

# RULING

Panellist/s: E. Tlhotlhemaje  
Case No.: PSCB77-09/10  
Date of Ruling: 20 APRIL 2010

In the MATTER between:

**JR MOKOENA & OTHERS**  
(Union / Applicants)

And

**THE SOUTH AFRICAN POLICE SERVICES**  
(1<sup>st</sup> Respondent)  
&  
**THE DEPARTMENT OF PUBLIC SERVICE AND ADMINISTRATION**  
(2<sup>ND</sup> Respondent)

**Union/Applicant's representative:** A. GERBER (SAPU) & DD CHILI  
**Union/Applicant's address:** 255 PAUL KRUGER STREET  
PRESIDIA BUILDING. PRETORIA  
0001

Telephone: 011 950 4571 / 012 360 1392  
Telefax: 011 950 3964/ 012 347 7174

**Respondent's representative:** D ODENDAAL  
**Respondent's address:** PRIVATE BAG X94  
PRETORIA  
0001

Telephone: 012 393 7026  
Telefax: 012 393 7097

## **BACKGROUND TO THE DISPUTE**

[1] A referral was lodged by the Applicants on 27 May 2009. The dispute pertained to the Interpretation/application of a collective agreement, and in particular, the PSCBC Resolutions 1 of 2007 and 3 of 2008. The Applicants contended that legal administration officers employed in the SAPS as employees in terms of the Public Service Act 103 of 1994 and whose salaries are discussed at the PSCBC are supposed to be included in the implementation of an Occupation Specific Dispensation (OSD) for legally qualified categories. The Applicants seek an order that the 1<sup>st</sup> Respondent should implement the OSD in compliance with Resolution 3 of 2008, and further that the 2<sup>nd</sup> Respondent should be ordered to ensure that the 1<sup>st</sup> Respondent complies with the provisions of the Resolution.

[2] In the light of the importance and significance of this dispute particularly to the members of SAPS, the PSCBC on 02 June 2009 had sent correspondence to a number of Unions who might have an interest in the matter and extended an invitation to them to be joined as parties to this dispute. Only the South African Police Union and HOSPERSA positively responded to the invitation by the PSCBC.

[3] The matter was then scheduled for conciliation on 17 July 2009. SAPU had on 04 August 2009 indicated by way of correspondence that there appeared no prospects of resolving the dispute and requested that the dispute be arbitrated. A certificate of outcome was then issued on 07 August 2009. A request for arbitration was then filed on 21 August 2009 by the Applicants. The PSCBC had then on 25 August 2009 requested the parties to hold a pre-arbitration meeting. A meeting was held at a date unspecified and pre-arbitration minutes in that regard were filed with the PSCBC. The issue that the parties agreed should be determined was whether the provisions of PSCBC Resolutions 1/2007 and 3/2008 were applicable to the Applicants. Amongst other issues recorded in the minutes was that the Respondent was to raise a jurisdictional point pertaining to whether the PSCBC has the necessary jurisdiction to hear the matter as referred by the Applicants.

[4] The 1<sup>st</sup> Respondent had submitted its heads of argument in respect of the preliminary point it intended to raise on 08 October 2009. SAPU had on 14 October 2009 requested an extension to file its answering arguments. The original Applicants had filed their response on 22 October 2009. As at 20 November 2009 when this file was handed to me to deal with for the first time, SAPU had not filed its answering arguments. HOSPERSA had also not filed its response to the points in limine raised by the 1<sup>st</sup> Respondent.

