

ARBITRATION  
RULING ON POINT IN LIMINE

Council Name

Panellist/s: Seretse Masete  
Case No.: GPBC11/2019

Date of Award: 12/06/2019

In the ARBITRATION between:

**PSA obo ANSIE FOURIE AND 8 OTHERS**

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(Union / Applicant)

And

**DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT**

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(Respondent)

**Union/Applicant's representative:** Represented by Joel Ntwampe of PSA

Union/Applicant's address: P.O. Box 40404 Arcadia 0007

Tell no: 012 432 4800

Fax: 012 432 4848

Cell: 0828837242

**Respondent's representative:** Siphwe Maimela

Respondent's address: P/Bag X 81 Pretoria

Telephone: 012 3151136

Cell: 0827851955

## Particulars of proceedings and representation

1. The matter was held on 12 June 2019 at GPSSBC Lyttelton offices in Centurion Gauteng at 9h00.
2. The Applicants, **Ansie Fourie and 8 others (employees)** were represented by Joel Ntwampe of PSA and the respondent, **Department of Justice and Constitutional Development (employer)** was represented by its employee Siphwe Maimela.
3. Parties submitted their arguments in writing.

## Issues to be decided

4. I have to decide whether or not the conduct of the respondent by not upgrading the employees in terms of the OSD to MR6 as per the directive of the DPSA constituted an unfair labour practice pertaining to benefits.
5. I must determine the appropriate relief, if I find that the conduct of the respondent constituted an unfair labour practice.

## Background to the dispute

6. The **employees** are employed by the employer as legal Admin officers at the level of Occupation Specific Dispensation (**OSD**).
7. The employer failed to upgrade them to MR6 as it did with others and they lodged a grievance on 21 June 2017 which was turned down by the employer.
8. They referred a dispute on the interpretation and application of collective agreement but withdrew it on 5 December 2018. They then lodged a dispute of unfair labour practice-benefits in terms of Section 186(5)(a) of the Act on 14 December 2018.
9. It was the employer's case that the employee did not exhaust all the internal processes as required by Resolution 14 of 2002 (**Resolution**).
10. The employees withdrew the dispute of interpretation and application on 5 December 2018 because the Council did not have a jurisdiction and there was no grievance about the new and or current dispute referred to the Council.

11. The employer raised a jurisdictional issue citing that the employee did not exhaust all the internal dispute resolution mechanisms and that if the dispute was about the interpretation and application, the Council did not have any jurisdiction thereof.

### **Point in Limine**

12. The employer representative raised a point in limine that the employee did not exhaust all the internal dispute resolution mechanisms because the 2017 dispute was withdrawn by them and there was no grievance about the current dispute. Both parties agreed to adjourn and submit their arguments in writing on or before the 8<sup>th</sup> of July 2019.

### **The employer's submission.**

13. The employee's dispute about the interpretation and implementation of the OSD arose on 5 December 2018. Conciliation on the matter was referred to on 21 December 2018 and was conciliated on 23 December 2018. The referral form of the application for arbitration was completed on 09 April 2019. No formal grievance was received by the employer on the said dispute. The only grievance received by the employer was concerning the 2017 interpretation and application matter which was withdrawn. That dispute of interpretation and application of the collective agreement on OSD was lodged in 2017 by the employees and was withdrawn on 5 December 2018. That dispute was about the translation of the salary levels of the employees to Legal Admin officers (MR6). The relief sought by the employees was to be upgraded to OSD MR6 which is the same with the current relief sought in the current dispute. The employees withdrew the dispute on interpretation and application and should therefore have lodged a grievance on the current dispute before referring it to the Council.
14. If the current dispute is still about interpretation and application, then the employees should apply for condonation but still the Council does not have a jurisdiction.

### **Submission by the employees**

15. They lodged a grievance on 21 June 2017 and it was received by the employer on 23 June 2017. The current dispute is based on the 2017 grievance because the facts of the current dispute are based on the facts of the 2017 dispute. There was therefore no necessity for them to lodge another grievance and it is not a requirement to attach a grievance on the referral form when

lodging dispute. The current dispute arose on 05 December 2018 after the withdrawal of the 2017 dispute. The only problem was that the employer did not apply the DPSA Circular consistently to all affected officials and it was that unfairness which the employees sought the employer to correct.

