



# ARBITRATION AWARD

Case Number: PSCB75-15/16

Panelists: Malusi Mbuli

Date of Award: 10-02-2016

In the **ARBITRATION** between

NEHAWU obo N. L. GWAZA & 6 OTHERS

Applicant)

And

DEPARTMENT OF HEALTH – EASTERN CAPE

(Respondent)

## **DETAILS OF THE HEARING AND REPRESENTATION**

1. The matter came before the PSCBC for arbitration in terms of section 24 (2) [24(5)] of the Labour Relations Act No 66 of 1995 ("the Act"). It was set down for an arbitration hearing at the NEHAWU Regional Office in Umtata on the 03<sup>rd</sup> of February 2016.
2. Both parties attended the hearing and the employer was represented by Mr. V. Gidigidi an official of the respondent.
3. The applicant NEHAWU obo Gwaza & 6 others attended the hearing and were represented by Mr. T. Damoyi, an official of the applicant's trade union NEHAWU.
4. At the commencement of the proceedings the respondent's representative raised 2 points in limine, that the applicants are no longer the employees of the respondent and therefore cannot file the Interpretation and Application of a Collective Agreement dispute.
5. The other point raised by the respondent is that the applicants have filed a dismissal dispute with the PHSDSBC and whilst this is pending the applicants have no *locus tandi* to refer this type of a dispute because they are no longer the employees of the respondent.
6. The two *points in limines* were both dismissed and I will deal with the reasons for such decision hereunder.

## **ISSUE TO BE DECIDED**

7. I am required to interpret and apply clause 4.1, clause 6, clause 2.2, 7.3 (a) (b) (o), and clause 8.8 of the PSCBC Resolution 1 of 2003 and decide whether the respondent has complied with the said resolution in disciplining the applicant.

## **POINTS IN LIMINE**

8. The 1<sup>st</sup> *in limine point* raised by the respondent was that the applicants cannot refer an interpretation and application of a collective agreement dispute because they are no longer the employees of the respondent.
9. This dispute arose whilst the applicants were still the employees of the respondent and there was even an objection raised at their disciplinary hearing on non - compliance with the collective agreement. This point was not dealt with at that stage as there was no ruling to that effect.

10. It follows that the applicants had only one forum left to challenge the interpretation and application of the collective agreement at the PSCBC and this point in limine is hereby dismissed.
11. The 2<sup>nd</sup> point in limine raised by the respondent was that the applicants have referred a dismissal dispute to the PHSDSBC and the issues that they are raising should be dealt with at the arbitration for a dismissal dispute.
12. On this point the issues raised by the applicants are not all arbitration issues relating to the procedural aspect of their dismissal but some are issues relating to the interpretation and application of a collective agreement and they are supposed to be dealt with as such.
13. This point in limine is also dismissed for the reason stated above.
14. The respondent cannot escape responsibility on the basis that the applicants have since been dismissed. The respondent is still bound by the clauses of the PSCBC Resolution 1 of 2003. These two points are both dismissed.

## **SURVEY OF EVIDENCE**

15. The parties did not lead any evidence on the matter as they agreed that the facts in this dispute were common and it follows that the matter was not electronically recorded and the party's documents and arguments will form the record of the hearing.
16. The parties agree that their dispute is the dispute of law and not a dispute of fact.

## **ANALYSIS OF EVIDENCE AND ARGUMENT**

17. *Section 23 of the LRA provides that the collective agreement is binding on the parties to it and also takes precedent over the provisions of the Act for whole period of that collective agreement.*
18. The PSCBC Resolution 1 of 2003 is a collective agreement hence it should be dealt with and applied in consideration of section 23 of the LRA. This collective agreement is binding on the parties to it and this means that compliance with the said collective agreement is compulsory.
19. When interpreting collective agreements arbitrators should follow the judgment of the LAC in ***North East Cape Forests v SAAPAWU & others* (2) 1997 (18) ILJ 971 (LAC)**<sup>1</sup>:

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- *“A collective agreement in terms of the Act is not an ordinary contract and the context within which a collective agreement operates under the Act is vastly different from a commercial contract. Froneman DJP has indicated that the primary objects of the Act were better served by a “practical approach to the interpretation and application of collective agreements rather than by reference to purely contractual principles.”*
- *This is not to say however that the ordinary principles of interpretation of contract are never appropriate when interpreting and applying collective agreements. In Northern Cape Forests the Court merely stressed that the interpreter should ask the further question whether an interpretation yielded by these principles accords with the objectives of the LRA.*
- *The fact is that a collective agreement is a written memorandum which is meant to reflect the terms and conditions to which parties have agreed at the time that they concluded the agreement. The courts and arbitrators must therefore strive to give effect to that intention.*
- *Thus the Courts frequently apply the ‘parole evidence’ rule – that is that evidence outside the written agreement itself is not generally permissible when the words of the memorandum are clear - when interpreting collective agreements.”*

20. This also means that there can be no dismissal of an employee in the Public Service if there was violation of a collective agreement as long as that collective agreement is still in place.

