



IN THE PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL

HELD IN LADYSMITH

CASE NO: PSCB 66-17/18

PSA obo PSA MABASO and 4 OTHERS

APPLICANTS

and

Department of HEALTH- KwaZulu-Natal

FIRST RESPONDENT

DPSA

SECOND RESPONDENT

ARBITRATION AWARD

DATE OF AWARD: 25TH OCTOBER 2017

ARBITRATOR: Saber Ahmed Jazbhay

DETAILS OF HEARING AND REPRESENTATION

1. The dispute relates to the interpretation or application of PSCB Resolution 7 of 2015 (the Collective Agreement) in respect HOUSING allowance. The dispute was referred to the PSCBC in terms of the provisions of section 24 of the Labour Relations Act 66 of 1995.
2. At the hearing, it transpired that three of the five applicants have been paid out and that the dispute against them has been settled and therefore they are not before me and that this award relates to the remaining two, namely **M.C Dlamini and J.D Shabalala** (hereinafter referred to as the “Applicants”)
3. Both the representatives of the Applicants and the First Respondent had provided me with a brief background of what had transpired so as to bring the matter to this point. The crisp issue is whether the Applicant’s complied with the requirements antecedent to them being allowed, the R300-00 they claimed entitlement to in terms of PSCB Resolution 7 of 2015, it being common cause that they are already receiving R900-00.
4. The Second Respondent was absent and I enquired from the PSCBC and I was satisfied that it was duly notified via email on the 7th August 2017 and I proceeded against it by default.
5. The award therefore follows upon the arbitration which was held on Friday the 20th October 2017, relating to that dispute, which took place at the boardroom of the First Respondent in Ladysmith, KwaZulu-Natal.
6. The Applicants were represented by Mr Mbongeni Mbanjwa of the Public Servants Association whilst the First Respondent was represented by Mrs Ntokozo Gumede.

BAKGROUND TO THE DISPUTE

7. It's common cause that this is an issue about whether, in refusing or alternatively, declining the application by the Applicants or, alternatively, considering them ineligible to qualify for the increase, the First Respondent has incorrectly interpreted and applied the Collective Agreement and in the process caused the Applicants severe financial prejudice.
8. To consider whether this is in fact the case, it is imperative that I set out the salient facts and the background as gleaned from their respective representative’s oral arguments and submissions.
9. It's also common cause , that
 - a. The Applicants are employees of the First Respondent.

- b. They responded, albeit later than a deadline specified in an internal circular (page 9 of the Respondent's Bundle of documents) dated 17th December 2015, by the Second Respondent, the Department of Public Service and Administration to enroll as home-owners with the Government Employees Housing Scheme which would automatically increase their housing allowance from R900-00, which they have been receiving to R1200-00 from 1 July 2015 on submission of necessary documents such as proof of home ownership.
- c. Paragraph 4.5.2 of the Collective Agreement, under the heading "STATE FINANCING OF EMPLOYEE HOUSING" to which the internal circular referred to in sub para (b) supra, provides that the increased housing allowance of R1200-00 shall be paid to "eligible employees".
- d. Pertinently, it is common cause that had the Applicant's timeously responded they would have received the increase from R900-00 to R1200-00 but that as they did not timeously respond and submitted documents their applications were denied.
- e. Paragraph 3.1 of a directive issued by the Department of Public Service and Administration (DPSA) on 1st December 2015 provides that "an employee with registered title over a residential property" is **a home-owner** (see page 10-11 of First Respondent's Bundle of Documents)
- f. The First Respondent doesn't dispute that had the Applicants submitted their documentations timeously they would have been eligible. Its contention is that because they submitted their documents later than the deadline set in the circular (at b above) rendered them ineligible to the increase from 1 July 2015 to the date they submitted their documents and therefore they were not entitled thereto in terms of PSCB Resolution 7 of 2015. My attention was drawn to page 18 of the Respondent's bundle of documents, to namely para 2.2 of internal circular 37 of 2017 which is dated 3rd May 2017 which provided that 'Employees who submitted the outstanding documents *after 30 June 2016* do not qualify for backdated payments from the date they became home owners."

ISSUES TO BE DECIDED

10. The crisp issue I am to decide is whether the Applicants are eligible and therefore entitled to the increased housing allowance from 1st July 2015 to the date of submission and if I decide in the affirmative, I must direct the amount of such costs.

ANALYSIS OF EVIDENCE AND ARGUMENT

11. This matter relates to housing allowance in terms of the Collective Agreement PSCBC RESOLUTION 7 OF 2015.
12. No oral evidence was led before me. The parties had agreed that the factual background to the dispute was largely common cause, and that the principal issue for determination pertained to the interpretation and application of the Resolution.

