ARBITRATION AWARD

Panellist/s: Nkosinathi Mkhize
Case No.: PSCB129-18/19
Date of Award: 13 February 2019

In the ARBITRATION between:

PSA obo NC Musandiwa & 2 Others

(Union / Applicant)

and

Department of Water and Sanitation – Limpopo and DPSA

(Respondents)

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DETAILS OF HEARING AND REPRESENTATION

1. This is the award in the matter between PSA obo NC Musandiwa & 2 Others ("the applicant") and the Department of Water and Sanitation - Limpopo ("1st Respondent") and DPSA (2nd Respondent").
2. The arbitration was held at the offices of the Respondent in Limpopo on10 December 2018.
3. The applicants were present and represented by Ms. Patricia Matlhadisa, trade union official.
4. The 1st respondent attended the proceedings and was represented by Mr. Vusani Mudau, its employee. The written submissions were however made by Ms. PK Moothelal, its employee.
5. The 2nd respondent ("DPSA") was present and represented by Mr. Braam Van Der Walt.
6. The proceedings were manually recorded. The parties submitted that they intended submitting written arguments and treat the matter as stated case. The parties agreed on a set of common facts (stated case) and placed on record that only the interpretation of the law was in dispute.

BACKGROUND AND COMMON CAUSE FACTS

7. The parties agreed that the dispute was about the interpretation or application of Resolution 3 of 2009, particularly the interpretation or application of clauses 3.6.2.2. The parties agreed that it was not in dispute that the applicants had performed satisfactory and that they had attained the necessary 15 years of required experience.
8. It was also common cause that the applicants were occupying their posts as follows:
   (8.1) Musandiwa Carlson was at salary level 6 as Senior Admin Clerk effective from 01/07/1999.
   (8.2) Rejoice Siphalale was at salary level 6 as Senior Admin Clerk effective from 01/07/1999.
   (8.3) Eric Maphaha was at salary level 6 as Chief Auxiliary Services Officer effective from 01/07/1999.
9. Where parties shall rely on case law (Court decisions), they shall submit a full citation or the actual judgment.
10. If the parties will rely on awards, they shall submit those awards in full.
11. The applicants shall rely on Bundle A, as submitted.
12. The respondents shall submit appendices, together with their submissions.
13. The parties agreed to submit their written arguments as follows:
    - Founding affidavit – 21 December 2018
    - Opposing notice and reply – 11 January 2019
    - Answering affidavit – 15 January 2019.

ISSUE TO BE DECIDED

14. I had to decide whether the applicants, based on the salary level 06 they attained on the 01 / 07/ 1999, qualify for grade progression to salary level 07 in terms of PSCBC Resolution 3 of 2009 ("the Resolution").

SURVEY OF EVIDENCE AND ARGUMENT

APPLICANTS' SUBMISSION – Ms. P Matlhadisa

15. Ms. Matlhadisa submitted that the applicants were promoted from salary level 5 to salary level 6 in 1999 and even today they were still occupying those levels.
16. The applicants lodged respective grievances and it remained unresolved, hence the matter needed to be resolved by the Council.
17. That Clause 3.6.2.2 of Resolution 3 of 2009 stated that: *"With effect from 1 April 2010 (salary adjusted with effect from 01 July annually) an employee on salary level 5, 6, or 7 who has completed 15 years of continuous service on a salary level, irrespective of the notch and has obtained at least satisfactory rating in his or her performance assessments (the average assessment over the last 2 year period will determine the performance rating) shall grade (salary level) progress to salary level 5, 6, 7 or 8 respectively. This is not subject to the availability of posts."*
18. The applicants complied with the above-mentioned Resolution as they have more than 15 years on salary level 6 with at least satisfactory performance for the last 2 years as per the above Resolution which made them to be eligible to grade progress to salary level 7 since 2014/2015 financial year.
19. The respondent was inconsistent in the interpretation and application of the collective agreement because other employees of the same rank and level were grade progressed to salary level 7.
20. The applicant Maphaha N.E who is a Chief Auxiliary service office was left out when Mmbara M.A who was promoted to salary level 6 in 1999 and grade progress to salary level 7 in 2013 but they were of the same rank. Again, Raudzingana N.E was also promoted to salary level 6 like Maphaha in 1999 but was grade progressed to salary level 7 in 2014 just to mention a few.
21. That Musandiwa and Siphalale who are senior administration clerks were also left out when Matshiki who was promoted to salary level 6 like Maphaha in 1999 but was grade progressed to salary level 7 in 2013. Moreover, Baloyi R.D was also promoted to salary level 6 in 1997 and was grade progressed to salary 7 in 2013.
22. The applicants further submitted that they wanted the commissioner to determine whether the 1st respondent acted inconsistently when it grade progressed other similar posts to salary level 7 and left out those of the applicants.

23. The applicants prayed for the commissioner to order the 1st respondent to grade progress them from salary level 6 to salary level 7 as per clause 3.6.2.2 of the PSCB Resolution 3 of 2009 with effect from the date they completed 15 years on salary level 6.

