of her employment contract. Sometime thereafter she received a letter terminating her contract. Ms Baloyi launched an application on the basis that the termination of her employment contract had been unlawful.

[60] The high court dismissed Ms Baloyi's application on the ground that it did not have jurisdiction over the dispute and that it should have been brought before the Labour Court. However, the Constitutional Court held that the high court had erred in dismissing Ms Baloyi's application on the basis that it essentially entailed a labour dispute and that its jurisdiction was not engaged. It held that on an analysis of her pleaded case, Ms Baloyi claimed relief on three grounds, none of which had to be determined in terms of the LRA or fell within the exclusive jurisdiction of the Labour Court. These grounds were that the termination of her employment contract constituted a breach of contract, that the official who had purported to terminate it had no power to do so and that the decision to terminate the contract had been made in bad faith and for an ulterior purpose. Each case must, of course, be decided on its own facts and, as we shall show, the facts of this case differed markedly from those of Baloyi.

[61] A perusal of the application of the PSA makes it quite clear that the PSA sought the implementation of the 2010 Determination by the 'translation' of the DDPPs and CPs to the OSD specialist work stream on the LP-10 OSD band. On the facts of this case, however, the high court could only have been clothed with

jurisdiction if this outcome had been claimed on the ground that the terms of the individual employment contracts between the DDDPs and CPs and the NPA obliged the NPA to act accordingly. Thus, the notice of motion and founding affidavit has to be analysed to ascertain whether the enforcement of employment contract terms was relied upon. In performing this exercise, substance must prevail over form and proper regard must be had to context.

[62] The first indicator in this regard is that the PSA was the applicant in its own name. As a trade union it was not a party to any of the employment contracts in question. This strongly points to the absence of an intention to enforce the terms of individual contracts of employment. The material relief claimed in the notice of motion is quoted in the judgment of Molemela JA. It suffices to say that the notice of motion in no way conveyed a reliance on employment contracts. In the founding affidavit the deponent said 'I am advised that this is a contractual dispute (applicants seek specific performance) . . .' and proceeded to reproduce the provisions of s 77(3) of the BCEA. This vague and unsubstantiated averment constituted the founding affidavit's only reference to a contractual dispute.

[63] In the circumstances it is necessary to set out what the PSA said in the founding affidavit under the rubric '**PURPOSE OF THIS APPLICATION**':

- '18. The principal purpose of this application is to seek specific performance and also to compel the first respondent to comply with the following:
- 18.1.1 the collective agreement dated 5 July 2007 being PSCBC Resolution 1 of 2007;
 - 18.1.2 the collective agreement dated 7 February 2008 being GPSSBC Resolution 1 of 2008;
 - 18.1.3 government notice dated 2 December 2010 issued and published by the second respondent acting in accordance with s 18(1) of the Act;
 - 18.1.4 the NDPP's approval regarding the implementation of the OSD dated 29 July 2014; and
 - 18.1.5 the memorandum dated 24 November 2014 from the Chief Executive Officer of the first respondent, Adv Karen van Rensburg regarding the "proposal on the implementation of the LP 10 in the NPA".
19. In addition, this application seeks declaratory orders declaring that the conduct of the first respondent in not complying with its obligations as detailed in subparagraphs 18.1.1-18.1.5 is unlawful.

20. Lastly, to declare that the first respondent created a legitimate expectation to the 2nd to 55th applicants that they are entitled to and would receive all the benefits extended to legal professionals within the justice cluster.
21. To advance the applicants' case, I propose to deal with its pertinent aspects in the following terms:
 - 21.1 First, salient background facts of this dispute;
 - 21.2 Second, the remuneration of DDPP and Chief Prosecutors in terms of the Act;
 - 21.3 Third, applicability of the collective agreements to the NPA;
 - 21.4 Fourth, whether the applicant's members are entitled to the OSD benefits;
 - 21.5 Fifth, first respondent's internal circulars to employees regarding the OSD;
 - 21.6 Sixth, whether the non-implementation of the OSD by the first respondent constitutes an unfair labour practice;
 - 21.7 Seventh, the legal framework proposed in the determination of this matter;
 - 21.8 Eighth, whether the applicant has made out a case of unfair labour practice in this matter; and
 - 21.9 Lastly, conclusion.'

[64] Read with the notice of motion and in context, the PSA in our view clearly claimed specific performance of obligations that had allegedly arisen from the documents listed in paras 18.1.1 to 18.1.5 of the founding affidavit themselves, not from employment contracts. All of these documents were of collective and/or general nature.

