



**ARBITRATION HELD UNDER THE AUSPICES OF THE PUBLIC SERVICE CO-
ORDINATING BARGAINING COUNCIL IN PIETERMARITZBURG**

CASE NO: PSCB612-17/18

PSA obo LZ BUTHELEZI

APPLICANT

and

DEPARTMENT OF PUBLIC WORKS-KZN

FIRST RESPONDENT

DPSA

SECOND RESPONDENT

ARBITRATION AWARD

DATE OF AWARD:

16TH JULY 2018

ARBITRATOR:

Saber Ahmed Jazbhay

APPLICANTS' REPRESENTATIVE:

Mr RAMA NAIDOO

Public Servants Association

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1ST RESPONDENT'S REPRESENTATIVE:

NOKUTHULA MADLALOSE

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2ND RESPONDENT'S REPRESENTATIVE:

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DETAILS OF HEARING AND REPRESENTATION

1. A dispute relating to the interpretation or application of a collective agreement, namely PSCBC Resolution 3 of 2009, was referred to the Public Service Bargaining Council (PSCBC) in terms of section 24(2) [Section 24(5)] of the Labour Relations Act 66 of 1995.
2. The parties are as represented on page 1 and 2 of this award.
3. Even though I had cautioned them against this¹, as the parties had agreed that with the facts being common cause, the dispute be decided by way of written submissions. Hence the proceedings were only partly recorded electronically.
4. Mr Naidoo and Mrs Mdlalose as well Mrs Esther Nkosi representing the Applicants as well as the First and Second Respondent respectively, were granted time till the 9th July 2018 to submit written arguments. Mr Naidoo failed to file arguments in reply to those of the Respondents. Therefore this award or determination is based on what was submitted to and received by me as at date hereof.

Background in general

5. It is common cause that:-

- 5.1 The PSA referred a dispute to the PSCBC concerning the interpretation or application of a collective agreement, it being PSCBC Resolution 3 of 2009 (hereinafter "*Resolution*"). The dispute was lodged by PSA on behalf of the above named Applicant.
- 5.2 It's also common cause that the Applicant who, on the 1st July 1993, commenced employment with the Respondent as a Security Officer, Grade 2 is currently at salary level 4 under the now abolished PAS system (now replaced by the CORE system).
- 5.3 He grade progressed, through the Rank and Leg Promotion (Personnel Administration Standards) aka PAS system, to his current level 4 on the 1st July 1999.
- 5.4 This system grade progressed employees every three years and therefore if the PAS system wasn't abolished on 1st July 2001, he would have grade progressed to salary level 4 on 1st July 2002.
- 5.5 Two Collective Agreements, namely PSCB Resolution 1 of 2007 and PSCBC Resolution 3 of 2009 concern the outcome of this dispute before me.
- 5.6 The Applicant alleges that he has not been pay progressed despite the fact, as alleged, he satisfies the criteria set out in relevant provisions such as clause 3.5 and 3.6 in the Resolution 3 of 2009.

¹ See their agreement dated the 25th May 2018 which was filed with the PSCBC

6. The First and Second Respondents deny the foregoing allegation in para 5.6. They contend that they have correctly interpreted and applied the provisions and that the Applicant doesn't qualify to be grade and pay progressed.
7. The dispute was lodged as a direct result of the First, alternatively the Second, alternatively both the First and Second Respondents having declined, allegedly in breach of the relevant provisions of the resolution, to pay progress the Applicant from salary level 4 to salary level 5.
8. A careful perusal of the voluminous documents used in support of submissions and the arguments made during the arbitration hearing show that Resolution 3 of 2009 as a whole as opposed to relevant provisions alone, is key and relevant to the Applicant. There was a heavy preponderance or reliance on the part of the Respondent on documents not ancillary to a collective agreement.
9. After their opening statements, both parties handed me their respective bundle of documents which I had marked "A" and "B" respectively.
10. The dispute lodged was classified as being about the interpretation or application of a collective agreement, the latter being PSCB Resolution 3 of 2009 and the substantive issue in dispute is one that comes under the purview of section 24 of the Labour Relations Act No 66 of 1995. This was critical because, the issue in dispute is couched as one pertaining to the interpretation or application of a collective agreement.
11. The outcome required as per the dispute referral is for me to determine whether or not that the First, alternatively the Second, alternatively both and First and Second Respondents correctly interpreted the provision of the Resolution and if I determine in favour of the Applicant to order the First, alternatively the Second, alternatively both and First and Second Respondents to grade progress the Applicants to salary level 5.

