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ARBITRATION AWARD

Panellist/s: ***Shiraz Mahomed Osman***
Case No.: ***GPBC 1123/2021***
Date of Ruling: ***25 December 2023***

In the ARBITRATION between:

PSA obo Ms. M Engelbrecht
(Union / Applicant)

and

National Prosecuting Authority & The Department of Public Service & Administration

(Respondent)

Union/Applicant's representative: ***Mr. H Thomas***
Union/Applicant's address: _____

Telephone: _____
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1st & 2nd Respondent's representative: ***Ms. M do Toit & Ms. N Mzinyane***
Respondent's address: _____

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DETAILS OF HEARING AND REPRESENTATION

1. The present dispute between PSA obo Ms. M Engelbrecht (hereinafter referred to as the applicant) and The National Prosecuting Authority (NPA) (hereinafter referred to as the 1st respondent) & The Department of Public Service & Administration) (DPSA) (hereinafter referred to as the 2nd respondent) was referred to Arbitration, in terms of Section 24 of Act no. 66 of 1995, as amended (the Act). At the Arbitration hearing, which was held on, 8 & 9 June 2022; virtually, initially on Microsoft Teams platform on, 13 December 2022; and on 27 & 28 November 2023, at the premises of 1st respondent, the applicant was represented by Mr. H Thomas, of PSA, registered trade union, and the 1st respondent was represented by Ms. M du Toit, whilst the 2nd respondent, was represented by Ms. N Mzinyane.
2. The parties had concluded their testimonies, and were given the opportunity to submit written closing arguments, by no later than, 5 December 2023, hence being, the last date of the arbitration.

THE ISSUE

3. The issue to be decided by myself, pertains to the Interpretation and Application of Council's Resolution 1 of 2008. In the main, the clause relating to Grade Progression.

BACKGROUND

4. The applicant was employed at the respondent, since, 1 September 2023, as a Regional Court Prosecutor (hereinafter referred to as the RCP). She was appointed on, 1 June 2020, to commence work in Kimberley, as a State Advocate.
5. The 1st respondent is the custodian of the South African Law, and prosecutes on behalf of the South African state, hence the National Prosecuting Authority. The 2nd respondent is in charge of the state's Public Service and Administration, and is the custodian of Collective Agreements entered into by the State, and the unions, acting on behalf, of its members, in the public service.
6. The applicant, as a result of her promotion was not upgraded to a higher salary level.
7. Being dissatisfied that the 1st respondent had not upgraded her in terms of the disputed Resolution 1 of 2008, she lodged a dispute with Council.

8. Having considered that the DPSA had a material interest in the dispute, I ordered for their joinder. A joinder ruling was submitted, and they were subsequently invited to the hearings.

SURVEY OF EVIDENCE AND ARGUMENTS

9. Both parties were afforded the opportunity to present opening statements, call witnesses and submit written closing arguments. The applicant, Ms. Mary Ann Zureka Carmonita Engelbrecht, testified on her own behalf. The 1st respondent called three witnesses, Mr. Moses Thuso Damane (Human Resource Clerk Supervisor) & Mr. Thabiso Vena (Deputy Director Human Resource- National Office) & Mr. Jacobus Frederick Hayward (Director-Human Resource Management) to testify. The 2nd respondent called Ms. Esther Nkosi (Deputy Director-Remuneration Management Unit).
10. A pre arbitration meeting was concluded, on the first occasion that the matter was scheduled to be heard, and an agreed signed minute was entered into record.
11. All parties handed up bundles of documents, and were accepted to be what they purported to be.
12. Herewith, brief reasons for my decision in terms of Section 138 (7). Should any of the evidence or argument presented, not be reflected hereunder, then it does not mean that it was not considered.
13. In any event, I am required to deal with the substantial merits of the dispute.