[5] On 17 December 2009 I had then issued a directive in the following terms; *It is my view that given the national importance of this dispute to the public service as a whole, and the implications any ruling might have on the matter, it would be not only improper but also impractical to deal with the matter solely on the basis of the documents presented by the parties. It would not make any sense to deal with this matter in this inadequate fashion, particularly when the parties had requested specific number of days to dispose of the matter and further indicated that there might be a need for oral evidence to be led. It is further my view that the complexity of the issues raised requires that proper oral submissions be made, and where necessary, for a determination to be made as to the necessity of oral evidence.*

*A further concern to be raised is that two other Unions had indicated an intention to be joined as parties to this dispute. It is not sufficient to simply agree to be joined as a party to a dispute and not make any submissions in regard to the issues raised as this may create potential disputes as to the binding nature of the ruling to be issued. It is either these two Unions indicate on record that they concur with the submissions made by the original applicants, or alternatively submit supplementary arguments on their own. In the light of these concerns, the following directive is issued;*

- I. This matter should be set-down for arbitration on 17 February 2010.*
- II. SAPU and HOSPERSA are directed to file a response to the preliminary points raised by the 1<sup>st</sup> Respondent, or alternatively indicate in writing to the PSCBC on no later than 29 January 2010 that they concur and bind themselves to the submissions and arguments made by original applicants.*
- III. Failure to comply with this directive will result in both SAPU and HOSPERSA being “disjoined” and excluded from this dispute.*
- IV. This directive should be served on all affected parties, inclusive of the 2<sup>nd</sup> Respondent, SAPU and HOSPERSA, and a notice of set-down for 17 February 2010 should also be served on these parties.*
- V. There is no order as to costs.*

[6] SAPU had on 20 January 2010 advised the Council in writing that it acted on behalf of the Applicants and stood by the answering affidavits/submissions already filed. HOSPERSA had similarly on 20 January 2010 also advised the Council that it had perused the answering affidavits already submitted on behalf of the Applicants, and concurred with those submissions. It thus considered itself bound by any determination to be made.

[7] The matter was then set-down for arbitration on 05 March 2010 for oral argument on the jurisdictional issues raised by the 1<sup>st</sup> Respondent. At this hearing, Mr Odendaal was half way through his submissions and arguments when one of the Applicants, Mr. Chili raised an objection to the effect that SAPU had no mandate to

represent him. In the light of these surprising developments I had then adjourned the proceedings in order to afford Mr. Chili an opportunity to make separate submissions and advised the parties that the issues would be determined on the basis of written submissions made by all parties. This was following upon my view that the setting down of the matter for only oral submissions to be made would not serve any purpose in the light of the written submissions which had already been filed. Setting the matter down at a later date would not in any manner expedite the resolution of the dispute. Mr. Chili had filed his submissions on 19 March 2010 as agreed. Mr. Odendaal was given until 25 March 2010 to file a reply to Chili's submissions if he so wished. None however were filed on the agreed date.

### **The Points in limine:**

[8] The following facts are common cause as per the parties' pre-arbitration minutes; all the Applicants are Jurists in the employ of SAPS Legal Services Division with the necessary legal qualifications as prescribed by Resolution 1/2007 and 3/2008. The Applicants are employed in terms of the SA Police Service Act of 1995 and are signatories to a collective grievance relating to the implementation of the OSD for them. The OSD for legal officials is currently an agenda point for the SSSBC as from July 2009. In terms of the provisions of Resolution 1/2007, the OSD should have been finalised within two months after signature within the relevant Council and if not, should have been referred back to the PSCBC.

[9] The issue in dispute is whether the provisions of the PSCBC Resolution 1/2008 and 3/2008 are applicable to the applicants. If this is answered in the affirmative, the Applicants seek retrospective implementation of the OSD.

[10] The Respondent's contention is that the PSCBC does not have jurisdiction to arbitrate the dispute on the following grounds; Resolution 3/2008 is an agreement on the implementation of the OSD for legally qualified categories of employees appointed in terms of the Public Service Act falling outside the scope of the GPSSBC and it flows from Resolution 1/2007. It was argued that Annexure "C" of Res 1/2007 provides a framework which only relates to the Health and Social Development Sector, the Education Sector and the General Public Service Sector. The Safety and Security Sector is not mentioned in Res 1/2007.

