



CONSTITUTIONAL COURT OF SOUTH AFRICA

National Education Health and Allied Workers Union and Others v Minister of Public Service and Administration and Others;

South African Democratic Teachers Union and Others v Department of Public Service and Administration and Others;

Public Servants Association and Others v Minister of Public Service and Administration and Others;

National Union of Public Service and Allied Workers v Minister of Public Service and Administration and Others

CCT 21/21; CCT 28/21; CCT 29/21; and 44/21

Date of hearing: 24 August 2021

Date of judgment: 28 February 2022

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Monday, 28 February 2022 at 10h00, the Constitutional Court handed down a unanimous judgment in an application for leave to appeal against the judgment and order of the Labour Appeal Court, which dismissed the applicants' application to enforce clause 3.3 of the collective agreement between the State and various trade unions which determined public sector wage increases for the 2020/2021 period.

On 31 October 2017, the Committee of Ministers (COM) – which consists of among others, the Minister of Public Service and Administration and Minister of Finance – mandated the Department of Public Service and Administration's chief negotiator to negotiate wage increases for the 2018-2021 period with trade union representatives of public sector employees at the Public Service Coordinated Bargaining Council (PSCBC). In November 2017, the National Treasury (Treasury) prepared the 2017 Medium Term Budget Policy Statement (MTBPS) in terms of which R128.5 billion was set aside to fund

the compensation increases for all public service employees over the period 2018/2019 to 2020/2021. Of this amount, R110 billion was allocated to fund the cost of compensation increases for employees in the PSCBC bargaining unit. Effect was given to these and other recommendations in the MTBPS with the passing of the Adjustments Appropriation Act 12 of 2017 and various other pieces of legislation. Subsequently, wage negotiations began.

The first relevant offer was tabled by the State's representative on 7 December 2017 and would have kept the total compensation expenditure within the budgeted R128.5 billion. The trade union representatives rejected the offer and proposed a substantially larger increase. As a result, negotiations were adjourned until 9 January 2018.

On 25 January 2018, the State's representative tabled a five-year offer strikingly different to its previous one. However, it was not mandated to make this offer, and the offer exceeded the budgeted amount of R128.5 billion. The applicants initially rejected this offer and again countered with a larger increase. The following day, the parties produced a draft agreement for a three-year wage agreement exceeding the budgeted amount by R30.2 billion – including an excess amount of R13.2 billion required for the enforcement of clause 3.3 – which they undertook to seek mandates to enter into.

On 7 February 2018, at a meeting of the COM, the State's representative requested that Treasury approve a R15 billion increase of the budgeted amount for compensation increases. It remains unclear why an increase of R15 billion rather than R30.2 billion was sought, when the draft agreement would have exceeded the allocated budget by the latter amount. On 14 February 2018, the then Minister of Finance, Mr Malusi Gigaba, rejected this request. To free up funds for the proposed increase, he suggested that bonus packages be restricted, that voluntary retirement be offered to approximately 19 000 public servants, and that overtime payments be curtailed. It is apparent that even if these measures had been successfully implemented, the State would have battled to free up sufficient funds to bring the draft agreement within budget.

On 20 March 2018, the COM met and reprimanded its negotiating team for failing to observe its mandate by tabling an offer which exceeded the allocated budget. On 4 April 2018, negotiations recommenced, and the State proposed a reduced offer which was within the budgeted amount but was rejected by the applicants who insisted that effect be given to the offer of 25 January 2018.

On 19 April 2018, the COM met again to receive clarity on the state of the negotiations. The State's representative explained that there were three options in respect of the 25 January 2018 offer: the first was to withdraw the offer, but that carried the risk of being accused by the unions of negotiating in bad faith; the second was to confirm the offer, however this would mean that the agreed wage increases would exceed the allocated budget; and the third was to confirm the offer subject to an agreement on measures which would bring it within the budget. The COM resolved to seek direction on this issue from Cabinet.

On 25 April 2018, Cabinet resolved that the DPSA and the Minister of Finance should deliberate on the cost implications of the offer of 25 January 2018. The State was not able

to withdraw it and Cabinet instructed the DPSA to regularise the offer and proceed to conclude the agreement.