1st RESPONDENT'S SUBMISSION – Ms. P Moothelal

24. Ms. Moothelal submitted that the applicants were employed by the respondent as Administrative clerks and Chief Auxiliary Service Officer at salary level 6.
25. The dispute was mainly based on clause 3.6.2.2 of Resolution 3 of 2009. It provided that *"That with effect from 1 April 2010 (salary adjusted with effect from 01 July annually) an employee on salary level 5, 6, or 7 who has completed 15 years of continuous service on a salary level, irrespective of the notch and has obtained at least satisfactory rating in his or her performance assessments (the average assessment over the last 2 year period will determine the performance rating) shall grade (salary level) progress to salary level 5, 6, 7 or 8 respectively. This is not subject to the availability of posts."*
26. The applicants were employed at their Thohoyandou District Office. The case of Maphaha who is a Chief Auxiliary Service Officer should be treated differently from the case of the other two (2) applicants as they were affected by the Job Evaluation outcome for clerks. In light of that, it was the 1st respondent's submission that Mr. Maphaha's grade progression to salary level 7 be approved.
27. That the PSCBC Resolution 3 of 2009 at clause 3.5 provided that the grade progression model was based on the following principles:
    3.5.1 Posts are graded based on the outcome of the Job evaluation;
    3.5.2 Recognition of performance; and
    3.5.3 Completed continuous years of service on the salary level irrespective of the notch.
28. That clause 3.6.2.7 provides that when an employee is appointed on post graded on salary level 6, he or she shall only progress to salary level 7.
29. That clause 3.6.2.9 provides that: *"No employee who was appointed on salary level 4, 5 and 6 can grade progress to salary level 6, 7 and 8 respectively i.e. over two salary levels. These employees must apply for the vacant funded posts graded on those salary levels".*
30. That clause 3.6.2.10 expressly states that: *"This provision does not do away with the Job Evaluation system in the public service."*
31. The DPSA issued circular no. 2 of 2009 regarding the implementation of salary / grade progression model for employees on salary level 1 to 12 (non OSD employees). Clause 7.6.1 provides that posts are graded on the outcome of Job Evaluation, unless otherwise in the determination. The grade determined with Job Evaluation therefore forms the basis from which employees can receive grade progression.

32. The positions (Administration Clerks) occupied by the applicants were graded on salary level 5 on 12 December 2012 (**DPSA Benchmark Circular).** Although applicants' post is graded on salary level 5, they progressed to salary level 6.
33. Clause 7.9.5 of the DPSA circular 2 of 2009 provides that no employee who was originally appointed in a post graded on salary level 4, 5 and 6 respectively can grade progress to salary level 6, 7 and 8 respectively. That therefore meant that an official could not grade progress over two salary grades whilst occupying the same graded post.
34. Clause 7.16.4 (b) states that employees in posts graded on salary levels 4, 5, 6, 7, 9 and 11 respectively, but who have been remunerated on the next higher salary level (above the next salary level attached to their posts) on a personal position, therefore qualify for pay progression on the mentioned salary level on 1 July 2010.
35. That in terms of DPSA circular 2 of 2016, clause 3b, the applicant is eligible to grade progress to salary level 7. Salary level 6 is the appropriate level in terms of grade progression model for incumbents of posts graded on salary level 5 to grade progress to 6 and not salary level 7. Therefore the applicants should remain on salary level 6.
36. Clauses 3.6.2.5 to 3.6.2.8 of Resolution 3 of 2009 are more specific. In respect of employees whose posts were graded on salary level 5 in terms of Job Evaluation, clause 3.6.2.6 stipulates that *"when an employee is appointed on a post graded at salary level 5, he/she shall only grade progress to salary level 6".*
37. The applicants have raised the issue of "consistency", referring to 4 other employees who progressed to salary level 7 viz, Matshikiri AH, a Senior Accounting Clerk; Baloyi R, a Senior Admin Clerk and Raudzingana NE and Mmabara both Chief Auxiliary Officers. It was the 1st respondent's submission that the Auxiliary Officers positions were correctly on 7 and Maphaha must also benefit.
38. With regards to the Clerks on salary 7 as mentioned above, the progression was erroneously implemented and the Respondent was in the process of rectifying the error. It was for that reason that no other clerks progressed to salary level 7. The respondent has consistently defended its position (see Takalo & DWS – PSCB432-17/2017).
39. It was therefore their submission that the respondent was consistent in its position on grade progression of clerks to salary level 7 and was in the process of rectifying its errors in implementation.
40. The 1st respondent was therefore submitting that the applicants do not qualify to grade progress to salary level 7 based on clause 3.5 of PSCBC Resolution read with clause 7.6 of DPSA circular 2 of 2009 as their posts have been evaluated and graded to salary level 5.