Applicable legal Principles

The law and jurisprudence

13. The purpose of section 24 of the Labour Relations Act (this is a referral in terms of the section) is to resolve disputes where a party to an agreement is alleged to have been in breach of the provisions of that agreement by failing to apply its terms either correctly or at all.
14. The principles applicable to the interpretation of collective agreements are trite as restated by the Labour Appeal Court in ***Western Cape Department of Health v MEC Van Wyk and Others [2014] ZALAC 25; [2014] (5 June 2014)***
15. The legal position is that:
 - a) When interpreting a collective agreement, the arbitrator is enjoined to bear in mind that a collective agreement is not like an ordinary contract, and he/she is therefore required to consider the aim, purpose and all the terms of the collective agreement;
 - b) The primary objects of the LRA are better served by an approach which is practical to the interpretation of such agreements, namely to promote the effective, fair and speedy resolution of labour disputes. See *PSA obo Liebenberg v Department of Defence and Others (2013) 34 ILJ 1769 (LC)* In addition, it is expected that I adopt an interpretation and application that is fair to the parties.
 - c) A collective agreement is a written memorandum which is meant to reflect the terms and conditions to which the parties have agreed at the time that they concluded the agreement.
 - d) Arbitrators must therefore strive to give effect to that intention, and when tasked with an interpretation of an agreement, must give to the words used by the parties their plain, ordinary and popular meaning if there is no ambiguity. This approach must take into account that it is not for the Courts or arbitrators to make a contract for the parties, other than the one they in fact made;
 - e) The “parole evidence” rule when interpreting collective agreements is generally not permissible when the words of the memorandum are clear.

f) Collective agreements are generally concluded following upon protracted negotiations, and it is expected of the parties to those agreements to remain bound by their provisions. ***It therefore follows that such agreements cannot be amended unilaterally.***

16. Section 26 of the Bill of Rights to the Constitution of the Republic of South Africa¹, which is the supreme law of the country, provides that

- a. Everyone has the right to have access to adequate housing, and
- b. The State must take reasonable steps, through legislation and other measures *within its available resources*², to achieve the progressive realization of this right...”

17. Section 39 of Constitution of the Republic of South Africa obliges me that when interpreting the Bill of Rights, I must promote the values that underlie an open and democratic society based on human dignity, equality and freedom³.

18. Moreover I must “promote the spirit, purport and objects of the Bill of Rights”⁴.

19. Section 138(9) of the Labour Relations Act, provides that “The Commissioner may make any appropriate award in terms of this Act, including , but not limited to, an award-

- (a) That gives effect to any *collective agreement*;
- (b) That gives effect to the provisions and primary objects of *this* Act;
- (c) That includes, or is in the form of, a declaratory award.”

20. Therefore I have the power to give effect to collective agreements in terms of the aforementioned provision. It is then open to me to order the First and Second Respondents to accede to Applicants’ application if, based on the conspectus of evidence and arguments before me, I am persuaded that this is appropriate.

21. This matter has been referred to the PSCBC in terms of section 24(2) of the Labour Relations Act and the relevance of section 24 of the Labour Relations Act vis-à-vis to the interpretation and application of a collective agreement has been luminously resolved by the Labour Appeal Court in ***Hospersa SA obo Tshambi v Department of Health, KwaZulu-Natal***, [2016] ZALAC 10. It held that the phrase “interpretation or application”, is not to be read disjunctively. In other words it must be read as a whole and in context with the objectives as set out in the Collective Agreement. Enforcement of a collective agreement is a process which follows on the positive

¹ This is the supreme law of the land. This means that all laws and conduct or actions must be in consonant with the Constitution. Accordingly the conduct of the respondent must cross the threshold established by this section.

² Such resources have been made available as the directive of the DPSA indicates

³ This is very vital considering the vulnerable status of the applicants

⁴ Section 39(2) of the Constitution.

finding about ‘application’ and not ‘a facet of application’. Simply phrased, what does the Collective Agreement provide vis-à-vis the entitlement that the applicants claim?

22. When interpreting a collective agreement, such as PSCB Resolution 7 of 2015, I have taken cognizance of the judgment of the LAC in ***Northern Cape Forests v SAAPAWU and Others***⁵. In that case it has been held that a collective agreement is not an ordinary contract and the context within which a collective agreement operates under the LRA is vastly different from a commercial contract. I am persuaded by the dictum of Froneman DJP, as he then was that the primary objects of the Act would be better served by a ‘practical approach to the interpretation and application of collective agreements rather than by reference to *purely contractual principles*.” The operable words are “practical approach”
23. It follows that I have to ask whether the interpretation yielded by these principles accord with the objectives of the Act.
24. This judgment reminds me that a Collective Agreement, such as PSCB Resolution 7 of 2015, is “a written memorandum which is meant to reflect the terms and conditions (in other words what “the intention” at the time the parties concluded the agreement) to which the parties *have agreed at the time they concluded the agreement*.”
25. In other words I must strive to give effect to that intention.
26. Furthermore, as the Labor Appeal Court ruled in ***Arendts and Others v SA Local Government Bargaining Council and Others***,⁶ the factual matrix within which the Collective Agreement is located “must be placed in its proper context”⁷. Moreover, agreements are not made in a vacuum and, as the court reminds us, they are ‘a product of a particular background, context and knowledge of the parties thereto’ and that without context “words mean nothing”⁸. It’s regrettable, therefore, that the parties did not place the contextual evidence before me which would have greatly assisted me.
27. With the foregoing in mind I now analyze the evidence and the arguments submitted by the parties.

NOTE WELL, I HAVE SUMMARIZED THE ARGUMENTS AS WELL AS EVIDENCE AND ONLY THE SALIENT POINTS HAVE BEEN INCLUDED IN WHAT FOLLOWS. TO AVOID REPETITION AND UNNECESSARY PROLIXITY REFERENCE MUST BE HAD THEREO AS WELL.

⁵ (2) 1997 (18) ILJ 971 (LAC)

⁶ [2015] 36 ILJ 1200 (LAC)

⁷ At para [17]

⁸ *ibid*

APPLICANTS SUBMISSIONS

28. Most of what the Applicants' contend in their argument has been mentioned in paragraph 7 to 9 of this award.
29. They contend that the Collective Agreement read in tandem with the directive of the DPSA (pp. 10-11 of the First Respondent's bundle of documents renders them qualified and therefore eligible for the increase housing allowance backdated to 1st July 2015.
30. They are, already in receipt of R1200-00 per month and that they are therefore entitled to the R300-00 backdated from 1st July 2015 onward to the date of their late submission that the First Respondent has declined them.
31. The Applicant's, as being amongst the lowest paid employees, fall under the vulnerable category and it is these that the Collective Agreement as well as the directive addresses.
32. Accordingly acting in response to the directive, they applied, albeit later than the deadline set by the Second Respondent, for the increase of R300-00 per month in the housing allowance, which they have been recipient of.
33. It is not in dispute that the documents that they submitted, albeit after the deadline, they would have been entitled to the adjustment from R900-00 to R 1200-00 backdated to 1st July 2015.
34. The First Respondent, they submit, is in breach of the Collective Agreement which takes priority over and above the circular relied upon by the First Respondent, and they are as a result, each, suffering financial prejudice at the rate of R 300-00 per month which as at November 2016 amounts to in the case of Dlamini R4500-00(15 months x R300) and in the case of Shabalala amounts to R2100-00 (7 months x R300-00) respectively.
35. They claim payment thereof within thirty (30) days of this award.

RESPONDENT'S SUBMISSIONS

36. Most of what the respondent contends in its argument has been mentioned in paragraphs 7 and 9 of this award.
37. The crisp issue, it contends, is that because the Applicants submitted their documents late they are ineligible.

ANALYSIS OF EVIDENCE AND ARGUMENT

38. Does the PSCBC have jurisdiction in this dispute? I find that it does. For its trite law that order to remain within the scope of section 138 (1) of the Labour Relations Act

the relevant provision of the Collective Agreement must be read with the applicable provisions relating to the terms and conditions of employment of the employee by the employer

39. Paragraphs 2 (Scope of the Collective Agreement) and 6 (Dispute Resolution) of the Collective Agreement clearly clothes the PSCBC with jurisdiction.
40. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax, in context in which the provision appears, the apparent purpose to which it is directed and the material known to those who are responsible for its production.
41. Surely, given the nature of its version put before me in argument, the First Respondent should have produced expert witnesses to gainsay its version.
42. It is apposite that I give consideration to the status of a circular versus a collective agreement. The DPSA circulars referred to above are regarded by the First Respondent as legally binding, but is this the case?

Status of circulars and directives

43. The Collective Agreement referred to as PSCB Resolution 7 of 215 does not allow for its provisions to be unilaterally changed as the circulars and directives relied on by the First Respondent seek to do. The circulars contain unilateral, far-reaching administrative decisions that potentially impact on the rights that follow from the Resolution.
44. If one has regard to the Promotion of Administrative Justice Act, for instance, very clearly from an administrative law perspective it would be misleading into thinking a circular is the final word, but it isn't and PAJA protects against procedurally unfair administrative action. Only the parties to the Collective Agreement can change or regulate its provisions.
45. The process adopted by the First and Second Respondents is one undertaken outside the bargaining process and was not sanctioned by the Collective Agreement, to wit, Resolution 7 of 2015. Let me simplify. Parties that concluded the collective agreement with the First Respondent at national level were not a party to this process. It would be incorrect and, in my view, unfair to hold that the First, alternatively the Second, Respondent, an unfettered prerogative to impose its understanding of the bargained collective agreement on the Applicants, without specific authority to such prerogative in the collective agreement itself. See ***Western Cape Department of Health v MEC Van Wyk and Others***, [2014] ZALAC 25 (5th June 2014) at para 20.

46. A circular is not a directive and it cannot be legally binding. It's merely a guide. It creates no enforceable legal rights or obligations, as these cannot be imposed in the absence of procedural fairness. There is therefore no such thing as contravention of a circular as the First Respondent alludes to. A circular, in my opinion, is nothing more than an FYI.
47. The DPSA circulars cannot be relied upon by the First Respondent as legally binding. If I err, I err on the side of the principle that a collective agreement is a product of negotiation between the employer and employee through their unions or representatives and the provisions of that agreement are sacrosanct and can only be varied through the same process that gave birth to the conclusion of the collective agreement.
48. I make reference to the fact the collective agreement refers to Section 26 of the Constitution and mindful of its obligations the State as employer concluded the Collective Agreement together with, inter alia, the Applicants which recognizes that “the current housing allowance dispensation has not translated into significant improvement in home ownership among employees”⁹.
49. It is in pursuance of the aforementioned obligations that it established the Government Employees Housing Scheme to improve access to affordable housing finance through various initiatives¹⁰ available to the Applicants.
50. There is no dispute that, but for their late submission of documents, the Applicants who are already receiving R1200-00, would have received the R300-00 backdated to July 2015. I refer to page 18 of the First Respondent's bundles of documents (referred to in paragraph 9(f) supra and relied upon by the First Respondent. That circular HRM Circular No 37 of 2017 is dated 3rd May 2017, that is well after both Applicants submitted their documents and it seeks to have a retrospective effect, albeit unilaterally.
51. Notwithstanding the foregoing, however, like Judges I must be alert to or mindful of and guard against, the temptation to substitute what I regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation.
52. In interpreting the collective agreement I am required to consider its purpose or objective and all the terms and conditions thereof. I am mindful that the collective agreement is not to be read and interpreted like an ordinary contract, (see **Northern Cape Forests v SA Agricultural & Allied Workers & Others**, (1997) 18 ILJ (LAC). Furthermore the learned judge in the **Western Cape Department of Health v**

⁹ Paragraph 3.8 of the Collective Agreement.

¹⁰ Paragraph 4.2 of the Collective Agreement

MEC Van Wyk and Others (supra) instructs me that as I derive my power from the LRA, I must take into account “the primary objects of the [LRA]” (at para [22]).

53. In the context of a contract which, in essence is what the collective agreement inter partes is tantamount to, it is imperative not to make a contract for the parties other than the one that they in fact entered into. Furthermore, the primary objects of the LRA would, as the learned judge in **Western Cape Department of Health** judgment, reminds me, are better served “by an approach that is practical to the interpretation and application of such agreement, namely *to promote the effective, fair and speedy resolution of labour disputes* (see section 24).

54. Reverting to the facts in the present dispute before me the inescapable facts are that:-

- a. The Applicants are already recipients of a housing allowance and that the R 300-00 is a top-up
- b. On a plain reading, neither the Collective Agreement nor the directive of the DPSA seems to render the applicants ineligible and therefore, in the absence of evidence to the contrary, only a strained reading as posited by the respondent leads to such a conclusion. Neither the circular nor the directive, I find, renders them ineligible. They are silent on the issue of what happens if, as in the context of the current case, the Applicants submitted their documents later than the deadline.

55. The terms and conditions or the provisions of the Collective Agreement as supplemented by the directive of the DPSA are plain.

56. I am therefore persuaded that there is nothing to gainsay the version of the First Respondent and I must therefore find in favour of the Applicants.

AWARD or DETERMINATION

57. Therefore I determine and order that:

57.1 The First Respondent incorrectly applied the provisions of Resolution 7 of 2015 in relation to the application by the Applicants for the increase in the home owners' allowance.

57.2 As a result of the foregoing, the Applicants have suffered financial prejudice and will continue to be prejudiced if the First Respondent's decision is not reversed.

57.3 Accordingly, the Applicants application for the increase in the housing allowance be approved and

57.4 The First and Second Respondents, are ordered, jointly and severally and in solidum, the one paying to absolve the other, to reimburse

- (a) M.C Dlamini in the sum of R4500-00 (15 months x R300) as at November 2016
- (b) J.D Shabalala in the sum of R2100-00 (7 months x R300-00) as at March 2016

57.5 This amount be paid to them within thirty (30) days from the date of this order.

THIS DONE AT DURBAN ON THIS 25th October 2017.

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

Commissioner: Saber Ahmed Jazbhay

Award PSCB 66-17/18 (PSA obo BE Mabaso and 4 others)