On 2 May 2018, Treasury delivered a presentation to the COM and explained that, given the State's financial position it could not implement the offer of 25 January 2018 (which entailed annual increases exceeding the Consumer Price Index (CPI)) without a headcount reduction of 36 000 public servants. The scope for reducing the headcount, however, was limited since this could adversely affect service delivery. Over the three-year term of the proposed wage deal, Treasury thought that a plausible headcount reduction would be only 14 263 public servants. The other option was to limit increases to the CPI for all three years. Together with the implementation of the equalisation of pay progression, and the extension of the housing allowance to spouses in 2020/2021, this would allow the State to stay within the budget for the three-year term of the wage deal. The following day, negotiations recommenced and there was engagement about the need for cost cutting measures to bring the offer within the budget.

On 21 May 2018, the State entered into an agreement with the relevant trade union representatives which incorporated the collective agreement. This agreement was signed by a majority of trade union representatives at the PSCBC and became binding on all parties. The State suggests that this agreement was conditional on it implementing various cost cutting measures but admits that the applicants refused to allow a clause to this effect to be included in the agreement. However, the applicants contend that the collective agreement was never intended to have such a condition.

The collective agreement comprised clauses 3.1 which regulated wage increases for 2018/2019; clause 3.2 which regulated wage increases for 2019/2020; and clause 3.3 which regulated wage increases for 2020/2021. The 2020/2021 wage increase expired on 31 March 2021. The effect of these three clauses was that the allocated budget would be exceeded by R30.2 billion, an excess not approved at all by any Act of Parliament.

After the conclusion of this agreement, South Africa's economic situation deteriorated markedly. Despite this, the 2018/2019 and 2019/2020 increases were implemented. In his 2018 MTBPS, the Minister of Finance drew attention to the fact that the public service wage agreement exceeded budgeted baselines by R30.2 billion over the medium term, and said that Treasury had not allocated additional money for this, and that national and provincial departments would "be expected to absorb these costs within their compensation baselines". In other words, the departments needed to engage in cost cutting measures to afford the wage increases. It seems that this was successfully achieved in the first two financial years of the wage agreement but not in the third year. The State contends that this was because enforcement of the two clauses did not result in it exceeding the allocated budget. Enforcement of clause 3.3 would cause the State to exceed that budget. As at May 2018, when the collective agreement was concluded, the amount by which implementing clause 3.3 was anticipated to exceed the budget for the 2020/2021 period was R13.2 billion. However, by 2020, the cost of implementing clause 3.3 in terms of the State was expected to substantially exceed this amount.

In 2019, South Africa's economic situation deteriorated further and on 30 October, Mr Tito Mboweni, the then Minister of Finance, noted in his MTBPS that public sector

wages had increased by about 66% in the last 10 years and that cost cutting measures were therefore urgent. A document annexed to the 2019 MTBPS revealed that in 2018/2019, spending on the compensation of State employees accounted for 35.4% of consolidated national expenditure. On 26 February 2020, Treasury announced that it had revised downward its projections of South Africa's economic growth and that real growth for 2019 was 0.9%.

Furthermore, on 25 March 2020, the PSCBC reconvened, and the State's representative proposed a revised wage increase for the 2019/2020 period. This increase would afford certain public sector employees above inflation wage increases and still exceed the compensation envelope but it was a reduction on the amount promised in terms of the collective agreement. This offer was rejected by the trade union representatives, and the State maintained that it was simply unable to enforce clause 3.3 of the collective agreement. The unions refused to revise the agreement and insisted on its implementation. It is common cause that clause 3.3 was not implemented on 1 April 2020.

As a result, on 2 April 2020, the trade union representatives referred a dispute to the PSCBC. The dispute was conciliated on 20 May 2020, however, the issue about the enforcement of clause 3.3 of the collective agreement remained unresolved. Consequently, the unions referred the dispute to arbitration.

Before the arbitration was finalised, on 8 June 2020, the unions launched an application in the Labour Court seeking an order compelling the State to enforce the collective agreement for the 2020/2021 financial year. The State launched a counter-application seeking declaratory relief about the legality of the collective agreement and its enforcement. The arbitration was subsequently postponed by agreement pending the outcome of the Labour Court application. The parties agreed to request the Labour Appeal Court to hear the matter as a court of first instance in terms of section 175 of the Labour Relations Act 66 of 1995 (LRA). The request was granted.

The Labour Appeal Court had to determine whether clause 3.3 was concluded in contravention of regulations 78 and 79 of the Public Service Regulations GN R877 GG 40167, 29 July 2016. The Labour Appeal Court found that the cost of the collective agreement could not be covered solely from the Minister of Public Service Administration's budget; that Treasury did not provide a written commitment to guarantee additional funding and no further agreements were made by other departments or agencies in accordance with the regulations. Therefore, it declared the enforcement of clause 3.3 unlawful for violating sections 213 and 215 of the Constitution and the impugned regulations and dismissed the application.

Aggrieved by this outcome, the applicants, the National Education Health and Allied Workers Union (NEHAWU), the South African Democratic Teachers Union (SADTU), Police and Prisons Civil Rights Union (POPCRU), Democratic Nursing Organisation of South Africa (DENOSA), Public Servants Association (PSA), the National Professional Teachers Association of South Africa (NAPTOSA), the Health and Other Services Personnel Trade Union of South Africa (HOSPERSA), the South African Teachers Union (SATU), the National Teachers Union (NATU) and the National Union of Public Service and Allied Workers (NUPSAW) each lodged separate applications to the Constitutional

Court appealing the order and judgment of the Labour Appeal Court. The DPSA and the Minister of Finance oppose the applications.

Before this Court, NEHAWU and NUPSAW submit that the Labour Appeal Court's judgment undermines and limits the right to engage in collective bargaining. NEHAWU further submits that the Labour Appeal Court erred when relying on sections 213 and 215 of the Constitution when the LRA specifically regulates collective bargaining. Furthermore, that the Court erred in relying on the Minister of Finance's letter dated 14 February 2018 in refusing to accept that the respondents had authority to negotiate on behalf of the State. Finally, it also argues that the State's delay in reviewing the collective agreement should not have been condoned because it was inordinate, and it failed to provide an adequate explanation.

The SADTU, POPCRU and DENOSA contend that the collective agreement was lawfully concluded and once Cabinet approved the offer, the respondents were bound by such approval. And following Cabinet's approval, the Labour Appeal Court should have inferred that the requirements of regulations 78 and 79 were satisfied, and that the agreement was therefore lawfully concluded, and even if the collective agreement is found to be unlawful, justice and equity demand that clause 3.3 is enforced. This is because the employees are innocent bystanders to the State's failure to act lawfully.

The PSA, NAPTOSA, HOSPERSA, SATU and NATU submit that the provisions of the LRA take precedence over the impugned regulations, thus the collective agreement is enforceable. In addition, regulation 4 permits the Minister of PSA, under justifiable circumstances, to authorise deviation from any regulation, and such authorisation need not be in writing. The conduct of both the Minister of Finance and DPSA thus demonstrate that NT approved the conclusion of the agreement, alternatively, that deviation from the regulations was authorised. As such, there was actual compliance with the regulations.

The PSA, NAPTOSA, HOSPERSA, SATU, NATU and NUPSAW submit that the Labour Appeal Court failed to consider the doctrine of estoppel which prevents the State from seeking to escape its contractual obligations. These applicants further submit that the sanctity of contracts must be upheld and allowing the respondents to escape their obligations would undermine the purpose of and the enforceability of collective agreements. And that if the Labour Appeal Court had applied the *pacta sunt servanda* (agreements must be honoured) principle, it would have come to a different conclusion.

The DPSA and the Minister of Finance contend that organs of state are obliged to act within the confines of the law and that the collective agreement did not comply with the mandatory statutory provisions prescribed by regulations 78 and 79 since the DPSA could not cover the cost of the wage increases from its own budget, no written commitment was made by Treasury, and no written agreements were forthcoming from other departments. They submit that any reliance on estoppel or public policy cannot remedy the agreement because courts cannot validate unlawful contracts. Thus, they submit that the application should be dismissed.

In a unanimous judgment penned by Madondo AJ (Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Rogers AJ, Theron J, Tlaletsi AJ and Tshiqi J concurring), the issue was whether

the non-compliance with regulations 78 and 79 rendered clause 3.3 of the collective agreement invalid and unenforceable. The Court noted that regulations 78(2) and 79(c) created jurisdictional facts which must exist prior to the Minister's exercise of power to negotiate and conclude collective agreements on behalf of the State, absent which the Minister acts without legal authority. The Court found that the jurisdictional facts were not present and that non-compliance with the requirements of regulations 78 and 79 rendered the resultant collective agreement between the State and the trade unions invalid and unlawful, and thus unenforceable.

The Court therefore dismissed the applications for leave to appeal with no order as to costs.