

IN THE GENERAL PUBLIC SERVICE SECTOR BARGAINING COUNCIL HELD CENTURION

CASE NUMBER: GPBC655/2019

P.S.A. obo R. MATHEBULA

APPLICANT

AND

DEPARTMENT OF WATER AND SANITATION

RESPONDENT

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION:

1. This dispute on the interpretation and application of a collective agreement was scheduled for arbitration on 27 September 2019 at the Centurion offices of the Council.
2. The Applicant was present and represented by Mr. A. Eager, a union official from the PSA. The respondent was represented by Ms. J.M. Songo in her capacity as the respondent's Human Resources Officer.
3. At the commencement of this arbitration, both parties expressed their intention to deal with this dispute by means of written arguments only. The parties declined the invitation to present *viva voce* evidence and agreed upon the submission of opposing heads of arguments. The Applicant's initial founding arguments were supported by a voluminous bundle of documentary evidence which was made available by the Council on 25 October 2019. The Respondent filed opposing arguments to which the Applicant replied to. I have considered all arguments, supported by documentary evidence in the form of various attachments, in the rendering of this award.
4. The proceedings were conducted in English without any need for interpretation. A manual recording was made of the process.
5. Section 138(7)(a) of the Act requires a Panellist to issue a signed arbitration award with brief reasons. For this reason, only the salient points will be referred to in this award although all evidence, documentation and submissions have been carefully considered in the rendering of this award.

ISSUES TO BE DECIDED:

6. I am required to determine whether the Respondent has correctly applied and implemented the applicant's translation in terms of Resolution 5 of 2009 and if not, whether the Applicant should be translated in terms of Resolution 3 of 2009.

BACKGROUND TO THE DISPUTE:

Common cause issues:

7. The Applicant was appointed by the respondent in November 2006 as a Chief Industrial Technician. During July 2009, the applicant was promoted to Control Industrial Technician. The Applicant's duties for this position are duly recorded in paragraph 1.2 of the founding arguments.
8. On 02 November 2011, the applicant was translated in terms of Resolution 5 of 2009 to the Occupation Specific Dispensation (OSD) for Technicians. His role was translated to that of Control Engineering Technician.
9. During May 2018, the applicant's Chief Director and his Deputy Director General, requested approval for the applicant to be translated to the OSD for Professional Scientists. The respondent declined this request and stated that the former translation was an once off translation and that any further progression had to be in terms of the respondent's Recruitment and Selection Policy.
10. The Applicant lodged a formal grievance on 17 July 2018. The applicant maintained that his duties, remains of a scientific nature which is in line with the provisions of Resolution 3 of 2009. The Applicant motivated that he should have been translated to a position of Scientist. The respondent replied to this grievance and confirmed their position that the applicant was correctly translated in terms of Resolution 5 of 2009. This prompted the applicant to refer this current dispute.

Issues in dispute:

11. The Respondent is of the view that the applicant was correctly translated in 2011 in terms of Resolution 5 of 2009. This was done in line with the post which the applicant held prior to the implementation of OSD. The Respondent argues that the applicant did not fall under the scope and application of Resolution 3 of

2009 at the time of the once off translation and that the nature of his duties and experience are regarded as irrelevant with regards to the determination of the issue at hand.

12. The Applicant argues that he has been performing the duties of a scientist ever since the commencement of the employment relationship and continues to do so. He is currently performing the duties of a Scientific Specialist. He is of the view that the respondent should have considered the substance of his duties but failed to do so which resulted in the applicant's translation to the incorrect OSD in accordance with Resolution 5 of 2009. The applicability of this latter Resolution is disputed by the applicant who is of the view that he should have been translated in terms of Resolution 3 of 2009.
13. In terms of relief, the Applicant requests for his translation to the OSD for Scientists as provided for by Resolution 3 of 2009. The Respondent in turn prays for the dismissal of the applicant's dispute.