[11] It was further submitted that the GPSSBC Resolution 1/2008 was entered into at the GPSSBC and only covers the legal profession in the general public sector. In the light of the limited application of Resolution 1/2008, the parties to the PSCBC had entered into the PSCBC Res 3/2008 and this Resolution only covered legally qualified categories of employees appointed in terms of the Public Service Act. In support of this contention, reference was made to clauses 2, 3, 4.2 and 5 of the Resolution, and it was reiterated that the

Resolution (3/2008) was only applicable to legally qualified categories of employees appointed in terms of the Public Service Act, and was therefore not applicable to the Applicants who were employed in terms of the South African Police Act.

[12] Furthermore, it was argued that since the PSCB and the GPSSBC Resolutions were not applicable to those officials appointed in terms of the SAPS Act, the Minister of the Public Service Administration had requested the Minister of Safety and Security to make a similar determination to cover employees appointed in terms of the SAPS Act and even though the Minister of Safety and Security had initially authorised the implementation of the OSD dispensation to legally qualified officials in SAPS, that decision was currently under review, and also that the implementation of the OSD in SAPS was currently on the agenda in the SSSBC. In the light of the factors, it was argued that the correct forum for deliberations on the OSD for legally qualified officials appointed in terms of the SAPS Act is the SSSBC, and any dispute flowing from this forum will have to be resolved in terms of that forum's dispute resolution procedure, and not of the PSCBC. In this regard, it was concluded that the dispute declared and referred by the Applicants did not fall within the ambit of the PSCBC Res 3/2008.

[13] The Applicants' submissions and arguments in regards to the point in limine raised were as follows: in regards to the first point that the Applicants are employed in terms of the SAPS Act and therefore are not covered by the Resolutions, it was submitted that reference should be made to correspondence from the Minister of Public Service and Administration who is the overall employer of Government employees, which correspondence was addressed to the Minister of Safety and Security on 09 May 2008. The correspondence advised the Minister of Safety and Security to make a similar determination, i.e. implementation of the OSD in the SAPS to cover employees appointed in terms of the SAPS Act with retrospective effect from 1 July 2007. In response to this correspondence, the Divisional Commissioner, Nchwe had prepared and approved the OSD document on 03 September 2009 in terms of which she had recommended that the Minister of Safety and Security in terms of the powers vested in him approved the phased in approach for the Legal Administration Officers appointed in terms of the SAPS Act, and further recommended that the Minister approves the new salary structure for Legal Administration officers in the SAPS. It was submitted that the Divisional Commissioner, Schutte had confirmed that funds were available and following further recommendations, the current Minister of Safety and Security had on 14 November 2008, approved the recommendations.

[14] In the light of the determination made by the Minister of Public Service and Administration, this had brought the qualified employees employed in terms of the Public Service Act within the ambit of the Resolution 1/2007, and by virtue of the recommendations and approval of the Minister of Safety and Security, the

determination, this had brought the Applicants within the ambit of the Resolution. To this end, by virtue of these determinations, it was argued that the provisions of the Resolutions were applicable to the Applicants, thus vesting the PSCBC with jurisdiction.

[15] With regard to the argument that the issue of the OSD was an agenda item on of the SSSBC, reference was made to paragraph 4.16 of Res 1/2007 which provided that all negotiations must be finalised 2 months prior to the implementation date as referred in para 4.14. In the event that negotiations are not concluded, the matter will be referred to the PSCBC for finalization within 7 days of the expiry of the 2 months prior to the date of implementation. Since negotiations in the different councils were not finalised, it was contended that the PSCBC had jurisdiction. It was submitted that the Respondent had not referred the matter back to the PSCBC and that it was only placed on the agenda of the PSCBC during July 2009.