2nd RESPONDENT'S SUBMISSION – Mr. Braam VD Walt

41. Mr. Van Der Walt submitted that NC Musandiwa (applicant 1), NR Siphalale (Applicant 2) and NE Maphaha (Applicant 3) [applicants] were employed by the Department of Water and Sanitation in their respective posts and "leg" progressed in terms of the then rank/leg promotion system applicable to their respective occupations to salary level 6, on which salary level they are being remunerated.
42. All the applicants progressed in terms of the dispensation that prevailed at that time to salary level 6 with effect from 1 July 1999.
43. The applicants referred their dispute as *"the interpretation or application of collective agreement PSCBC Resolution 3 of 2009",* requesting that the 1st Respondent must grade progress them to salary level 7 in terms of clause 3.6.2.2.
44. Whilst the grades (salary levels) of the Senior Administration Clerks were certain, the same could not be said about the grade level of the Chief Auxiliary Service Officer.
45. About the abolished Rank and Leg Promotion dispensation, the 2nd respondent was submitting that prior to 1 July 2001; the State applied a salary progression dispensation that was referred to as *"Rank and Leg Promotion Dispensation".* In terms of that Dispensation, various salary ranks / legs (salary levels) were attached to a post class (work level) in the (now abolished) Personnel Administration Standard (PAS) for each occupation, as part of a defined career (salary) path.
46. If an employee was appointed / promoted to such a post, he or she could have advanced (progressed) to the higher ranks / legs (scales) attached to the post whilst occupying the same post until he or she eventually reached the last (highest) scale (so called rank/leg) attached to the post, provided he or she met the prescribed performance criteria and periods of service.
47. In respect of the administration clerk, which covered the applicant, the PAS for the occupation provided for a production and supervisory post class (work level) respectively. The following ranks with salary levels, were attached to the production post class for career pathing purposes:

- Administration Clerk Grade 1 – Salary level 2 **CAN GRADE PROGRESS TO**
- Administration Clerk Grade 2 – Salary level 3 **CAN GRADE PROGRESS TO**
- Senior Administration Clerk Grade 1 – Salary level 4 **CAN GRADE PROGRESS TO**
- Senior Administration Clerk Grade 2 – Salary level 5 **CAN GRADE PROGRESS TO**
- Senior Administration Clerk Grade 3 – Salary level 6

48. The use of the prefix 'senior' in some of the levels above does not denote that the person was occupying a position at supervisory level. All these posts clustered together, constituted the production posts class of Administration Clerk.
49. In respect of the occupation Speciliased Auxiliary Services Officer, which covered applicant 3, the PAS for the occupation provided for a production and supervisory post class (work level) respectively. The

following ranks (designations), with salary levels, were attached to the production class for career pathing purposes:

- Specialized Auxiliary Services Officer– Salary level 3 **CAN GRADE PROGRESS TO**
- Senior Specialized Auxiliary Services Officer– Salary level 4 **CAN GRADE PROGRESS TO**
- Principal Specialized Auxiliary Services Officer– Salary level 5 **CAN GRADE PROGRESS TO**
- Chief Specialized Auxiliary Services Officer– Salary level 6

50. The *Rank and Leg Promotion Dispensation* for both these occupations was abolished with effect from 1 July 2001 in terms of a PSCBC collective agreement. That meant that eligible employees could have received their rank and leg promotions attached to their posts, as provided for in their respective repealed PASes, until 30 June 2001.
51. The applicants occupied a production posts in the occupations Administration Clerk and Specialized Auxiliary Services Officer, and progress over time through the ranks (salary levels) attached to her post until applicants 1 and 2 have reached the rank of Senior Administration Clerk Grade 2 (salary level 6) and applicant 3 the rank of Chief Specialized Auxiliary Services Officer (Salary Level 6).
52. On Job Evaluation, Section 41 of the Public Service Act, 1994 provided that the Minister for the Public Service and Administration (MPSA) may make regulations regarding various HR practices in the Public Service.
53. Regulations 41 and 43 of the Public Service Regulations (PSR) 2016, stipulated that:

❖ **Sub-regulation 41(1) provided that the MPSA shall determine –**

- A job evaluation and job grading system or systems that shall be utilized in the Public Service to ensure work of equal value is remunerated equally; and
- A range of job weights derived from the systems or systems for each salary level in a salary scale.

❖ **Sub-regulation 41(3) provided that:**

- An Executive Authority may evaluate or re-evaluate any job in his or her Department, except –

✓ Jobs evaluated and graded by the MPSA (e.g. through a coordination process); or

✓ Jobs determined in terms of an Occupational Specific Dispensation (OSD).

❖ **Sub-regulation 43(2) provided that:**

- An Executive Authority shall determine the grade of a post to correspond with –

✓ Jobs evaluated and graded by the MPSA referred to in the coordination process.

✓ Jobs determined in terms of Occupation Specific Dispensations referred to above.

✓ If a job is not covered by the outcome of the above, the evaluation of the job by the Executive Authority.

54. Similar regulations were contained in the repealed 2001 PSR.

55. With the introduction of the prescribed grading of posts through the application of job evaluation in 199, production Administration Clerks in the Public Service who performed the same job (including the Respondent), were scattered across salary levels 2 to 6 due to the effect of the abolished *rank / leg promotion dispensation*. With the decentralizing of the grading of posts to Executive Authorities, it was incumbent on Executive Authorities to appropriately grade the production posts of Administration Clerks to determine an appropriate an appropriate (single) job score (salary level) for these posts in their departments.