ANALYSIS OF EVIDENCE AND ARGUMENTS

14. Essentially, the crisp issue is whether the applicant had had to have been in the position of a Regional Court Prosecutor, for four years, before she could advance onto the next notch, which thereafter, would have then earned her a salary, on a higher notch as a State Advocate. And, if she indeed was.
15. The applicant argued that, she had joined the respondent, at its Port Elizabeth offices on, 1 September 2015, and she had qualified after 4 years, in the position as an RCP, and had performed “satisfactorily”. She had according to her, completed her four- year Performance Appraisal (PA). In June 2020, she had moved to Kimberley, to assume the post of State Advocate, at the High Court. The respondent’s argument is that the applicant was not in her position as RCP, for four years, as was required by the criterion of the Resolution, for grade

progression. She contended that she had taken the advice of a Senior HR official, who informed the applicant that she would not be prejudiced if she took up the State Advocate position, a month earlier.

16. The 1st respondent's argument was that the applicant was not in the post for, four years. They argued that the Collective Agreement would come into effect on, 1 July, the following year. The applicant applied. The applicant accepted the position, and was in a new position. Therefore, the applicant could not get both; a higher position and grade progression. The applicant was on a new contract. She had accepted the post a month earlier.
17. The "golden rule" of the interpretation of any agreement is that it must be given their ordinary grammatical meaning. And only, in the event of ambiguity is reference permitted to "context" in the sense of the terms of the contract as a whole, and the background to, and the purpose of the contract.
18. In essence, the applicant testified, on her own behalf that, her contract of employment stipulated that she would grade progress to RCP grade 2, upon completing 4 years in RCP, grade 1. Therefore, having commenced work as an RCP grade 1, she would be entitled to grade progress in 2019. She insisted that at the time of the commencement of her position, there was no stipulation regarding the evaluation of performance. In 2019, when she had contacted the HR department, it was explained to her that grade progression was not an automatic right, and that there were requirements. One of these requirements was to be performance appraised and assessed "satisfactorily". She indeed, had been assessed and appraised "satisfactory" in 2018. She received a performance bonus as a result. She had expected to have been upgraded to grade 2, in September 2019, which had not happened. She approached Mr. Damane, who had informed her that, she had to be performance appraised for 4 years. Her final performance assessment was in, April 2020, which was till the period, 31 March 2020. She was asked to phone him again, and to inform him of the result. After her final assessment in 2020, she did meet the criteria to move from grade 1, to grade 2.
19. The applicant continued to testify, that when she had not got graded from Grade 1 to Grade 2, she communicated with Mr. Damane who had informed her that there might have been a misunderstanding about what he had said. When the applicant had not received her grade progression, in September 2019, she was reminded by Mr. Damane that she still had had to have her grade assessment in by, 31 March 2020. Once done, the applicant phoned Mr. Damane, and reminded him that she had indeed been assessed in 2020, and was assessed satisfactorily. He assured the applicant that she would be grade progressed. In the meantime, she was offered a State Advocate's position in both, Kimberley and Cape Town. The applicant

insisted that Mr. Damane had indicated to her that her grade progression was a mere formality. She had entered the position of State Advocate on approximately R 300 000.00, instead of an approximate R 500 000. And she would have got a salary 4 notches higher, as a Sate Advocate. Indeed, the applicant had suffered and is suffering severe financial prejudice. The applicant had commenced her position as state advocate in Kimberley, on, 1 June 2020. Her colleagues, had grade progressed but the applicant, had not. She was informed by the HR department at Kimberley that she was not listed for grade progression. She contacted Mr. Damane who agreed that she would have qualified from, 1 July 2020, for grade progression, had the applicant still held the position of Regional Court Prosecutor on, 1 July 2020. Indeed, the applicant was not in the position of RCP in, July 2020. This is precisely what the entire dispute is about. I believe the applicant when she suggested that had she known that she had to be in the post of RCP on 1 July 2020, to receive the grade progression, she would not have moved into the position of State Advocate, prior to, 1 July 2020.