ISSUES TO BE DECIDED

It's trite that each matter has to be decided on its own merits and that there's no one size fits all outcome favourable to either party. The facts in this case are in their own sense different as will appear.

12. ISSUES

- a. Whether, given the facts and circumstances of this case, the fact that the Applicant completed the requisite years of continued service on the level, the Respondents correctly interpreted the Resolution in relation to the Applicants' application for grade progression? It's axiomatic that there are positive rights and obligations that both parties are obliged to adhere to.

- b. Whether the Respondent complied with the provisions of the Resolution and or correctly applied the Resolution in relation to the Applicant's application to be grade progressed to the next salary level as it is alleged that he satisfied the principles enshrined in clause 3.5 in Resolution 3 of 2009.

Opening statements

13. Both parties made very brief opening statements and after exchanging bundles of documents they agreed that as all the facts in dispute were common cause, the dispute be decided by way of written submissions.

SURVEY OF EVIDENCE, SUBMISSIONS AND ARGUMENTS

I only set out here a brief summary of all the evidence, submissions and arguments of the parties that which were germane to and necessary to enable me to determine this dispute.

14. Applicant's case is as couched below

Introductory note

To avoid unnecessary repetition or prolixity, I incorporate by reference what is agreed as common cause as well as in the background that prefaces this award or determination, as if stated in this segment of the award.

His case, crisply summarised is as follows:-

- 14.1 He qualifies for grade progress from his current salary level 4 to salary level 5 because he meets the criteria as couched in clause 3.6.2.2, read with clause 3.4 (Career Pathing) and 3.5 (Grade Progression Model) of PSCBC Resolution 3 of 2009.
- 14.2 It is strongly argued that in negotiating and signing the aforementioned collective agreement, it could never have been the intention of the parties to produce the kind of outcome that the Applicant submits is absurd. In other words, as I understand it, it could never have been the intention of the parties where the right of the Applicant, in this case, is to be pay and grade progressed, is stultified by the terms of a collective agreement. It is argued, albeit baldly, that the parties could never have agreed to interpret and apply provisions of the Resolution that would "lead to absurd results."
- 14.3 The Respondent's rely on circulars issued by the DPWSA to implement the agreement and its trite law that a circular is complimentary to a collective agreement and therefore in going about this way to interpret the collective agreement they have, so I infer, afforded superior status to the circulars.

- 14.4 It follows that the Respondent's incorrectly interpreted and applied clause 3.6.2.2 of PSCBC Resolution 3 of 2009.
- 14.5 The relief he seeks is as follows:-
- 14.5.1 The Respondent be ordered to grade progress the Applicant from salary level 4 to salary level 5 and
- 14.5.2 Pay retrospectively with all benefits, with immediate effect.