56. Due to the non-grading of posts in the occupation Administrative Clerk in certain departments, and inconsistencies in grading in grading of similar of Administration Clerk in other departments, it was necessary for the Minister for the Public Service and Administration (MPSA) to intervene to address these discrepancies through a benchmark job grade for production Clerks (Applicants 1 and 2).

57. The MPSA determined job descriptions and grading levels for the production and supervisory post levels in the following occupations:

- Finance Clerk
- **General Administration Clerk**
- Human Resources (HR) Clerk
- Registry Clerk
- Supply Chain Management (SCM) Clerk

58. The MPSA recommended that departments must grade their production and supervisory posts in these occupations on salary levels 5 and 7 respectively. The purpose of the benchmark was to ensure uniformity in the grading of production and supervisory clerks in all departments in the Public Service due to inconsistencies in the grading of posts, and in some instances non-grading of posts, by departments therefore to level the playing field between departments regarding the grading (remuneration) of clerks.

59. The benchmark job description and grading level for production and supervisory posts in these occupations were communicated to departments in DPSA letter 16/6/2/1 dated 12 December 2012.

60. The 1st respondent confirmed that the posts of Administration Clerks in the Department of Water and Sanitation (Including the posts of Applicants 1 and 2) were duly graded on salary level 5 based on the mentioned benchmark job description and grading, while continuing to remunerate those incumbents who [had] already progressed to salary level 6 (including the applicants), on salary level 6.

61. At the arbitration hearing, and in the applicants' written arguments, applicant 3 could not indicate or confirm that his post was indeed properly graded by the employer in terms of the prescribed job evaluation system, and if it was, the result thereof (salary level attached to his post). The 1st respondent could also not shed light on the matter. In fact, applicant 3 alleged that he was indeed performing clerical duties, and therefore should be treated as such. The 1st respondent was requested to investigate the matter.

62. Therefore, for purposes of the 2nd respondent's argument in this case, it was regarded that the applicant 3's post was ungraded (not job evaluated).

63. The "Resolution" which provides for the grade progression model for non-OSD personnel with effect from 1 April 2010, is in terms of section 5(6) (a) of the Public Service Act, 1994, deemed as a determination made by the MPSA.

64. Clause 3.5 of the Resolution stipulates that the grade progression model is based on (underpinned by) the following principle:

- Posts are graded based on the outcome of Job Evaluation
- Recognition of performance
- Completed continuous years of service on a salary level irrespective of the notch.

65. Clause 3.6.2.2 of the Resolution provides that: *"With effect from 1 April 2010, an employee on salary levels 4, 5, 6 and 7 who has completed 15 years of continuous service on a salary level, shall grade progress to salary level 5, 6, 7 and 8 respectively."*

66. Clause 3.6.2.6 of the Resolution provides that: *"When an employee is appointed on a post graded on salary level 5, he /she shall only progress to salary level 6"*

67. *Clause 3.6.2.9 of the Resolution provides that: "No employee who was appointed on salary level 4, 5 and 6 can grade progress to salary level 6, 7 and 8 respectively i.e. over two salary levels. These employees must apply for the vacant funded posts graded on those salary levels".*

68. The Director- General of the DPSA issued Circular 2 of 2009 on 11 September 2009, in which he conveyed the directive which the MPSA has made in terms of section 5(6)(b) of the 'Public Service Act' to elucidate the determination / resolution.

69. It was emphasized in paragraph 7.6 of the Circular that posts were graded based on the outcome of job evaluation therefore forms the basis from which employees could receive grade progression.

70. It was also emphasized in paragraphs 7.9.1 and 7.11 of the Circular that employees who occupied posts on salary level 4, 5, 6 and 7 respectively, and who had completed 15 years of continuous service on the particular salary level on which the post was graded…shall progress to salary levels 5, 6, 7 and 8 respectively.

71. It was further emphasized in paragraph 7.9.4 (b) that in practical terms that meant that when an employee was appointed in a post graded on salary level 5, he/she may only progress to salary level 6 while he/she was occupying a post graded on salary level 5. That meant that if the employee was already being remunerated on salary level 6, there was no further 'room" to grade progress; he / she would remain on salary level 6.

72. The Director General of the DPSA further issued Circular 2 of 2016 on 15 February 2016 in which he sought to clarify the implementation of grade progression for employees on salary levels 1 to 12 in terms of the "Resolution" and the MPSA's directive (DPSA Circular 2 of 2009). The DG-DPSA indicated on

paragraph 2 that it had come to the attention of the DPSA that some departments were implementing grade progression irregularly without taking into account the grading level of the post as determined through job evaluation. They therefore grade progressed the employees to higher salary levels for which they were not eligible in terms of the grade progression model as envisaged in the Resolution.

73. Therefore a collective agreement must be interpreted in context and in totality. However, the Applicant interprets the "Resolution" selectively and out of context by relying solely on clause 3.6.2.2 for their relief; hence, discarding the contents of the entire "Resolution", as well as the MPSA's Directive (DPSA Circular 2 of 2009) and DPSA Circular 2 of 2016.

74. The applicant's selective interpretation (reading) of the Resolution and the DPSA Circulars out of context was therefore incorrect. It was not the intention of the parties to the Resolution that the employees should receive "open ended" grade progression each time that they complete a period of 12/15 years' service on the salary level on which they are remunerated, irrespective of the reason how an employee has ended up on a specific salary level, and without taking into account the official grading (salary level) of the posts.

75. The issue of the official grading of posts was very emotional – especially for employees who have reached certain salary levels in terms of the repealed *Rank and Leg promotion dispensation*. It should be noted that the salary level which an Administration Clerk has reached in terms of the repealed dispensation and in the case of the applicant the salary level 6 may not be regarded as the official grade of the post.

76. The applicant's argument that the criteria to grade progress was not linked to the grade of her post (salary level 5) but solely based on her profile (number of years' service and satisfactory performance during the last 2 years of the qualifying period on salary level 6) was not correct.

77. In the **National Commissioner for the South African Police Services v Mokoena and Others (2013) (18 July 2013) JR1583/2011),** the Applicant argued the following in its review application, which was upheld by the Labour Court that:

[18] Further reasons why the applicant said that the arbitration award should be reviewed and set aside relate to the Arbitrator's reasoning as to why Resolution 1/2007 was applicable and include the contentions that:

18.1. A clause in a collective agreement that an arbitrator is called upon to interpret has to be interpreted in the context of the collective agreement as a whole, whether or not the ordinary principles for interpreting contracts under the common law are applied. It would thus be inappropriate to interpret a clause in a collective agreement in isolation without proper regard to the other relevant provisions of the collective agreement, which, together with the Act, provide a proper context in which the clause is to be interpreted.

18.2. An interpretation that ignores the context provided by the rest of the document under consideration is not permissible in respect both of ordinary agreements under the common law, and in respect of statutes.

18.3. There is no scope for what the individual respondents described as an "*adventurous*" approach to the

interpretation of collective agreements. Such an approach, imprecise as it is, would lead to the Court, as did the Arbitrator impermissibly, making a new agreement for the parties. Such is not the role of a Court or an arbitrator under the LRA.

18.4. What is required is a practical approach, constrained by the ordinary rules of interpreting a document, which do not ignore context and give effect to the ordinary meaning of words used.

78. Therefore, a collective agreement must be interpreted in context and in totality; the selective use of only certain clauses is not permissible. The applicants interpret the "Resolution" selectively and out of context by relying solely on clause 3.6.2.2 for their relief; hence discarding the contents of the entire "Resolution", as well as the MPSA's Directive (DPSA Circular 2 of 2009) and DPSA Circular 2 of 2016.

79. This is confirmed in the judgment in the Labour Court in **Tabane v Vlieger - Seynhaeve N.O. and Others (C27/15) [2017] ZALCCT 43 (28 September 2017).** The Court had this to say:

[1] *The Applicant seeks to have the award reviewed on the basis that the Commissioner incorrectly concluded that the grade determined which job evaluation formed the basis from which employees could receive grade progression. He contended that this conclusion was not based on the provisions of the Resolution. The Applicant further contended that the Commissioner's conclusion that clause 4.1.3 of Circular 29 of 2011 was not applicable to advanced progression as it would cause confusion and unfairness, was incorrect, as this was tantamount to making a contract for the parties other than the one they envisaged or in fact made.*

[2] *The objectives of Resolution include giving effect to clause 5 of Resolution 1 of 2007 by introducing a revised salary structure for all occupational categories graded on salary levels 1-12 not covered by any Occupation Specific Dispensation (OSD), and to introduce a career pathing model and grade progression for identified salary levels[1]. In this regard, it is not in dispute that the Applicant is within the salary levels in question, and is also not covered by the OSD.*

[3] *The essential elements of the Resolution to the extent that they are relevant for the determination of this application are to provide for a grade progression model, to be based on, inter alia, the principle of completed continuous years of services on a salary irrespective of the notches, and for employees who have performed above satisfactory over a period of 12 years.*

[4] *With a view of ensuring the proper implementation of the provisions of the Resolution, the Director-General and Deputy Director-General (Corporate Services) of the DPSA had issued circular 2 of 2009 and circular 29 of 2011. The intervention of the Minister of the DPSA in the implementation of collective*

agreements concluded in the public service, is permissible within the context of section 5 of the Public Service Act (PSA)[2]. These provisions permit the Minister to issue directives to elucidate or supplement collective agreements, with the proviso that that any act performed by the Minister under the PSA may not be contrary to the provisions of any collective agreement concluded at a bargaining council for the public service as a whole or for a particular sector in the public service.

[5] *A proper interpretation of clause 3.6.2.12 of the Resolution needs to take into account other provisions of the Resolution, more specifically the other parts of clause 3 which provide;*

"3. PARTIES TO THE COUNCIL AGREE

Revised salary structure

3.3 Progression to a higher notch within the scale attached to a salary level will be based on performance in terms of existing department performance management and development systems.

Grade Progression Model

3.5 The grade progression model is based on the following principles:

3.5.1 Posts are graded based on the outcome of Job Evaluation;

3.5.2 Recognition of performance; and

3.5.3 Completed continuous years of service on a salary level irrespective of the notch.

[6] *In line with the above, I agree with the submissions made on behalf of the Department that clause 3.5 of the Resolution should be read conjunctively with clause 3.6, which set out the salary structure of the model. Accordingly, the fact that an employee has served 12 cumulative years in a grade is not a basis for an automatic grade progression, as any grade progression is based on a variety of factors, including job evaluation, recognition of performance and obviously the cumulative 12 years.*

80. As confirmed in the above mentioned Labour Court Judgment, it was definitely not the intention of the parties to the PSCBC to introduce a Model based on the profile of the employee only that would perpetuate current disparities (disjuncture) caused by previous service dispensations between, on the one hand, the salary levels on which employees are remunerated and, on the other hand, the official grade (salary level)

of the post. Allowing employees the opportunity to grade progress "open-ended", without being based (anchored) on the grade of the post, will perpetuate this situation.

81. Because the Labour Court has confirmed that clause 3.6 must be interpreted together with clause 3.5, it is clear that DPSA Circular 2 of 2009, in which the importance of the grading of an employee's post is determined whether he or she is eligible for grade progression, as was confirmed in DPSA Circular 2 of 2016, is not contrary to the "Resolution".

82. Therefore when the official grading of the posts of applicants 1 and 2 are read with:

- The principles that underpin the grade progression model in the Resolution
- Clause 3.6.2.1, 3.6.2.6, 3.6.2.9 and 3.6.2.12 of the Resolution
- The Incentive Policy Framework
- The MPSA Directive as conveyed in DPSA Circular 2 of 2009, and
- The DPSA Circular 2 of 2016.

And based on the other arguments presented in this submissions, it was evident that the Applicants 1 and 2, whose posts were graded on salary level 5 based on the MPSA benchmark job description and grading, do not meet all the stipulated requirements in the Resolution to grade progress to salary level 7, as prayed for.

83. Neither applicant 3 or respondent 1, could confirm the official the official grading of the post of applicant 3, which was an instrumental criteria to determine whether he was eligible in terms of the Grade Progression Model for progression to salary level 7, or not. That could be established once the 1st respondent has confirmed the official grade of the post, and if it was not evaluated yet, the job evaluation must be conducted to determine its grade (salary) level.

84. The 1st respondent has interpreted and implanted the Resolution correctly by not grade progressing:

- Applicants 1 and 2 who occupy posts graded on salary level 5 to salary level 7.
- Applicant 3 to salary level 7 due to absence of written confirmation by the 1st respondent regarding the grade (official salary level) attached to his post by means of the prescribed job evaluation system

85. The 2nd respondent prayed for the application of the applicants to be dismissed.

ANALYSIS OF EVIDENCE AND ARGUMENTS

86. It was submitted on behalf of the applicants that they had more than 15 years' service in the same salary level and performed satisfactory and were remunerated at salary level 6 and qualified for grade progression to salary level 7. That assertion was based on the provisions of clauses 3.6.2.2 of the Resolution. It appeared that the applicants were saying that that clause should be read independently

from clause 3.5 of the same Resolution, alternatively, that since they were being paid at salary level 6, therefore they qualified to grade progress to salary level 7. I will deal with both probabilities shortly.

87. The applicants also submitted that the 1st respondent had grade progressed their fellow employees who were occupying similar posts, being paid at the same level (level 6) to salary level 7 and therefore wanted to be treated in a same way or be grade progressed for that reason / through parity principle. I will shortly deal with that submission as well.

88. The Resolution provided at clause 3.5. for a Grade Progression Model which provided that:

3.5 The grade progression model is based on the following principles:

3.5.1 Posts are graded based on the outcome of Job Evaluation;

3.5.2 Recognition of performance; and

3.5.3 Completed continuous years of service on a salary level irrespective of the notch.

89. The Court in **Tabane v Vlieger - Seynhaeve N.O. and Others (C27/15) [2017] ZALCCT 43 (28 September 2017)** had this to say about the proper interpretation of the Resolution 3 of 2009:

[22] A proper interpretation of clause 3.6.2.12 of the Resolution needs to take into account other provisions of the Resolution, more specifically the other parts of clause 3 which provide;

"3. PARTIES TO THE COUNCIL AGREE

Revised salary structure

3.3 Progression to a higher notch within the scale attached to a salary level will be based on performance in terms of existing department performance management and development systems.

Grade Progression Model

3.5 The grade progression model is based on the following principles:

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3.5.2 Recognition of performance; and

3.5.3 Completed continuous years of service on a salary level irrespective of the notch.

[23] In line with the above, I agree with the submissions made on behalf of the Department that clause 3.5 of the Resolution should be read conjunctively with clause 3.6, which set out the salary structure of the model. Accordingly, the fact that an employee has served 12 cumulative years in a grade is not a basis for an automatic grade progression, as any grade progression is based on a variety of factors, including job evaluation, recognition of performance and obviously the cumulative 12 years.

90. I am therefore not intending to depart from the position the Court has set out with regards to the interpretation or application of the grade progression question. The parties have agreed that the principles of recognition of performance and completed continuous years of service were common cause, i.e. the applicants had met those principles. It was therefore clear that the dispute was about the grade level and the question of whether the applicants should grade progress based on their current salary levels.

91. The 2nd respondent submitted that the MPSA having noted that there was a tendency of not grading posts by various executive authorities, co-ordinated a job evaluation and benchmarking exercises for various transversal posts in the public service and amongst those posts were those of administration clerks. The outcome of that exercise was such that the administration clerks were divided into two (2) levels, i.e. production and supervisory levels. The production level administration clerk was graded at salary level 5 whilst the supervisory level administration clerk was graded at salary level 7. It was clear then that various executive authorities had to grade progress their respective clerks in terms of the outcome of that exercise. It appears that all the parties (1st and 2nd respondents in particular) were relying on the outcome of that exercise to determine the salary grade levels of some of the applicants (1 and 2). The 2nd respondent submitted that the use of the prefix "senior" did not denote that the applicants were at the supervisory levels but was used for the purpose to classify them based on experience and qualifications. The same principal applied to Auxiliary services officers, the prefixes had nothing to do with the grade level of the post but recognition of experience and qualifications in terms of the PAS system. The PAS system was abolished effective 01 July 2001. The other parties did not submit any versions in response or rebuttal therefore that remained the only version that I had to accept. It was therefore clear that the Administration Clerks (applicants 1 and 2) irrespective of the use of the prefix "Senior" in their posts, were falling within the production level clerk categorization, which was at grade level 5. There was no proof submitted by any party to the effect of the official grade level of the applicant 3's post. In fact, the 2nd respondent recommended that the 1st respondent should job evaluate that post, for certainty purposes.

92. The DPSA issued a directive referenced 16/6/2/1, dated 12 December 2012 (see annexure B – 1st respondent's submission) wherein it was clarified that a co-ordination committee was established to develop benchmark job descriptions and grading levels for clerks. The co-ordination committee clustered job descriptions into five broader categories namely: Human Resource, **Finance,** Supply Chain Management, Registry and **General Administration Clerks** (my emphasis). Through this process two levels were developed, i.e. the production clerk level and supervisory clerk level. Both positions were evaluated and the results were that, the production clerk came out at grade 5 and the supervisory clerk came out at grade 6. The directive at paragraph 5 noted that the coordination process did not detract from the executing authority's power to manage his / her department, define the posts and determine an organizational structure that suited the service delivery requirements of the environment in which that department operated. If jobs were required that differed from the benchmarked job descriptions, they may be created and graded with the job evaluation system. However, clerk jobs appeared transversely in the Public Service in all departments and operated within the same regulatory framework and applied the same processes. There was therefore limited scope to define unique clerk posts that justified different salary grades. Grading similar jobs at different salary grades created labour relations issues. It also had

the effect that the Public Service was in competition with itself for the same employees which resulted in unjustifiable higher expenditure.

93. Paragraph 6 of the same directive indicated that the Minister for Public Service and Administration approved that the co-ordinated and benchmarked job descriptions, job evaluation results and implementation strategy be issued to departments / provinces as formal advice in terms of Chapter 1, Part III.1.4 of the Public Service Regulations (PSR), 2001.

94. The principles applicable to the interpretation of collective agreements are trite as restated in ***Western Cape Department of Health v Van Wyk and Others (2014) 35 ILJ 3078 (LAC)*** at para 22. 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. In addition, it is expected of the arbitrator to 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) The courts and 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.

95. In the **National Commissioner for the South African Police Services v Mokoena and Others (2013) (18 July 2013) JR1583/2011),** the Applicant argued the following in its review application, which was upheld by the Labour Court that:

[18] Further reasons why the applicant said that the arbitration award should be reviewed and set aside relate to the Arbitrator's reasoning as to why Resolution 1/2007 was applicable and include the contentions that:

18.1. A clause in a collective agreement that an arbitrator is called upon to interpret has to be interpreted in the context of the collective agreement as a whole, whether or not the ordinary principles for interpreting contracts under the common law are applied. It would thus be inappropriate to interpret a clause in a collective agreement in isolation without proper regard to the other relevant provisions of the collective agreement, which, together with the Act, provide a proper context in which the clause is to be interpreted.

18.2. An interpretation that ignores the context provided by the rest of the document under consideration is not permissible in respect both of ordinary agreements under the common law, and in respect of statutes.

18.3. There is no scope for what the individual respondents described as an "*adventurous*" approach to the interpretation of collective agreements. Such an approach, imprecise as it is, would lead to the Court, as did the Arbitrator impermissibly, making a new agreement for the parties. Such is not the role of a Court or an arbitrator under the LRA.

18.4. What is required is a practical approach, constrained by the ordinary rules of interpreting a document, which do not ignore context and give effect to the ordinary meaning of words used.

96. The Court in essence was saying that an interpretation that ignores the context provided by the rest of the document under consideration is not permissible in respect of ordinary agreements under the common law, and in respect of statutes.

97. The contextual and proper interpretation or application of the grade progression clause (3.6.2.2) of Resolution 3 of 2009 shall be read conjunctively with clause 3.5 of the Resolution (**Grade Progression Model**).