SUMMARY OF EVIDENCE AND ARGUMENT:

APPLICANTS' SUBMISSIONS AND EVIDENCE:

14. The Applicant states in paragraph 2.1 of his founding arguments that at the time when his post was advertised that the respondent also advertised for the position of a Principal Specialist Scientist. Both these positions required a 3 year qualification in Science (Water focused), Environmental Science or related fields with extensive experience in water services, especially drinking water quality management and laboratory operations.
15. In paragraph 2.4 of the applicant's founding arguments, reference is made to the submission of similar advertisements within the department which are for Professional Scientists, all of whom performs the very same duties as the applicant. He referred further to the role profile of Scientific Production Grade A-C (annexure A p26) and argued that his duties are those of a scientist.
16. In paragraph 2.2 of the applicant's replying arguments, he states that he has always been performing the duties of a scientist since his initial appointment. He argues that his view on the scientific nature of his duties, was fully supported by his Chief Director and Deputy Director General, both of whom understood his role and responsibilities.
17. In paragraph 2.6 of the founding arguments, the Applicant states that in 2009, the Directorate made provision for his position (then Control Industrial Technician) and Principal Specialist Scientist. He further

stated that in 2014, the Directorate made provision for 3 sub-directorates. The applicant's post fell under the Sub-Directorate: Service Quality Regulation. The sister sub-directorate made provision for 3 posts as Scientific Specialists. The applicant however states that this latter sub-directorate does not exist in reality. These posts have not been filled which results in the applicant performing duties attached to the post of a Scientific Specialist.

18. The Applicant attached copies of various performance agreements, all of which according to the Applicant, confirm that his duties are those of a Scientific Specialist. He specifically referred to the performance agreement of Ms. Martie Swarts (annexure B page 1) whom previously served the respondent as a Scientists Manager. The applicant submits that her former position was never filled but that that he is currently performing all of the duties attached to this post.
19. The Applicant states that he had several engagements with the respondent with regards to the change in the title of his post from Chief Industrial Technician to Chief Development Expert. He raised his concerns during February 2011 to which the respondent responded by reversing this naming of the posts. The respondent failed to provide any reason for the change in title. The applicant also queried the issue of his other colleagues whom were translated to the OSD for Scientists, to the exclusion of the applicant. The respondent maintained their position that the applicant should be translated to the OSD for Technicians without basing their response on the substance of the applicant's duties, but rather on the title of his post. The applicant considers this failure as the basis for translating him to the incorrect OSD.
20. On 06 March 2019, the applicant requested from the respondent to provide the reasons for the change of his post from Control Industrial Technician to Control Engineering Technician. He referred to the emails exchanged included as pages 8 & 9 of annexure D. The Applicant argued that the respondent correctly concluded on page 9, that the work content should be analysed in order that the most appropriate post can be established. The Applicant argues that the respondent failed to analyse his job content. Had they done so, the respondent would have realised that the applicant is performing the duties of a Scientist.
21. The Applicant states in paragraph 3.9 of his founding arguments that in terms of the work stream for his occupational class, that the positions of Scientific Production, Scientific Manager or Specialist Scientist would have been appropriate. The respondent however failed to analyse his work content in order to determine an appropriate position.
22. In paragraph 2.4 of the applicant's replying arguments he makes reference to the Circular 5 of 2009 (the Circular), issued by the DPSA on 01 October 2009. The Circular provides in paragraph 3(xi) that: *"Departments must align their post establishment with the post structures contained in the OSD."* The

Circular continues that the grading and structure should be based on the job description as contained in the OSD.