[65] Under the heading 'SALIENT BACKGROUND FACTS', the deponent referred to a grievance that she had lodged on 26 October 2015. She said:

'Central to my grievance was the failure of the first respondent to implement the OSD and to translate me to LP-10 as per the decision of the second respondent read with collective agreements cited above including the approval by the NDPP of the implementation of the OSD within the prosecuting authority'

[66] She proceeded to explain that her grievance set out the steps that the NPA had taken ' . . . to implement the OSD in respect of myself, before it became apparent that the First Respondent was no longer going to implement the OSD'. The deponent thus said that her grievance tabulated the steps that the NPA had taken as follows:

- '45.1 Individual work assessments, ensuring the 80/20 split between production work and management/administrative tasks, which was approved by my supervisor, the Director of Public Prosecutions;
- 45.2 Completion of a choice whether to translate, which I did choose by signing the performance agreement;
- 45.3 Completion of individual experience audits, which I filed;
- 45.4 An exercise whereby I was informed of the estimated financial impact of the translation, which I received (although I dispute the accuracy thereof);
- 45.5 the undertaking given that translation to LP10 will be effected both at meetings and in writing, as referred to and expanded in my affidavit; and
- 45.6 The signing of an LP10 performance agreement for the 2015/2016 performance year, which I did.'

[67] The deponent to the founding affidavit proceeded to say that all the other DDPPs and CPs had followed suit in lodging grievances. She said that her grievance had been referred to the GPSSPC as a dispute for resolution. She stated that the matter was scheduled for arbitration on 10 August 2016. The GPSSPC determined that it had jurisdiction in respect of the dispute and ordered the deponent to apply for condonation. She proceeded to say that the condonation had subsequently been granted and that the arbitration proceedings were not yet concluded.

[68] This part of the founding affidavit was immediately preceded by the following passage:

'It is important to note that the implementation date communicated in the meeting of 25 May 2015 and on the memorandum dated 24 November 2014 is not the same date that was agreed upon at the bargaining Council. It is neither the date the second respondent endorsed nor the date communicated by the third respondent in their respective determinations. The common implementation date agreed upon and duly communicated by the bargaining councils, second respondent and the third respondent for the purposes of the OSD is 7 July 2007 and not 1 April 2015.'

[69] In their context and in terms of their plain language, these averments did not purport to found relief on the terms of the employment contracts between the NPA and the DDPPs and CPs (who, in any event, were not parties to the application). The

founding affidavit simply did not place reliance on employment contracts. That is why the following was stated in the answering affidavit:

‘The Applicants correctly do not and cannot rely on any enforceable contractual right, because there was no binding agreement between the NPA and the Applicants – which is the hallmark of contractually enforceable obligations.’

And it came as no surprise that this averment had not been disputed in the replying affidavit.

[70] 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 this regard the founding affidavit concluded as follows:

‘In the circumstances, we submit that a proper case for unfair labour practice has been made out by the applicant on behalf of its members. The applicant’s members remain financially disadvantaged by the non-implementation of the OSD determined for their benefit by the second respondent acting in terms of s 18(1) of the Act and as per collective agreements.’

In terms of s 191 of the LRA such unfair labour practice disputes must, of course, be dealt with in terms of the LRA. It is 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.

[71] For these reasons we conclude 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. In the exercise of our discretion in respect of costs, the PSA should be ordered to bear the costs of the abortive application in the high court and of the appeal, inclusive of the costs of two counsel where so employed.

[72] In the result we make the following order:

- 1 The appeal is upheld with costs, including the costs of two counsel where so employed.
- 2 The order of the high court is set aside and replaced with the following:
‘The application is struck from the roll with costs, including the costs of two counsel where so employed.’

H K SALDULKER
JUDGE OF APPEAL

C H G VAN DER MERWE
JUDGE OF APPEAL

Appearances

Case No. 353/2020

For Appellant: L Halgryn SC (with him P Mafisa)

Instructed by: State Attorney, Pretoria
State Attorney, Bloemfontein

For 1st Respondent: S Sethene

Instructed by: Couzin & Hertzog, Pretoria
Symington De Kok, Bloemfontein

Case No. 354/2020

For Appellants: F Boda SC (with him Z Ngwenya)
State Attorney, Pretoria
State Attorney, Bloemfontein