98. It was common cause that the applicants were on salary level 6 through rank or leg system and not through a system of job evaluation as envisaged by subsection 3.5.1 of the Resolution. The applicants did not submit any proof that the salary level 6 was as a result of any job evaluation system. It was also common cause that the grade level of a production clerk posts were at level 5 through a coordinated job grading exercise by the MPSA.

99. "The system of rank/leg promotions is incompatible with a salary grading system which is based on job evaluation (as implemented with effect from 1 July 1999 in the Public Service). All salary progressions in such a system are normally confined within the boundaries of salary grades" – Source: PUBLIC SERVICE COMMISSION: REPORT ON CAREER MANAGEMENT IN THE PUBLIC SERVICE [page 35].

100. I therefore found on balance of probabilities that since the applicants 1 and 2's posts could not have been at salary level 6 through a job evaluation system and that the implementation measures had noted that some clerks were at salary level 6 through the rank or leg system and that the rank of a senior clerk (salary level 6) was a grade progression rank, that therefore the applicants do not qualify for further grade progression based on the principles as set out under clause 3.5 of the Resolution. For an employee to

grade progress in terms of clause 3.5 of the Resolution, the employee must meet all the three grade progression model criteria / principles and in the present case, there was no evidence that the applicants met sub criteria / principle 3.5.1. The implementation measures further noted that in terms of the Resolution, salary level 6 was a grade progression level for a production clerk grade. The applicants were already being remunerated at that level.

101. The 1st respondent casually submitted that: *"The applicants were employed at their Thohoyandou District Office. The case of Maphaha who is a Chief Auxiliary Service Officer should be treated differently from the case of the other two (2) applicants as they were affected by the Job Evaluation outcome for clerks. In light of that, it was the 1st respondent's submission that Mr. Maphaha's grade progression to salary level 7 be approved".* The 2nd respondent submitted that: *"At the arbitration hearing, and in the applicants' written arguments, applicant 3 could not indicate or confirm that his post was indeed properly graded by the employer in terms of the prescribed job evaluation system, and if it was, the result thereof (salary level attached to his post). The 1st respondent could also not shed light on the matter. In fact, applicant 3 alleged that he was indeed performing clerical duties, and therefore should be treated as such. The 1st respondent was requested to investigate the matter. Therefore, for purposes of the 2nd respondent's argument in this case, it was regarded that the applicant 3's post was ungraded (not job evaluated)".* The applicant party did not make any submission on behalf of the applicant 3 – Eric Maphaha) that his job grade level was level 5 or otherwise. It was clear as to why the 1st respondent had submitted that Mr. Maphaha's case should be treated differently whilst his claim was based on the same principle of the application of clause 36.2.2 or the parity principle. I see no reason why the principles as set out in clause 3.5 of the Resolution should not apply in the case of Mr. Maphaha. I must however comment that the commissioner cannot stop the 1st respondent from treated Mr. Maphaha differently; it's just that the 1st respondent's prayer to have him treated differently by the commissioner (in the absence of probable reasons) could not be granted. On the basis of the application of clause 3.6.2.2 read with clause 3.5 of the Resolution, applicant 3 (Mr. Eric Maphaha) does not meet the requirements from salary level 6 to salary level 7.

102. I now have to turn to the question of whether the 1st respondent had inconsistently applied Resolution 3 of 2009 amongst its employees. I must state upfront that this question was not within the scope of interpretation or application of the Resolutions under the jurisdiction of the PSCBC and neither was it part of the agreed stated case before the commissioner. I therefore have no intentions of dealing with the legal principles that underpin the parity or consistency principle. The applicants stated that some employees occupying similar posts (salary level 6) were being paid at salary level 7 through grade progression. The 1st respondent submitted that the payment of those employees at that level was erroneous and they were working on correcting that. The posts in question were those of Senior Administration Clerks, Chief Auxiliary Services Officer and Senior Accounting Clerk. I have already dealt with the grade progression principles within the production level posts and have no intentions of overburdening this award

unnecessarily. It was therefore clear that the grade progression to salary level 7 of the applicants on that ground would not be in terms of the principles as set out on clauses 3.5 and 3.6.2.2 of the Resolution.

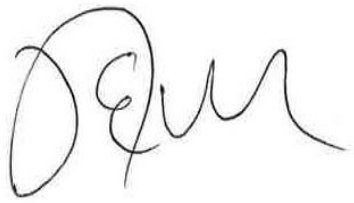
103. On balance of probabilities, I therefore find that the applicants do not qualify for grade progression to salary level 7 on the basis of clause 3.5 and 3.6.2.2 of the Resolution and as a consequence, the 1st respondent had correctly interpreted or applied Resolution 3 of 2009.

AWARD

104. In light of the analysis of the aforesaid submissions, I therefore make the following award:

a. The 1st respondent correctly interpreted or applied Resolution 3 of 2009; hence the applicants did not qualify for grade progression to salary level 7.

b. The applicants' application is dismissed.



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Nkosinathi Mkhize

Panellist/s