15. First and Second Respondent's submission as summarised

- 15.1 Paragraph 3.6.2.5 of PSCBC Resolution 3 of 2009 states that "when an employee is appointed on a post graded on salary level, s/he shall only grade progress to salary level 05."²
- 15.2 The Applicant ***was not appointed to salary level 4 but only grade progressed until salary level 4 over the years through the Rank and leg promotion which was abolished in 2001.***
- 15.3 Therefore, the Applicant does not qualify to be graded to salary level 5 because his post ***is graded on salary level 3.***
- 15.4 In terms of Paragraph 7 of the DPSA Amended Incentive Policy Framework including Interpretation of the Grade Progression Model contained in PSCBC Resolution 3 of 2009, this clarifies the position in sub-paragraph 3.6 of PSCBC Resolution 3 of 2009 which states that if ***an employee's job has been graded on a specific level which is higher than the grading of that particular post due to rank & leg promotion, that employee is not eligible to grade progress to the next salary level.***³
- 15.5 They submit that the Applicant's post of Security Officer is graded at salary level 3 and he is already on 4. In terms of Paragraph 7.6 of DPSA Circular 2 of 2009 that the grading of the posts is based on the outcome of the job evaluation⁴.
- 15.6 They further submit that according to paragraph 25.4 of DPSA Amended Incentive Policy Framework for employees on salary levels 1 to 12 and those covered by OSD in the Public Service: "***if an employee's job has been graded on a specific level but the employee is already remunerated on a higher level, the employee is not eligible to grade progress to a next higher salary level***"⁵
- 15.7 The posts of Security Guards and Security Officers were evaluated and were graded at Salary level 3 because their job description of Security Officers and Guards were similar in nature and the title was changed to Security Officers⁶.
- 15.8 They reiterate that cognisance must be taken in that the post which the Applicant is occupying was ***evaluated and graded at salary level 3 but he is on salary level 4.*** They

² Page 23 of the Respondent's bundle

³ Page 28-29 of the Respondents' bundle

⁴ Page 34 of the Respondent's bundle

⁵ Page 86 of the Respondent's bundle

⁶ Page 40-61 of the Respondent's bundle

add that paragraph 3.6.2.3 of PSCBC Resolution 3 of 2009 states that grade progression will be capped for salary level 3, 8 and 10. **Meaning that employees on salary level 3 cannot grade progress to salary level 4.**

15.9 They further argue that in terms of paragraph 3.6.2.6, an employee can only grade progress to salary level 5 if that employee **is appointed on a post graded at salary level 4.**⁷

15.10 It is not in dispute that the Applicant has served more than 15 years in level 4 **but because his post is graded at salary level 3 and he is already on salary level 4 he cannot grade progress to salary level 5.**

15.11 In terms of the Resolution an employee can only grade progress to one level up and the applicant has already benefitted.

15.12 Therefore, they argue in conclusion, that what the Applicant seeks through such an upgrade contravenes PSCBC Resolution 3 of 2009.

15.13 The Applicant can only be grade progressed to salary level 5 if he applies and be appointed on a post that is graded to salary level 4⁸.

15.14 In light of the afore-mentioned, Respondents submit that the First Respondent correctly interpreted and implemented Resolution 3 of 2009 and that the Applicant's claim be dismissed.

ANALYSIS OF EVIDENCE AND ARGUMENTS

16. In ***National Commissioner for the South African Police Services v Mokoena and Others, [2013] ZALCJHB 142 (18.7.2013)***, the labour court pertinently held that a clause or clauses in a collective agreement has to be interpreted in the context of that ***collective agreement as a whole to pass muster*** and that any interpretation that ignores the context provided by the rest of the collective agreement "is impermissible".

17. I have adopted a practical and purposive approach constrained by the ordinary rules of interpretation which have taken into account the context and which gives effect to the plain and ordinary meaning of the words in the provisions themselves.

18. Considering the overall context, the reliance of the Respondents on documents extraneous to a negotiated agreement, accordingly falls away as it is trite law that a collective agreement supersedes all documents at variance with it. I must also mention that, in ***Appels v Education Labour Relations Council and Others***⁹ the labour court held that primacy must be given to collective agreements.

