



ARBITRATION AWARD

Panelist: Khomotjo Daniel Matji _____
Case No.: PSCB 681-12/13
Date of Award: 7 July 2013 _____

In the ARBITRATION between:

PSA OBO ELANA VAN ZYL _____

(Union / Applicant)

And

NATIONAL PROSECUTING AUTHORITY OF SOUTH AFRICA _____

1ST RESPONDENT

PUBLIC SERVICE COMMISSION _____

2ND RESPONDENT

(Respondent)

Union/Applicant's representative: Mr. LJ Jensen _____

Union/Applicant's address: P.O. Box 11027 _____
HATFIELD
0028 _____

Telephone: 012 432-4838 _____

Telefax: .012 432-4848/9 _____

1st & 2nd Respondents' representatives: Mrs. M. du Toit & Mrs. MJ Mashao _____

Respondents' addresses: Private Bag X752 & Private Bag X121 _____
PRETORIA _____
0001 _____

Telephone: 012 845-6000 _____

Telefax: 012328-7690

DETAILS OF HEARING AND REPRESENTATION

- [1] This matter was heard at the offices of the Public Servants Association at the Forum Building; 1157 Francis Baard Street, in Hatfield on the 29th of July 2013. The respondents, National Prosecuting Authority (NPA) and Public Service Commission (PSC), were represented Mrs. M du Toit for the NPA and Mrs. Mashao for the PSC, whilst the applicant, Adv. E van Zyl, was represented by Mr. LJ. Jensen.
- [2] Two (2) bundles of documents were entered into the arbitration marked as follows: Bundle A > Applicant's bundle of documents paginated from 1 to 74 and Bundle B > 1st Respondent's bundle of documents paginated from 1 to 71.
- [3] The matter was stood down to Friday, 2nd July 2013 pending the outcome of a meeting between the Public Service Commission and National Prosecuting Authority on the grievances. Feedback had since been received from the NPA that the matter is not yet finalized.

PRELIMINARY ISSUE

- [4] When proceedings commenced on the 29th of July 2013, a point-in-limine was raised by Mrs. Mashao for the 2nd Respondent wanting to know the basis and grounds on which the Public Service Commission has been joined and cited as a respondent in the proceedings. She argued that the Public Service Commission is not party to the Public Service Co-ordinating Bargaining Council.
- [5] She stated further that the Public Service Commission is not a state department but has been established as an independent institution for a specific constitutional purpose in terms of section 196 of the Constitution of the Republic of South Africa Act No. 108 of 1996 (as amended).
- [6] Having heard representations by the parties and the responses thereto, it became more apparent that the matter is possessed of sufficient legal merit. The dispute referred to the Council for adjudication is about the interpretation and application of a collective agreement. Section 23 of the Labour Relations Act No. 66 of 1995 provides that a collective agreement binds the parties to the collective agreement. Clearly, if the Commission is not party to the collective agreement, it cannot be bound by it.
- [7] Resolution 14 of 2002 is a collective agreement concluded in the bargaining council and is only applicable and enforceable against the parties to whom it is made applicable. I was satisfied that the Public Service Commission was erroneously cited as a party. I ordered that the matter must proceed without the Public Service Commission.

BACKGROUND TO THE DISPUTE

- [8] Adv. Van Zyl is a Deputy Director of Public Prosecutions (DDPP) in the service of the National Prosecutions Authority since 1 February 2007. She lodged a grievance in terms of the grievance procedure in October 2008 against the fact that the post she occupied is on level 13 while the post had been evaluated and graded to level 14. She had exhausted all the internal remedies up to the Executive Authority and had since requested that the grievance be submitted to the Public Service Commission in accordance with the provisions of Resolution 14 of 2002.
- [9] The grievance has been with the Public Service Commission since September 2010 and to date it has not been finalized. The PSA on the 22nd of February 2013 declared a dispute at the Council in Pretoria on behalf of the applicant concerning the interpretation and application of the collective agreement Resolution 14 of 2002 being the grievance procedure. The matter came before Panelist Eddie Tlhotlhalemaje for conciliation on the 19th of March 2013 and he issued a '*Certificate of Outcome*' in confirmation that the parties were unable to amicably resolve their differences during the conciliation phase of the dispute. The dispute was subsequently referred to arbitration.

ISSUE TO BE DECIDED

- [10] The issue to be decided relates to the interpretation and application of a collective agreement Resolution 14 of 2002 and more specifically, whether the post level of the post occupied by the applicant must be at level 13 or level 14.

SURVEY OF EVIDENCE AND ARGUMENT

THE APPLICANT'S CASE

- [11] Mr. Jensen referred to a document in p23 of bundle A and stated that it illustrates the time lines according to the e-mails received concerning the grievance since 6 October 2010. The applicant's grievance is in p32 of bundle A. The grievance has been submitted to the Public Service Commission and it has failed to deal with the grievance within the stipulated time-frame.

- [12] In terms of Resolution 14 of 2002, the Public Service Commission has thirty days to deal with the grievance. The PSC informed the PSA on 16 October 2012 that submissions of the PSC with findings and recommendations have been forwarded to the chairperson for approval. The 30-day period has long expired and no response has been received from the PSC.

THE RESPONDENT'S CASE.

- [13] Mrs. Du Toit confirmed that Advocate Van Zyl lodged a grievance on 31 October 2008 concerning her post level. The grievance was investigated by the labour relations department of the NPA. In terms of the grievance procedure, an employee must give instructions whether the grievance must be referred to the executive authority.
- [14] Advocate Van Zyl referred the grievance to the Minister. The Minister attended to the grievance and reported in October 2010. The applicant received the minister's response on 6 October 2010. She replied that she was not happy with the response and asked that the grievance be referred to the Public Service Commission.
- [15] A memo was drafted and submitted to the Minister who then referred the grievance to the Public Service Commission. The Public Service Commission communicated with the NPA asking for inputs. Everything was given to the PSC at their request. Several enquiries were made to the PSC on the progress and the reply was always that the matter is being investigated.
- [16] No further particulars were required from the NPA since November 2012. She was adamant that the NPA has played its part and should not be blamed for the delay. It appeared from the e-mail sent by Mrs. Du Toit on 2 August 2012 that the PSC is still investigating the matter.

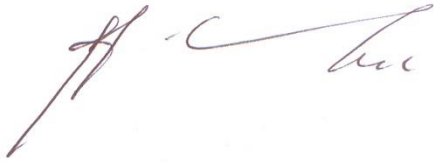
ANALYSIS OF EVIDENCE AND ARGUMENTS.

- [17] There can be no doubt that this case clearly illustrates that justice delayed is justice denied. A grievance lodged in October 2008, is today five years later still being investigated. In terms of the grievance procedure, the time-frame allowed to deal with the grievance is 30 days unless the parties by agreement consent in writing to a longer period. The case further illustrates how employers can flout time limits with impunity without any serious consequences.

- [18] The applicant stated in the grievance form that she has been appointed with effect from 1 February 2007 as a DDPP on post level 13 in the office of head of operations. It came to her attention on 28 October 2008 that the post in which she has been appointed has in fact been evaluated and upgraded to a level 14 DDPP position. The grievance is that her appointment had not been accordingly adjusted to a level 14 DDPP post.
- [19] The relief sought by the applicant is that with effect from 1 February 2007 and in accordance with the approved Job Evaluation she should be appointed as a level 14 DDPP. It is clear from the wording of the grievance that the applicant views the conduct of the employer as an unfair labour practice insofar as the employer failed or refused to adjust her post level to 14 according to the job evaluation results of the post.
- [20] Resolution 14 of 2002 is clear that the prescribed time limits must be strictly adhered to. According to the collective agreement, once the Commission has received all information from the executing authority, it must within 30-days consider such grievance and inform the executive authority of its recommendations and the reasons in writing. The information that the Commission still need to consult on the matter amounts to nothing more but a deliberate delaying tactic.
- [21] There is no doubt that the time limits prescribed in the grievance procedure have long expired. Since the dispute referred to the Council is about non-compliance with the grievance procedure, the appropriate remedy in the circumstances would be a compliance order against the 1st Respondent. However, that is not what the applicant seeks.
- [22] The grievance procedure has dismally failed to address the grievance of the applicant and a compliance order will also not bring closure because the dispute is actually not about the procedural issues but more on the substantive issues of the grievance. Be that as it may, Resolution 14 of 2002 provides at clause 11 that if there is a failure on the part of the department to respond to the grievance within the stipulated time frame, the aggrieved officer may lodge her grievance with the relevant sectoral bargaining council in the case of an unfair labour practice.
- [23] This appears to me to be the route that the applicant must have embarked upon as far back as 2009 as the NPA has already made its position very clear to her grievance. It was a futile exercise to refer the grievance to the Commission because the Commission would still make a recommendation to the same department that was initially not favourably disposed towards the matter. The appropriate route open to the applicant was to declare a dispute in terms of the dispute resolution mechanisms of the Council.

AWARD

- [24] The Public Service Commission was erroneously cited as a party to the proceedings as it is not party to the PSCBC.
- [25] The 1st Respondent, National Prosecuting Authority of South Africa, has failed to respond to the grievance of the applicant within the stipulated time frame.
- [26] It is ordered that the applicant must declare a dispute at the relevant Council in terms of its dispute resolution procedures and refer an unfair labour practice dispute as contemplated in section 186(2)(a) of the Labour Relations Act.
- [27] The date of this award will be the date on which the dispute arose.
- [28] I make no order as to costs.



K.D. MATJI

PSCBC - PANELIST