20. At this juncture, I must reiterate that it is not in dispute that the applicant had served 4 years as an RCP, and had performed satisfactorily. The debate is crisply that "whether an employee, must be in the position, on, 1 July of the year preceding the 4 years- service in that position to effect, the grade progression. Mr. Dumane had informed the applicant she had interrupted the grade progression, by one month, therefore the applicant did not qualify.
21. The applicant, subsequently lodged a grievance, and her grievance was not successful. The applicant was furnished with Circular 50 of 2010, issued by the Minister of Public Service & Administration. The Circular at paragraph 8.2 reads "*Progression to the next salary grade (scale) is subject to the candidates meeting all the promotion/appointment requirements for the relevant higher grades".* She insisted that she had occupied the position for four years, and had performed satisfactorily. The Circular regurgitates Resolution 1 of 2008. I need to remind the reader that the purpose of these Circulars issued by the Minister of the DPSA are to give effect to the consistent application, in regard to the execution of Resolutions entered into, and between, the State & Labour. Indeed, there appears nowhere the Resolution or the Circular that an employee must be in the position on, 1 July of the year that grade progression is due, to be implemented. Finally, we are getting somewhere in regard to the testimony which is relevant to the dispute, and is the crisp issue to be decided. The applicant was convinced that she was indeed correct that she had qualified for grade progression.
22. The reason tendered by the 1st respondent is as to why the applicant did not qualify for grade progression was outlined in the response to the applicant's grievance at "*2.2 The reason why you cannot grade progress is that you were appointed in a new post prior to the implementation*

date of 1 July 2020". This is the basis of both respondents' interpretation of the disputed Resolution, though there appears no such provision in the Collective Agreement. The basis of both the respondents' submissions, and evidence is premised on this defence/interpretation. Part C of Circular 50, does not provide for the premise that an employee must be in the position at the time that grade progression is implemented, for that position. The crisp and outlined provisions are, as for the present instance, that an employee must have been in the position for four years and that the employee must have performed satisfactorily. Nothing suggests that the employee must be in the position to implement the grade progression in July of the year following these provisions are adhered to. The reasons tendered by both respondents shall be elucidated through the testimonies of their witnesses. The applicant further referred to the NPA's Incentive Policy, and at page 86 Clause 18 of bundle R1, there is nothing to substantiate that the applicant disqualifies, as a result of the applicant not being in the disputed position on 1 July, of the year that the grade progression needs to be implemented, if all other criteria rea met, which I have outlined earlier on.

23. At cross-examination, the 1st respondent attempted to extrapolate that there was no likelihood of the mention of grade progression, in the applicant's contract of employment. Though the applicant suggested that there was, in her testimony in chief, it not vital to the dispute at hand, whether the grade progression provision was mentioned in the applicant's contract of employment or not. The applicant was not aware that the Collective Agreement would take precedence over her contract of employment. It is my view that the contract of employment would fall within the parameters of a Collective Agreement. It is not likely that the contract of employment would be structured in a way that conflicted with any Collective Agreement. The applicant had clarified the date she had signed the acceptance of the position of State Advocate, and the date she had moved. This is also not relevant to the dispute. It is established from the applicant's testimony that had she known that a qualifying criterion for grade progression, would be that she must be in the position of RCP, then the applicant in all probability would have waited before she took up the position as State Advocate.
24. The applicant named her two colleagues who had qualified for grade progression and commenced employment as State Advocates on notches higher, than the applicant. It was established from the testimonies of the 1st respondent's witnesses that, these two employees had been in their positions of RCPs on 1 July, of the year that these employees were grade progressed. Evidently, these employees were offered positions of state advocates in June 2020, and commenced employment in these positions in, August 2020. So, it is ascertained that they both were RCPs in, July 2020. These employees accepted their positions in July

2020. The 1st respondent's representative tendered these facts as evidence, that the two employees were still in RCP positions in, July 2020. The cross-examination was centred around the fact that, had the applicant had been in the position of RCP in July 2020, she would have grade progressed, as well. Point made and taken. The issue is, whether this is in fact an imperative, as per the Collective Agreement, to qualify for grade progression? No, is the crisp answer. Nowhere in the Collective Agreement does to require same, nor does Circular 50 provide for same. Seemingly, it is a convenient date for the Persal system to execute the grade progression, I gathered from the 2nd respondent's only witness. It was established that the applicant was indeed 4 years in the position, and had been performance assessed over four financial year periods. The applicant commenced employment RCP, on, 1 September 2015 and was assessed till, 31 March 2020. These equate to four full performance cycles. This clarity was achieved at re-examination, with the credit of the applicant's representative. The testimony at re-examination, put to bed the confusion elaborated by both the 1st and 2nd respondents' representatives.