⁷ The Applicant argued that he would've have been on salary level 4 had the PAS system been in operation on 1st July 2002

⁸ Page 23 of the Respondent's bundle)

⁹ [2017] ZALCJHB 428 (1st November 2017)

19. The Labour Appeal Court instructs me, in *Hospersa obo Tshambe v Department of Health, KZN*,¹⁰ that the dispute, I am required to determine, in terms of section 24 of the LRA ***must be ancillary to a collective agreement.***
20. It's axiomatic, that I have to characterise the issue in dispute objectively, and not defer slavishly to a party's subjective characterisation of this dispute. I must, furthermore, determine the true nature and scope of the dispute inter partes and to this end it was necessary for me to determine or establish all the relevant facts and to characterise the category of the dispute correctly.¹¹
21. In this case I must determine whether the Applicant qualifies to be upgraded to salary levels 5 as alleged he is in terms of PSCB Resolution 3 of 2009.

On the merits

22. The relevant clauses 3.6.2.2 substantially relied upon by the Applicant and Respondent cannot be read in isolation from the whole Resolution. It provides that with effect ***from 1st April 2010 an employee who has completed 15 years of continuous service on a salary level 4,5,6,or 7, irrespective of the notch, and has obtained a satisfactory rating in his or her performance assessment (the average assessment over at least 2 years will determine the performance rating) shall grade (salary level) 5,6,7 or 8 respectively. This is not subject to the availability of posts.***
23. When interpreting a collective agreement, I am obliged to follow the Labour Appeal Court judgment in the matter between *North East Cape Forests v SAAPAWU & Others*¹² which provides that a collective agreement, such as Resolution 3 of 2009 is not an ordinary contract and the context within which a collective agreement operates under the Labour Relations Act No 66 of 1995, as amended, is vastly different from a commercial contract.
24. In that case the dictum of Froneman DJP, as he then was, is instructive. He states that the primary objects of the LRA were better served if I adopted a 'practical approach' in the interpretation and application of collective agreements "rather than by reference to purely contractual principles."
25. In that (Northern Cape Forests) case what was stressed is that I must ask whether an interpretation by these principles accorded with the objectives of the LRA. A collective agreement after all, is a written memorandum which is meant to reflect what were the terms and conditions to which the parties had agreed at the time they concluded the agreement. And extraneous documents whose contents are at variance to what was agreed upon cannot hold sway over the former.
26. Turning to the merits of the common cause facts before me,

¹⁰ [2016] ZALAC 10 (decided on 24th March 2016)

¹¹ Para[16] of Hospersa

¹² (2) 1997[8] ILJ 971 (LAC)

- 26.1 It's admitted that that the Applicant has been in service of the First Respondent for 15 years¹³ subject to the qualification that follows thereon.
- 26.2 That admission finds common cause with the Applicant who claims that had the PAS system not been abolished on 1st July 2001, he would have qualified to progress to grade 4 of 1st July 2002.
- 26.3 In other words he had acquired a right which was stultified by the abolishment of a system that created that right. Did the transition from PAS to CORE and did the parties intend that through; inter alia, a negotiated collective agreement PSCBC Resolution 3 of 2009, surely not?
- 26.4 A proper interpretation of clause 3.6.2.2 of the Resolution needs to take into account other provisions of the Resolution, more specifically the other parts of clause 3. Before I proceed, it's apposite that I express my frustration because of the poor quality of submissions that each party made even though they handed in voluminous documents. I **continued with the merits at paragraph 26.8 infra.**

Perils of asking an arbitrator to decide as a stated case

27. The difficulty with this case presented by way of mere submission of written heads of argument, poorly couched by the Applicant's representative, and voluminous bundle of documents reverberates what Murphy AJA held in the Labour Appeal Court judgment in ***Arends and Others v South African Local Government Bargaining Council and Others***¹⁴. That such a decision (i.e. to merely present written submissions) in that case was ill-advised. The parties were cautioned by me that their respected cases sank or swim on their persuasive capacity on paper. The mere fact that a dispute pertains to the interpretation and/or application of a collective agreement does not imply that a determination in that regard will be confined solely to matters of interpretation or application. ***Such disputes must obviously be resolved within a factual context, and it is invariable that disputes of fact are bound to arise notwithstanding the parties' agreement that the background facts of the dispute are largely common cause.***
28. At para 11, in *Arends supra*, it was held that; "The appellants are to some extent the authors of their own misfortune. ***They placed the matter before the arbitrator as if there was a simple, single issue capable of resolution with the barest minimum of factual matter.*** Their approach was neither prudent nor correct. When parties desire to proceed without oral evidence in the form of a special case, ***it is imperative that there should be a detailed written statement of the facts agreed by the parties, akin to a***

¹³ See para 15.10 above

¹⁴ (2015) 36 ILJ 1200 (LAC)

pleading. Otherwise, the presiding officer may not be in a position to answer the legal question put to him. Alternatively, without such a statement, the question put is in danger of being abstract or academic. Courts of law and arbitration tribunals dealing with disputes of right exist for the settlement of concrete controversies and not to pronounce upon abstract questions or to give advice upon differing contentions about the meaning of an agreement.

29. That judgment goes on to say that “[W]here a question of legal interpretation is submitted to an arbitrator, the parties must set out in the stated case ***a factual substratum which shows what has arisen and how it has arisen.*** The stated case must set out agreed facts, not assumptions. The purpose of the rule is to enable a case to be determined without the necessity of hearing the evidence. ***An oral stated case predicated upon poorly ventilated and potentially unshared assumptions as to the facts defeat the purpose of the requirements of a stated case and, as this case shows, will lead to problematic results.***”

Back to the merits

30. In this case, and bearing in mind the provisions of clause 3 of the Resolution as pointed above, the questions that should be asked is how, in the absence of oral evidence am I expected to determine whether the requirements of grade progression as stipulated within clause 3.5 were met in this case? How am I to conclude that there was a proper job evaluation (if there was one), and what its outcome was? On what basis if any, was I to conclude that the Applicant’s performance was recognised and that he had satisfactorily performed? This is because the Applicant’s representative in his argument baldly submits that 2 out of 3 principle ‘weigh in favour of the Applicant’.
31. It’s a glaring anomaly is that in clause 3.6.2.12 (relating to Accelerated Grade Progression”) which allows “only 30% of the employees per year (to) be awarded grade progression in this regard.” Even more crucially, how am I required to know whether or not that the Applicant fell within the 30% threshold in 2014 for him to be awarded grade progression? “
32. In ***Tabane v Vlieger-Seynhaeve NO and Others***¹⁵ the respondent relied on circulars which were in conflict with provisions of the collective agreement. So does the Respondent in this case before me. But doesn’t relieve me of the duty to be satisfied that, on the balance of probability, the applicant discharged the onus that he bore in this instance.
33. However, given the poor presentation and articulation of the arguments by both sides, particularly the Applicant who bore a greater onus, I am not persuaded that he has

¹⁵ [2017] ZALCCT 43 [28th September 2017]

discharged the onus upon him and I cannot therefore find in his favour. For the sake of balance, the Respondents were woefully deficient as well.

AWARD

34. Considering the evidence and the facts as poorly articulated and presented on paper, I'm unable to find whether or not the First Respondent, alternatively the Second Respondent, alternatively the First and the Second Respondent have correctly (as the Respondents argue) or incorrectly interpreted and applied (as the Applicant argues) the terms and conditions of Resolution 3 of 2009.
35. The Applicant, LZ BUTHELEZI is not entitled to the relief he seeks.
36. There is no order as to costs.

SIGNED AT DURBAN ON THIS 16th DAY OF JULY 2018

A handwritten signature in black ink, appearing to read 'Saber Ahmed Jazbhay', with a long horizontal stroke extending to the right.

Saber Ahmed Jazbhay

PSCBC Arbitrator