23. He further argued in paragraph 2.11 of his replying arguments, that the objectives of Resolution 3 of 2009 are recorded in paragraph 2.12 thereof: The paragraph states that: *"To introduce an OSD...which provides for...career-pathing opportunities based on competencies, experience, performance and scope of work."*
24. The Applicant relies of the content of the Department of Public Service and Administration's: Occupational Specific Dispensation – Scientists and Related Professionals (annexure E page 46) to prove that his duties and functions fall within this occupational class as opposed to the Control Engineering Technician class. With reference to annexure E page 71, the applicant submitted that he is performing the key performance areas in respect of Scientific Manager, as recorded in paragraphs (a), (b), (c), (d), (f) and (g). He further referred to his substantial portfolio of evidence (annexures V to G) which is aimed at proving his involvement in the referred to key performance areas.
25. On 03 May 2018 and 23 May 2018, the applicant's Chief Director and Deputy Director General made a formal request for the applicant to be recognised as a Professional Scientist. The applicant states that both his seniors elaborated upon his scientific related duties for which the applicant was and remains Responsible for. They argued in their request that the applicant does not belong to the category of Control Engineering Technician but rather to the category of Professional Scientist. Their written request confirms that posts were available at that time and are still available. In paragraph 2.7 of the replying arguments, the Applicant states that the previous incumbent vacated the post. This post and other other scientific posts were however not filled even though the applicant continues to perform scientific functions within the department.
26. The Respondent's reply came on 13 July 2018. The Respondent stated that the applicant applied for an advertised post of Control Industrial Technician and that the OSD did not take qualifications into consideration. According to the respondent, the applicant was correctly translated to the rank of Control Engineering Technician by virtue of the operation of Resolution 5 of 2009. The respondent remains of the view that the respondent benefitted from a a once off translation and that the applicant had to apply for a post.
27. The Applicant argues in paragraph 4.6 of his founding arguments that both Resolutions and the DPSA Circular 5 of 2009 (attached to the applicant's reply) do not prescribe any exact qualifications. The Resolutions determine certain criteria, coupled with registration at an appropriate professional council. The

Applicant's initial post, as per advertisement, required an appropriate qualification: i.e 3 year qualification in Civil Engineering, Science or Water Care.

28. The Applicant argues that in 2019, this requirement was reduced to a National Diploma in Engineering 2019 or relevant qualification and 6 years post qualification technical experience. The applicant confirms that he does not possess any engineering related qualifications. He however holds a Bachelor's Degree in Water and Sanitation Services, a BSC Honours in Environmental Science and a Master's Degree in Water Resources Management, as per page 8 of annexure A.
29. In paragraph 4.7 of his founding arguments, the applicant records his contention, that when his post was advertised in 2009, pre-OSD, that the exact same requirements were stated for the post of Principal Scientist. He referred to his CV (annexure A pages 8 to 16) and states that he met all of the requirements for the position of Principal Scientist. He further argues that he had all the necessary qualifications and held a formal professional registration with the SACNASP. The Applicant is of the view that he should be considered as a scientist in line with paragraphs 3.1.4.6 and 5.1.1 of Resolution 3 of 2009.
30. The Applicant referred to an arbitration award issued in case GPBC 3060/2016. In this matter the applicants were held to be scientists. The award held that the employer failed to apply paragraphs 3.1.4.6 and 5.1.1 of Resolution 3 of 2009. The employer was ordered to comply with these clauses and to translate the Applicants to the OSD for Scientists in terms of phases 1 and 2.
31. The applicant presented a portfolio of evidence in support of his contention that he is executing duties as a scientist. He referred to annexures H, I, J, P, S and T and recorded the various projects and matters all of which according to the applicant, required his involvement as a scientist.
32. In terms of relief, the applicant prays to be translated to the OSD for Scientists in accordance with the provisions of Resolution 3 of 2009.

RESPONDENT'S SUBMISSIONS AND EVIDENCE:

33. The Respondent in its preamble to its opposing arguments, succinctly summarised the issues that need Determination. The questions to be considered according to the respondent, are whether the Applicant should be translated in terms of Resolution 3 of 2009 and whether the applicant was correctly translated in July 2009, as per the provisions of Resolution 5 of 2009.
34. The Respondent states that the grievance lodged by the Applicant recorded that he is performing duties of a

scientific nature and should be translated to the OSD for Scientists. The Respondent remains adamant that the Applicant was correctly translated in July 2009 in line with the post which he held at that time. The Applicant did not fall under the OSD in terms of Resolution 3 of 2009 and was thus not translated as a Scientist.

35. The Respondent argues that both Resolutions are very clear with reference to paragraphs 13.1 thereof. These paragraphs were quoted as recording that: *"Employees will translate to appropriate Posts and Salary Grades in accordance with the posts that they occupy at the time of the translation."*
36. It was further submitted on behalf of the respondent that the applicant's translation was a once off occurrence and not based upon his duties and qualifications. The translation was based on the post which the Applicant occupied at the time of the translation.
37. The respondent argues that the support which the Chief Director and the Deputy Director General showed towards the applicant's proposed translation to the OSD for Scientists, were only provided after the translation took place in 2009.
38. According to the respondent, the Applicant failed to prove the unfairness in the application and Implementation of the OSD and also that the post which he occupied in 2009 was that of a Professional Scientist. The respondent submits that the applicant's argument is incorrectly based on the duties he performed which are irrelevant to the question at hand. It is further argued that clause 3.1.4.6 of Resolution 3 of 2009 is immaterial to his translation in 2009 as he was correctly translated in accordance with Resolution 5 of 2009.
39. The Applicant cannot be translated to the OSD for Scientists because the applicant failed to prove that he occupied a post falling under Scientist at the time of the translation. The respondent prays for the dismissal of the applicant's dispute.

ANALYSIS OF EVIDENCE AND ARGUMENTS:

40. The determination of this dispute relates to the interpretation and application of both Resolutions 3 and 5 of 2009. The submissions considered revealed a single issue which requires interpretation and a further determination into whether or not the respective Resolutions were correctly applied.
41. I had regard to the purpose of both Resolutions under consideration, respectively recorded in paragraphs 1 thereof. Both Resolutions are agreements concluded in order to give effect to clause 4.14.3.3 of Resolution 1 of 2007 concluded in the PSCBC. The objectives of Resolution 1 of 2007 was to revise salary structures in accordance with specified occupational streams, to develop career pathing, to introduce pay progression,

grade progression and seniority, to increase competencies and performance with the overall aim at attracting and retaining professionals and other specialists in the Public Sector.

42. The specific occupational dispensations attached to Resolutions 3 and 5 are common cause. Resolution 3 of 2009 is aimed at Quantity Surveyors, Professional Surveyors, Architects, Town and Regional Planners, GIS Professionals and Scientists. The occupational streams associated with Resolution 5 of 2009 relates to Engineering, Technicians, Survey Technicians, Architectural Technicians, Draughtspersons, GIS Technicians and Scientific Technicians.
43. The Respondent in this current matter argues that the applicant was correctly translated and that his qualifications and/or duties at the time of the translation and also thereafter, should be regarded as irrelevant. The respondent also argues that clause 3.1.4.6 of Resolution 3 of 2009 has no bearing on the matter at hand due to their contention the applicant was correctly translated in terms of Resolution 5 of 2009.
44. Paragraph 3.1.4.6 of Resolution 3 of 2009 records that this agreement binds, amongst others, “Scientists”. The corresponding paragraph in Resolution 5 of 2009 records that the latter agreement is applicable to “Scientific Technicians”. I had regard to this differentiation between the phrases used in the respective Resolutions, both of which includes the word “Scientist”. It seems as if Resolution 3 of 2009 had in mind, “Scientists” in the proverbial true sense of the word, who are recognised as such within their individual academic field and prominently regarded and functioning as Professional Scientists.
45. The precedent set by our Supreme Court of Appeal in the matter of *National Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) provided valuable guidance with regards to the interpretational issues under consideration. The Supreme Court of Appeal held that:

“Interpretation is the process of attributing meaning to the words used in a document, be it legislation or some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighed in the light of all these factors. The process is objective and not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusiness like results or undermines the apparent purpose of the document. The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document”.