25. It is with regret that both respondents tried so hard to refute that applicant had indeed not been performance appraised for 4 years. The calculation is simple, excluding September 2015; 1 March 2016, till, 31 March 2020, is four completed years of performance appraisal. No wonder both the respondents' witnesses, did not take this fact any further, in an attempt to disprove the applicant. In fact, all the respondents' witnesses' as will be shown, had conceded that the applicant had met the criteria, however their contentions were that, the applicant was not in the position of RCP on, 1 July 2020, when the applicant's grade progression would have been implemented. I was surprised that both respondents had even bothered to venture up this route, in any event.
26. Nothing further emerged from the cross-examination, that is relevant to the issue, which I am called upon to decide.
27. The 1st respondent's witness, Mr. Damane testified that, he had informed the applicant that to grade progress, she had to complete four years as an RCP, and have performed satisfactorily. He insisted that he had informed the applicant that, if she accepted the position of state advocate, before 1 July 2020, she would not qualify, as the "cycle would be broken". There is nothing in the Resolution that suggests that an employee must be in a position on, 1 July, to qualify, or that the "cycle would be broken". The cycle according to Mr. Damane is that an employee must be in the said position, on the date that grade progression is implemented. Indeed, he testified that the OSD came into effect on, 1 July 2007. Grade progression is implemented on, 1 July, of each year. His reasoning for the implementation date of 1 July, was

that it was in line with the effective date of, 1 July 2007. Rather, a simplistic approach, I might add.

28. Since the applicant had commenced employment on, 1 September 2015, and her fours in the position would be completed on, 31 August 2019, and the applicant's grade progression would be implemented, on, 1 July 2020. He confirmed that if an employee left the position earlier, then 1 July of any year, then the grade progression would not be implemented. He was indeed sure of this was the way that OSD grade progression, was implemented.
29. I believe the witness, as this was the way in which he was told that grade progression was implemented. Whether it is indeed correct or not, is the subject of this arbitration award.
30. At cross-examination, Mr. Damane conceded that the applicant had met the criteria for grade progression. The applicant had had completed fours in the same position and had performed satisfactorily. Therefore, on 1 July 2020, the applicant would have qualified on 1 July 2020, for grade progression. It follows therefore, that the applicant's only sin was that she was not in the position RCP, on 1 July 2020. This is hardly acceptable, as there is no provision for the additional requirement, stated or can be even concluded, from the disputed Collective Agreement. It is done, apparently because the persal system would not let an employee grade progress if an employee is not in the position on 1 July. This is an issue of computer programming, and not a result of the interpretation of the Collective Agreement.
31. Mr. Damane gave impetus to my above statement, in that he could not "pin point" where, in either the Collective Agreement, or Circular 50 provided that an employee must be in the position on, 1 July, for the grade progression to be implemented. His suggestion was "we doing it like that". It is indeed, a significant event in an employee's career. He had received many enquiries about grade progression, and unfortunately, all the employees are being advised on something that does not exist in the Collective Agreement/Resolution. He did not remember whether he had advised the applicant that she ought to be in the position on 1 July 2020, to qualify for the grade progression.
32. I accept Mr. Damane's evidence as being honest, though he is misled about the fact that an employee must be in the position on 1 July to qualify for the grade progression. It is not in the Resolution nor is it provided for in the Circular.
33. The 1st respondent's second witness, Mr. Vena testified and in main regurgitated the provisions of Resolution 1 of 2008, had given effect to OSD. Essentially, he confirmed that an employee must be in the position for four years, and must have performed satisfactorily. This is not in dispute, and emerges in the plain reading of the Resolution. Importantly, he conceded that grade progression was implemented in the year following the employee having completed four

years of service in the position and having performed satisfactorily. They had been implementing grade progression on, 1 July, of each year. I have deliberately chosen to leave "accelerated grade progression" from this award, as it is not pertinent to the applicant's situation. Indeed, the NPA incentive policy is the same as the DPSA policy. However, both are equally misconstrued. Neither have in its requirement that an employee must be in the position that the employee is to be grade progressed in. Seemingly, it is a mere formality. There is no reasoning worthy of the assumption that an employee must be in the position on, 1 July, following the year that an employee qualifies for grade progression. Obviously, the witness testified that since the applicant was not in the position of RCP on 1 July 2020, she therefore did not grade progress. Everyone seemingly has this blinkered view.