[16] Mr. Chili, in his separate and more succinct reply gave a detailed background to the dispute and made the following submissions; the issue in dispute as reflected in the parties' pre-arbitration minutes was whether the provisions of the PSCBC Resolution 1/2007 and 3/2008 are applicable to the Applicants. The basis of the Respondent's point in limine was that the PSCBC did not have jurisdiction to hear the matter because the Applicants are not covered by the PSCBC as they are not employed in terms of the Public Service Act of 1994 but are employed in terms of the SAPS Act of 1995. It was argued that the Respondent's contentions go directly to the merits of the case due to the following reasons:

[17] The merits of the case were found in the pre-arbitration minutes and the issue to be determined and the ruling on the point in limine to be raised will invariably dispose of the matter on the merits. This was due to the reason that if it is in favour of the Respondent, it would imply that the PSCBC does not have jurisdiction to hear the matter because legal officials in the SAPS are not covered by the PSCBC Resolutions 1/2007 and 3/2008, and the opposite will be true in regard to a ruling being in favour of the applicants. In this regard, it was submitted that the point in limine should be dismissed as it goes to the heart of the merits of the case, and that the merits will be argued in the main case.

#### **Analysis of submissions and arguments on the points in limine:**

[18] The starting point in determining the issues raised by the Respondent is the definition of the concept of jurisdiction. The meaning of jurisdiction was set out in **Graaff Reinet Municipality v Reineveld's Poss Irrigation Board 1950 (2) SA 420 (A) at 42** 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. The best way in which a statute can indicate the jurisdiction of a court, is by stating categories of persons in respect of which it has jurisdiction, the geographical area in which such a court has jurisdiction and finally but very importantly, the matter such a court may entertain and deal with."*

[19] In this case, what has to be looked at is the cause of action and the basis of its origin, i.e., whether contract, collective agreement or any other legal instrument. As the Bargaining Council are creatures of statute established by the LRA, they can only function within the confines of the applicable statute both as to the issues to be dealt with as well as their powers and duties. The powers and functions of bargaining councils appear from s28 of the LRA, and include the performance of dispute resolution functions referred to in s51. Section 24 (1) is the empowering provision in terms of which all matters pertaining to the interpretation and/or application of a collective agreement within the Council are to be dealt with by the Council as envisaged in terms of its Constitution, Dispute Resolution procedures and Rules.

[20] The Applicants referred a dispute in terms of s24 (2) and 24 (5) of the LRA. The nature of the dispute I am required to determine as further elucidated in the parties' pre-arbitration minutes is whether the provisions of the PSCBC Resolutions 1/2007 and 3/2008 are applicable to the Applicants, and the Applicants seek retrospective implementation of the OSD. At this point, it needs to be pointed out that the dispute or issue to be determined is clearly distinguishable from the facts in **Minister of Safety and Security v SSSBC & Others (Case Number PA2/09)**.

[21] Two main issues were raised as preliminary and the issue is whether they are in fact a bar to the jurisdiction of the PSCBC to arbitrate. Differently put, the issue is whether the cause of action pursued by the Applicants is one that is not arbitrable.

**The argument that the Applicants are not employed in terms of the Public Service Act and thus not covered by the Resolutions:**

[22] It was not in dispute that all the Applicants were employed in terms of the SAPS Act. This fact on its own however cannot in my view oust the jurisdiction of the Council to arbitrate the dispute as developments emanating from the adoption of Resolution 3/2008 clearly indicated that there was a lacuna which the Minister of Public Service and Administration recognized, hence the advise issued to the Minister of Safety and Security on 09 May 2008 to make a determination that the OSD for legally qualified employees to be made applicable to all legally qualified employees in the SAPS to cover employees appointed in terms of the SAPS Act. In the light of these developments, coupled with measures taken by various individuals with mandated authority in addressing the matter within SAPS, one has to look at the intention of the parties, particularly of

the DPSA as the signatory of the Resolution on behalf of all government departments when these Resolutions were adopted. To this end, this would require delving into the merits of the matter, and to the extent that this is the case, I fail to appreciate how the employment of the Applicants in terms of the SAPS Act can be a bar in considering whether the Resolutions should be applicable to them or not, particularly taking into account the fundamental objectives and purpose of Resolution 1 of 2007 in the public service in general. The SAPS Act is a legislative measure used to engage the services of the Applicants, and is thus not a subject matter of the Applicants' cause of action. It is but one of the many factors to be looked at in considering whether the Resolutions are applicable to the Applicants or not.