21. For the purposes of this dispute the relevant clauses are 4.1, 6, and 22 read with 7.3 (a), (b) (o) and (8.8):

*(a) Clause 4.1 incorporates the Code of Good Practice contained in Schedule 8 of the Labour Relations Act 66 of 1995. The applicants representative argues that Mr. Gwaza was a shop steward and that the union was not consulted when he was about to be disciplined.*

*I don’t want to be tempted to deal with the substantive issues in this claim save to say that the Code of Good Practice incorporated in this collective agreement is not in itself a collective agreement.*

*Whether the union was consulted or not before the shop steward was disciplined is an arbitration issue on the procedural fairness of the applicant’s dismissal and not an issue for interpretation and application of a collective agreement.*

*It then follows that this one can be dealt with in the dismissal dispute as a procedural irregularity.*

*(b) Clause 2.2 read with clause 7.3 (a) provide that discipline must be applied prompt, fair, consistent and in a progressive manner. Clause 7.3 (a) provide that the disciplinary hearing must be held within ten working days after the notice of enquiry referred to in clause 7.1 is delivered to the employee.*

*The first sitting of the applicant’s disciplinary hearing was on the 05<sup>th</sup> of May 2014 as alluded to by the respondent in his arguments and the notification of the hearing was issued on the 02<sup>nd</sup> of April 2014.*

*This was clearly in violation of clause 2.2 read with 7.3 (a) of the PSCBC Collective Agreement 1 of 2003.*

*(c) Clause 6 provides that the employer may initiate a disciplinary enquiry for serious allegations and that the employer must appoint an employee as a representative, who as far as possible should be the manager of the employee.*

*The applicant's representative has argued that Mr. Bhebhula was not one of the O. R. Tambo District managers and as such was not as far as possible a manager of the applicants. In this regard it cannot be said that as far as possible means coming from the same district.*

*The Department of Health – Eastern Cape is an employer of the applicants and I do not know any rule, policy or regulation prohibiting the employer from using any of its managers. As far as possible a manager of the employees cannot be interpreted to mean the employer must be confined to a district and as such there was no violation of clause 6 of PSCBC Resolution 1 of 2003.*

*(d) Clause 7.3 (b) provides that the chairperson of the disciplinary hearing must be appointed by the employer and must be an employee on a higher grade than the representative of the employer.*

*I agree with the respondents argument that the authority to appoint can be delegated however the initiator and the chairperson of the disciplinary hearing were on the same level and this conduct was in violation of clause 7.3 (b) because the chairperson was not on a higher level than the initiator.*

*(e) Clause 7.3 (0) the chairperson of the disciplinary hearing must communicate the final out of the hearing to the employee within five working days after the conclusion of the disciplinary hearing, and the outcome must be recorded on the employees file.*

*The last date of the disciplinary hearing was the 21<sup>st</sup> of August 2014 and the outcome of the disciplinary hearing was issued on the 22<sup>nd</sup> of September 2014. The respondent's representative argues that the applicants were given up the 15<sup>th</sup> of September 2014 to submit mitigating factors and the applicants waived their right.*

*Even if we can take the 15<sup>th</sup> of September 2014 as a date when the hearing was concluded, an outcome issued on the 22<sup>nd</sup> of September 2014 is issued after five days and is again in violation of the PSCBC Resolution 1 of 2003.*

*(f) Clause 8.8 provides that the departments must finalize appeals within 30 days, failing where the employee is on precautionary suspension, he / she must resume duties immediately and await outcome of appeal whilst on duty.*

*In this matter it is common cause that the applicants filed their appeal on the 12<sup>th</sup> of January 2015 and it was finalized on the 24<sup>th</sup> of July 2015. The respondent argues that the department had a back log of appeal cases and that the applicants were not prejudiced because they received their salary.*

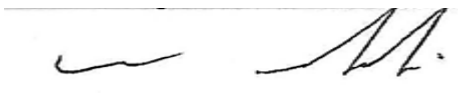
*The question is not whether the employees suffered prejudice or not but rather whether there was compliance with the collective agreement. Again the said collective agreement was violated.*

22. The respondent acted in violation of the PSCBC Resolution 1 of 2003 in respect of clause 2.2 read with 7.3 (a), 7.3 (b), 7.3 (o) and clause 8.8 of the said resolution.
23. These provisions are binding on the parties and both parties are not expected to deviate from the provisions of the collective agreement as it is binding on both of them and takes precedence over the provisions of the Act.
24. This means that the respondent as a custodian of discipline has acted in violation of clauses above contained in Public Service Co-ordinating Bargaining Council Resolution 1 of 2003.
25. Any disciplinary hearing concluded in violation of the collective agreement is null and void because of the legal status of the collective agreement contained in section 23 of the Labour Relations Act 66 of 1995 as amended.

26. In the circumstances I hereby make the following ruling.

## **AWARD**

27. The applicant's dismissal was not effected in accordance with the PSCBC Collective Agreement Resolution 1 of 2003.
28. The dismissal of the applicant is therefore null and void. The respondent is ordered to re – instate the applicants **L. Gwaza, N. Aldin, N. Mbhebe, N. Fiphaza, K. Korrie, T. Gxakoshe and N. Lumkwana** with full back pay with effect from the 01<sup>st</sup> March 2016 or put differently the applicants are expected to resume their duties on the **01<sup>st</sup> of March 2016**.
29. The said back pay from the period of dismissal to the 01<sup>st</sup> March 2016 will be quantified on the respondent's persal system and will be paid to each of the employees not later than the **31<sup>st</sup> of March 2016**.
30. This means that the applicants were effectively not dismissed by the respondent and are still the employees of the respondent until the respondent has complied with the PSCBC Resolution 1 of 2003.



Signature: \_\_\_\_\_

PSCBC Arbitrator: **Malusi Mbuli**