34. Indeed, he testified that the effective date is 1 July, after meeting the requirements of grade progression. He suggested that, if in the 4year cycle an employee broke the cycle then, the employee would have to start the cycle in the next of other position. I absolutely agree, but I adamantly do not accept that if an employee leaves before 1 July, then the employee would have broken the cycle. The four cycle is the four years that an employee is required to be in the position, and 1 July does not have to be included in the "cycle". He testified that since the applicant had failed to be in the position on 1 July after completing her four years in the position was the result of the applicant not being grade progressed. All the respondents' witnesses, with due respect, regurgitated each other's testimonies, and as such I am not inclined to labour this award with the repetition of testimonies which are the same. Moreover, much of the testimonies were a regurgitation of facts that are not in dispute.
35. At cross-examination, again, the witness testified in regard to the criteria, which I am going to repeat is being four years in the position with satisfactory performance. The cross-examination had not deferred from the other witnesses, and the outcomes were the same. The applicant broke down the financial years of the applicant's satisfactory performance. The witness agreed that the applicant was in the position of RCP for four years. The witness could not show the arbitration where amongst the criterion was that the applicant had to be in the position of RCP in July 2020, though he insisted that she had had to be.
36. In fact, the witness agreed that nowhere in the Resolution had it been mentioned that an employee had to be in the position on, 1 July, to qualify for grade progression. He further conceded that, the NPA Incentive policy also did not stipulate same. He testified that in their training, they were told that an employee had to be in the position on, 1 July, should the employee wished to grade progress in that post. He was not in agreement with the applicant's contention, but did not give a reason as to why not.

37. The 1st respondent's third witness, Mr. Hayward confirmed all the documents relevant to the dispute, whilst there was no need to do so. He further confirmed that if an employee met the requirements of grade progression, then the employee would indeed be grade progressed in July of the year following that the criteria had been met. The Resolution had taken effect on, 1 July 2007. Both, Advocates Phiri and Moyeta had signed their offers of acceptance as state advocates in, July 2020, and resumed the positions on, 1 August 2020. The applicant would only grade progress on, 1 July 2020. She had accepted the position of state advocate on, 1 June 2020. It would not be possible to grade progress the applicant as she had not been in the rank of RCP on, 1 July 2020.
38. At cross-examination, Mr. Hayward confirmed that the applicant had indeed qualified for grade progression as she had been in the position of RCP on, 1 July 2020, and she had performed satisfactorily for, four years. He conceded that nowhere had it been stated that an employee had to be in the position on, 1 July, to implement the grade progression.
39. The above was the long and short of Mr. Hayward's testimony. All the 1st respondent's witnesses confirmed that, neither the Resolution, nor the Circular required an employee to be in the position on, 1 July, in order to implement grade progression. Their testimonies are indeed in accordance with the applicant's contention. The applicant was not aware that she had had to be in the position of RCP on, 1 July 2020, in order to grade progress. I believe that if the applicant had known that, she would have resumed her position as State Advocate, after 1 July 2020. Moreover, there is no requirement for an employee to be in the position of RCP, on 1 July, in order to qualify for the grade progression.
40. Mr. Hayward suggested that the 1st respondent would not be able to effect grade progression if an employee was not in the position on, 1 July, of the year that an employee qualified for grade progression. Clearly, it is not a requirement, but indeed an issue of whether the persal system would allow for grade progression if an employee is not in the position on, 1 July, to effect the grade progression.
41. Ms. Nkosi testified for the 2nd respondent and her testimony had indeed corroborated that of all the 1st respondent's witnesses. The implementation date of grade progression was, 1 July of each year. She nonetheless submitted that it would be "double dipping" if an employee was grade progressed and promoted. Promotion in itself was a grade progression. But this does not explain how Advocates Phiri and Moyeta had grade progressed and were promoted in the same financial year. Indeed, the only difference is that these two employees were in the positions of RCPs on, 1 July 2020. They assumed their positions at state advocate in August 2020, whilst the applicant did on, 1 June 2020. Ms. Nkosi conceded that this information was

not in the Collective Agreement. She insisted that an employee could not grade progress and pay progress in the same performance cycle. But indeed, this was not the case with the applicant, as the applicant's performance cycle had completed on, 31 March 2020. A new performance cycle commences on, 1 April 2020, as per the public service financial year. Ms. Nkosi's theory does not give impetus to the situation of both Advocates Phiri, and Moyeta. They had indeed received their grade progression, backdated to July 2020, and had subsequently promoted to state advocate, and received the commensurate state advocate remuneration.