16. The employee also cited ***Shibogade v Minister of Safety and Security & others*** (LC) JR3307/09 (11 July 2012) where the court held that a withdrawal of a matter is not necessarily a bar to re-instituting proceedings as the merits of the claim have not yet been adjudicated. The same notion was held in the matter between ***M Ncaphayi v/s CCMA***. The employees further cited ***SABC Ltd v/s CCMA & 2 others*** where the court ruled on the continuation of the dispute.

#### **Analyses and arguments on the point in limine.**

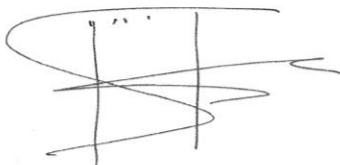
17. I took note that both the employer and the employee touched on the merits of the case and I am not going to deal with that at this point in time. I need to deal with the jurisdictional issue and make a ruling as to whether or not the Council has a jurisdiction to hear the matter. I, as a result did not include anything concerning the merits of the matter as submitted by the parties.
18. The employees submitted that they lodged a grievance about the interpretation and application which graduated into a dispute in 2017. Both parties corroborated that the 2017 dispute was withdrawn in December 2018. The withdrawal was caused by the fact that the GPSSBC did not have jurisdiction to hear a dispute on interpretation and application of the collective agreement. I agree with the employees that withdrawing a matter does not necessarily bar them from re-instituting the proceeding as seen in ***Shibogade and Minister of Safety and security*** as well as in ***M Ncaphayi v/s CCMA***. I further agree with the employees that the dispute continues as long as the employer did not put a stop to it as held in ***SABC Ltd v CCMA & 2 others***. However, what is at stake here, is whether or not all procedures to re-institute the proceedings were followed.
19. What is not clear with the employee's submission is, whether they re-instituted the 2017 dispute or they referred a new matter in terms of Section 186 (2)(a) of the "Act" as stated on the set-down. The quoted case laws in paragraph 18 above refer to re-instituting a matter. This means that the same matter was referred before and withdrawn but reinstated thereafter. The employees in their submission stated that as the 2017 matter was withdrawn in December 2018, there was no need to lodge another grievance. The employees further submitted that the facts of the current dispute are based on the same facts of the 2017 dispute. This, in terms of continuation, implies that the current dispute is the same with the 2017 dispute and the employer did not address it. This therefore will not be a section 186(2)(a) of the "Act". If the current dispute

is not the same with the 2017 dispute, then it is different and or new. If it is different and or new, all procedures of lodging a disputes should have been followed when referring it.

20. If the current dispute is similar and or the same in terms of merits, with the 2017 one, it could not have been referred in 2019 because it would have arisen in 2017. Reading through the submission of the employees, they say, the only problem was that the employer did not apply the DPSA Circular consistently to all the affected officials and that was the unfairness the applicant sought the employer to correct. My take is that this dispute of the employees cannot be resolved without Resolution 1 of 2008 as well as the DPSA Circular which gives a directive on how to implement the OSD. This is because reading both the employees' and the employer's submissions, the dispute is about the OSD. It would therefore be important for the two documents to be read and interpreted correctly in order to see whether or not the employees' salaries qualify to be upgraded. This would therefore mean that the employees' dispute is about interpretation and application which the Council does not have a jurisdiction to hear.
21. My findings are that if the current dispute is not about the interpretation and application as referred to the Council in 2017 and withdrawn in 2018, then it is a new and different dispute. The employee should have complied with all the dispute resolution processes as outlined in Resolution 14 of 2002. If the current dispute is the re-institution of the proceedings as per the case law in paragraph 18 above, which was referred to the Council in 2017 and withdrawn in December 2018, with condonation or not, the Council does not have a jurisdiction to hear the matter because it was about the interpretation and application of the collective agreement.

### **Ruling**

- 22. The employees Ansie Fourie and 8 others's dispute does not fall within the jurisdiction of the Council.**
21. The council does not have a jurisdiction to hear the matter.



Seretse Masete

Date 15/07/2019

**GPSSBC Panellist**