46. In line with the jurisprudence set by our Supreme Court of Appeal I am adopting a purposive approach in the interpretation of the phrase “*Scientific Technician*”, within the context of the wording used in Resolution 5 of 2009. I favour an interpretation which effectively couple the duties performed by a “*Scientific Technician*”, with the professional field of Engineering and associated professions, hence requiring a registration with the relevant professional council.
47. The Applicant’s uncontested submissions were wholly corroborated by reliable and unchallenged documentary evidence, supporting a finding on the probabilities considered, that the applicant has never had any formal qualification within the field of Engineering or the professional fields associated therewith. The Applicant was never required to hold any formal professional registration with a professional body within the field of Engineering. This in itself is contrary to the provisions of paragraph 5.1.1 of Resolution 5 of 2009 which holds that appointments and thereby effectively also translations will be subject to:

“An employee meeting the appointment requirements, inclusive of but not limited to, possessing the relevant qualification (s). prescribed years of experience, registration with an appropriate professional council;”
48. The submissions considered overwhelmingly show that the applicant is in fact a highly educated and also a dedicated scientist. This view is wholly corroborated by reliable documentary evidence which proves that he obtained a Bachelor Degree: Water and Sanitation Services in 2004, a BSc: Honours Environmental Science in 2006 and a MSc: Water Resource Management in 2016. The 2 former degrees were obtained before the translation to his current OSD.
49. It further stands uncontested that the applicant was a registered member of The South African Council for Natural Scientific Professions (SACNASP) at the time when his post was advertised. It was similarly not disputed that the exact same requirements were stated for the post of Principal Scientist which the Respondent advertised at the very same time. The Applicant referred to his CV (annexure A pages 8 to 16) and argued that he met all of the requirements for the position of Principal Scientist as he had all of the necessary qualifications and held a professional membership registration with the SACNASP at the time of his translation in 2011.
50. Upon considering the submissions made in the respective arguments the motivation for translating the Applicant to the OSD in terms of Resolution 5 of 2009, seems questionable as the facts considered confirm that the applicant has in fact met the requirements as per paragraphs 3.1.4.6 and 5.1.1 of Resolution 3 of 2009.
51. The Applicant persistently and reliably argued that he has been performing duties which are in line with a “*Scientist*” as envisaged by the provisions of Resolution 3 of 2009 from the commencement of his duties and still continues to do so. The respondent failed to counter the applicant’s proposition that the objectives

of Resolution 3 of 2009, as recorded in paragraph 2.12, states that: *"To introduce an OSD...which provides for...career-pathing opportunities based on competencies, experience, performance and scope of work."*

52. The Respondent's arguments dealt exclusively with the operation and interpretation of clause 13.1 of both Resolutions which states that: *"Employees will translate to appropriate posts and salary grades in accordance with the posts that they occupy at the time of the translation."* To this effect, the respondent considered the applicant's contentions, that he has been performing scientific functions all along and still continue to do so, as totally irrelevant, whilst maintaining the position that the once off translation was based on the title of the post and not the duties and qualifications of the Applicant. I cannot agree with this view in light of the overwhelmingly uncontested evidence to the contrary, that the Applicant met all of the requirements stated in Resolution 3 of 2009 at the time of his incorrect translation to the OSD in terms of Resolution 5 of 2009.
53. From the totality of the submissions and evidence considered I find that the Applicant was incorrectly translated in terms of Resolution 5 of 2009 and that he should have been translated as a Scientist in terms of Resolution 3 of 2009.

AWARD:

53. I order the Respondent to comply with clauses 3.1.4.6 and 5.1.1 of Resolution 3 of 2009 and translate the Applicant as a Professional Scientist with retrospective effect from 11 November 2011.
54. I order the Respondent to comply with this award on or before 15 January 2020.
55. I make no order as to costs.

SIGNED AND DATED AT POLOKWANE ON 20 NOVEMBER 2019.



**SJ LOMBARD
GPSSBC PANELIST**