42. Ms. Nkosi insisted that the applicant did not qualify as she had pay progressed, as a result of her promotion before, 1 July 2020. I see the logic, but it cannot apply, if one has met the criterion. Seemingly, it is a formality to be in the position, on, 1 July, to qualify. This is irrespective if an employee qualifies in terms of the Resolution/ Collective Agreement. Nothing in the Resolution requires the applicant to be in the position. It is a requirement for the computer system, which would be unable to identify an employee, if the employee is not in the position on, 1 July, of the year that the grade progression was to take effect. Ms. Nkosi insisted that the promotion had overridden the grade progression. I am not convinced that this can be so, if an employee had met all the criterion to grade progress. Ms. Nkosi suggests that an employee "forfeits" grade progression if an employee is not in the position on 1 July, of the year that grade progression is to be implemented. However, there is nothing in the Resolution, that gives impetus to Ms. Nkosi's claim.
43. Indeed, public service departments might have from April to July of each year to conclude the performance appraisal process, but this cannot suggest that an employee ought to forfeit grade progression, because the department had not completed its appraisal processes. If it is, then this factor is added onto the Resolution, which makes no provision for same. In the scenario that an employee resigns or retires from the department, then an employee is only pay progressed, or paid for those months after 31 March. This, assertion then gives credibility to the applicant's argument, in that she should in the same vain, be awarded her pay progression, and subsequently, be paid on the grade progressed level, when she assumed her position as state advocate. Just like Advocates Phiri and Moyeta did. Ms. Nkosi added that, whichever came first, the pay progression or grade progression, that is what would be paid first. She added that the persal pay system was configured to recognise the performance cycle. If indeed so, then it does not explain why an employee must be in the position to grade progress on, 1 July. Ms. Nkosi did admit that she did not work directly with the persal system. She conceded that if there was an error of the department, then they would implement that on the system, but insisted that one could not implement if grade progression requirements were not met.

However, I am not persuaded, because the applicant had indeed met the grade progression requirements. It is just that she was not in the position on 1 July 2020, and this not a requirement as per the Resolution/Collective Agreement.

44. Seemingly, the issue is that the persal system did not recognise the applicant, for pay progression, though the applicant had met all the requirements.
45. At cross-examination, it emerged that the applicant was in her position as RCP for 4years and nine months and on three of the four financial periods the applicant had performed satisfactorily, whilst in one financial year, she had performed "above satisfactory". Therefore, it is concluded that the applicant had met all the requirements to grade progress as per the disputed Resolution. The requirement that an employee must be in the position of the date grade progression is implemented, is a requirement that is seemingly imposed by both the 1st and 2nd respondents.
46. I disagree with Ms. Nkosi that the date had been established by the Ministerial Determination. It is evident that Circular 50 issued by the Minister of DPSA, reads like the Resolution, and there is nothing in it, to suggest that an employee must be in the position on, 1 July of the year that the grade progression is to be implemented. Absolutely, nothing. The only date that is reflected is the initial implementation date of, 1 July 2007. Ms. Nkosi also agreed that the applicant had met the criterion for grade progression. Seemingly, the only reason the applicant could not grade progress, is because she was not in the position of RCP on, 1 July 2020. And, in my humble opinion this does not disqualify the applicant from been grade progressed, in view of the fact that she had met all the criteria, as required in the Collective Agreement.

AWARD

47. The respondent had incorrectly, interpreted and applied the provisions of the disputed Collective Agreement, Resolution 1 of 2008.
48. The applicant qualifies for grade progression.
49. The applicant must be pay progressed, from, 1 September 2019, irrespective that she had grade progressed to State Advocate in, June 2020.

Signed at Kimberley on this 25th day of December 2023

GPSSBC PANELLIST

SHIRAZ MAHOMED OSMAN