**The argument that the issue is dispute is currently before the SSSBC as an agenda item:**

[23] Clause 4.13 of Resolution 1/2007 provides that; *"These dispensations will be implemented over the next three years commencing with effect from 01 July 2007. The priorities for implementation for new occupations will be determined by agreement within the sectoral bargaining council."*

[24] Clause 4.15 of the same Resolution further provides that; *"The negotiations related to each of the above occupations and salary structures, the translation measures for the movement from the current salary structure to the new structure, shall be dealt with at the relevant sectoral bargaining council or at the PSCBC it is a traverse occupation"*

[25] Clause 4.16 also provides that; *"All negotiation processes must be finalised 2 months prior to the implementation date referred to in paragraph 4.14 above. In the event that negotiations process is not concluded, the matter will be returned to the PSCBC for finalization within 7 days of the expiry of the 2 months prior to the date of implementation"*

[26] It is significant to point out that curiously, the Resolution does not make mention of the Safety and Security Sector in its clause 4. Even more curious is the omission in the Resolution to indicate as to whose responsibility it was to "return" the matter to the PSCBC for finalization in the event that the negotiation process is not concluded. Minutes of the SSSBC submitted indicate that on 07 July 2009, the Respondent indicated its unwillingness to engage in further rounds of negotiations regarding the OSD. The matter was treated as not finalised at that stage. On 07 September 2009, the matter was again an agenda item at a meeting of the SSSBC, and from the minutes, it can be gleaned that POPCRU had indicated that it had declared a dispute on the matter, and be that as it may, the matter remained on the agenda. It can only be assumed that the responsibility to return the matter back to the PSCBC would be on the parties themselves, or alternatively the Secretary of that Council. However, for the Applicants on their own to refer this dispute, and

more importantly for POPCRU to declare a dispute on the matter can only infer that there is no resolution in sight.

[27] Notwithstanding the gaps identified above in Resolution 1/2007, it is significant to point out further that firstly, following upon the Minister of the DPSA's advice, steps were taken by the Respondent's management in this regard with an endeavour to implement the OSD. Secondly, on the Respondent's own version, its Minister had acted on the recommendations it had received and on the advice of the Minister of the DPSA. As to the reason the Minister of the Respondent had initially authorised the implementation of the OSD in SAPS and then recanted on his decision is an issue that goes to the merits of the dispute, and it is my view that principles of justice and fairness dictate that the Applicants be afforded an opportunity to enquire and to understand the rationale behind the Minister's decision to review the initial decision to implement the OSD in SAPS.

[28] Since the overriding principles of Resolution 1/2007 and its scope covers the state as the employer and all its employees who fall within the registered scope of the Council, the Applicants are within their rights to refer the dispute as contemplated in clause 19 of that Resolution. The fact that the matter remains on the SSSBC agenda (Two and a half years since Resolution 1/2007 was adopted) does not in my view, imply that the PSCBC does not have jurisdiction to deal with it. Until such time that the matter is finalised at SSSBC level, the PSCBC, from which the Resolution emanates, remains its guardian and custodian. Furthermore, in the light of the clause 4.16 of Resolution 1 of 2007, the points in limine would have been more sustainable had the argument been that the matter is before the PSCBC for consideration of a Resolution to break the impasse in the SSSBC. In the light of these factors, I do not find any merit in the Respondent's second point in limine. It is therefore deemed fair and reasonable to make the following ruling;

**Ruling:**

- I. The points in limine raised by the Respondent are all dismissed.
- II. The PSCBC has the requisite jurisdiction to determine the dispute referred by the Applicants
- III. This matter should be set-down for arbitration for determination on the merits.
- IV. There is no order as to costs.

Dated and signed at Johannesburg on this the 20<sup>th</sup> day of April 2010



**E. Tihotlhalemaje**

Panellist: