



ARBITRATION AWARD

Panellist/s: Annelie Bevan

Case No.: PSCB 209-17/18

Date of Award: 29 June 2018

In the matter between:

D MOLOANA

(Union / Applicant)

And

DEPARTMENT OF PUBLIC WORKS & ROADS, NW

(Respondent)

Union/Applicant's representative: P Tau of Tlhaku Attorneys

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Respondent's representative: B Madede

Respondent's address:

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DETAILS OF HEARING AND REPRESENTATION

1. The arbitration into the abovementioned interpretation and application of collective agreement; Resolution 3 of 2009 was set down to be heard at 09h30 on 10 May 2018 at the offices of the Respondent, in Rustenburg.
2. The Applicant was present and represented by P Tau an attorney of Tlhaku Attorneys, Rustenburg and the Respondent was represented by B Madede, a Labour Relations Official of the Respondent.
4. The proceedings were electronically recorded.
5. The parties agreed that the matter could be decided on paper. Parties to submit the pre-arbitration minutes on 25 May 2018, the Applicant to submit her arguments by 1 June 2018, the Respondent to answer by 8 June 2018 and the Applicant to reply by 15 June 2018.
6. As a result of the contents of the pre-arbitration minutes filed by the parties, I have to consider whether the Council has jurisdiction to determine the dispute.

ISSUE TO BE DECIDED

7. I am required to determine whether or not the Council has jurisdiction to determine the dispute.

BACKGROUND TO THE MATTER

8. The Applicant referred a dispute relating to the interpretation and application of a collective agreement (the Resolution) to the Council, which was unsuccessfully conciliated and a certificate of outcome were issued. The Applicant then applied for arbitration of the dispute. The matter was then set down for arbitration on 9 May 2018.
9. On 5 June 2018 the parties completed and signed pre-arbitration minutes and in these minutes the parties agreed that the dispute to be decided by the Council is one of an unfair labour practice dispute.

SUBMISSIONS OF THE PARTIES

10. **The Applicant's representative** clearly stated in the first line of the arguments submitted on behalf of the Applicant that the characterization of the dispute is that of an unfair labour practice and went on to argue the unfair treatment and unconstitutional treatment of the Applicant by the Respondent.
11. **The Respondent's representative** argued this matter on the basis of the interpretation of paragraph 3.6.2.2 of PSCBC Resolution 3 of 2009.

ANALYSIS

12. I intend to offer brief reasons in my analysis as per Section 138 (7) of the *LRA* as amended, which provides that, “*Within 14 days of the conclusion of the arbitration proceedings – the commissioner must issue an arbitration award with brief reasons*”.
13. I am first going to deal with the pre-arbitration minutes signed between the parties: In the matter of ***Khumalo v MSCP Transport CC (JS 988/2011) [2013] ZALCJHB 124 (14 June 2013)***, the court stated clearly that:

“[17] It is trite that a pre-trial minute constitutes a binding agreement between the parties. It follows that one party cannot resile from that agreement without the consent of the other.”
14. It seems therefore clear that a pre-trial minute constitutes a binding agreement between the parties. The object of a pre-arbitration conference is to limit issues and to curtail the scope of the litigation. Therefore, if a party elects to limit the ambit of his/her case, the election is usually binding. As a commissioner I am therefore bound by the agreement reached between the parties.
15. In the matter of ***Hospersa OBO Tshambi v Department of Health, Kwazulu Natal [2016] 7 BLLR 649 (LAC)*** the Labour Appeal Court has warned Commissioners against accepting the parties characterization of the dispute at face value. It should be interrogated to determine whether the Applicant’s characterization of his dispute was, objectively, correct. An arbitrator is required to determine the true dispute between the parties. To that end, it is necessary to establish the relevant facts and construe the category of dispute correctly. An arbitrator must make an objective finding about what is the dispute to be determined (see ***Wardlaw v Supreme Mouldings (Pty) Ltd (Wardlaw), (2007) 28 ILJ 1042 (LAC)***).
16. The Constitutional Court in ***CUSA v Tao Ying Industries and Others (2008) 29 ILJ 2461 (CC)*** at para 66 has summarized it as follows:

‘A commissioner must, as the LRA requires, ‘deal with the substantial merits of the dispute’. This can only be done by ascertaining the real dispute between the parties. In deciding what the real dispute between the parties is, a commissioner is not necessarily bound by what the legal representatives say the dispute is. The labels that parties attach to a dispute cannot change its underlying nature. A commissioner is required to take all the facts into consideration including the description of the nature of the dispute, the outcome requested by the union and the evidence presented during the arbitration. What must be borne in mind is that there is no provision for pleadings in the arbitration process which helps to define disputes in civil litigation. Indeed, the material that a commissioner will have prior to a hearing will consist of standard forms which record the nature of the dispute and the desired outcome. The informal nature of the arbitration process permits a commissioner to determine what the real

dispute between the parties is on a consideration of all the facts. The dispute between the parties may only emerge once all the evidence is in.'

17. It is clear from the submissions of the Applicant that her dispute is an unfair labour practice relating to either benefits or demotion as is envisaged in section 186(2)(a) of the Labour Relations Act, No 66 of 1995. The Applicant is dissatisfied that her salary notch was lowered by the Respondent, after it was officially upgraded by the Respondent. No arguments were submitted in regard to interpretation of certain clauses of Resolution 3 of 2009.
18. I therefore find that the characterization of the dispute by the Applicant and as it was agreed between the parties in the pre-arbitration minutes is indeed correct.
19. As the characterization of the dispute is one of an unfair labour practice, the question of whether or not the Council has jurisdiction arises.
20. The meaning of 'jurisdiction' was set out in ***Graaff-Reinet Municipality v Ryneveld's Pass Irrigation Board 1950 (2) SA 420 (AD) at p.424*** wherein the court held that:

'Jurisdiction means the power or competence of a court, to hear and determine an issue between parties, and limitations may be put upon such power in relation to territory, subject matter, amount in dispute, parties, etc.....It is trite law that institutions such as the CCMA and bargaining councils are creatures of statute and are not Courts of law. As a general rule, they cannot decide their own jurisdiction.
21. As this is not an interpretation or application of a collective agreement dispute, the Council does not have jurisdiction to determine this dispute. However, as the Applicant is employed in the Department of Public Works & Roads, both the Applicant and Respondent falls within the scope of the GPSSBC (see section 3 of the Constitution of the GPSSBC). This dispute should therefore be referred to the GPSSBC.

AWARD

22. The Council does not have jurisdiction to determine the dispute.
23. The Council is advised to refer the dispute to the GPSSBC and advise them to set the matter down for arbitration.



PANELIST: ANNELIE BEVAN