



GENERAL PUBLIC SERVICE  
SECTOR BARGAINING COUNCIL



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# ARBITRATION AWARD

Arbitrator: Nozibusiso Faith Gumede \_\_\_\_\_  
Case No.: GPBC 331-2019 \_\_\_\_\_  
Date of Award: 05 May 2021 \_\_\_\_\_

**In the ARBITRATION between:**

**PSA obo ANAND MOODLEY** \_\_\_\_\_  
(Union / Applicant)

and

**GAUTENT DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT** \_\_\_\_\_  
(Respondent)

**Union/Applicant's representative:** Yolanda Ralawe – Union Official \_\_\_\_\_  
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## **DETAILS OF THE HEARING AND REPRESENTATION**

1. This matter was held under the auspices of the General Public Service Sector Bargaining Council ("GPSSBC"). The hearing took place at GPSSBC (18 September 2019 and 09 November 2019), Gauteng Department of Justice and Constitutional Development (29 September 2020 and 20 April 2021) and Public Servants Association of South Africa (PSA) (10 November 2020 and 11 November 2020). The virtual hearing was held on 16 March 2021. The closing arguments tendered on 4 May 2021.
2. The applicant, Anand Moodley was represented by Yolanda Ralawe, the trade union official from PSA whilst the respondent, Gauteng Department of Justice and Constitutional Development was represented by Advocate Moipone Kgatla from The Club - Advocates Chambers (briefed by State Attorney). The service of the interpreter was not required. The hearing was digitally and manually recorded.

## **ISSUE (-S) TO BE DECIDED**

3. I am required to determine whether the respondent's conduct was fair or not.

## **BACKGROUND TO THE DISPUTE**

4. The applicant is a Director: Third Party Fund - Financial Operations (post level 13). He entered into performance agreement for the period between 1 April 2017 – 31 March 2018, and he was earning R1 017 972.00 per annum during this period. The performance review or appraisal was duly conducted in this financial year. He sought performance bonus for 2017/18 financial year, as a relief in this matter.

## **SURVEY OF EVIDENCE AND ARGUMENT**

5. I do not intend to deal with every aspect of the evidence as it is recorded and will only record the part of the evidence that I deem necessary for the purpose of this determination. I will deal with the evidence of all the witnesses in the same manner. The parties submitted the documentary evidence to support their cases.

## **APPLICANT'S CASE**

6. **Anand Moodley**, the applicant testified as follows:

7. In 2017/18 financial year, he rated himself four (4) on Key Results Area (KRA) but his supervisor, Johan Johnson (Johnson), the Chief Director reduced it into three (3) without any valid reasons. He rollout Mojapay system in Gauteng Province (GP), Kwazulu-Natal (KZN), Eastern Cape (EC), Mpumalanga (MP), and Limpopo (LP) except Western Cape (WP) during this period. In contrast, to four (4) rating for the 2016/17 financial year for rolling out this system in Free State (FS), North West (NW) and Northern Cape (NC) except Gauteng Province (GP). The rolling out was partially implemented during these assessment cycles but inconsistently rated without a plausible explanation.
8. Johnson's projections did not materialized due to infrastructure and finance. Subsequently, he changed GP's projection from March 2017 to May 2017. He further changed LP and MP projections, as it was not feasible to be simultaneously rolled out. The initial plan was changed almost six (6) times. The plan was to train the trainer over two (2) weeks period, and estimated for the process to be completed within eight (8) weeks period.
9. He also had constrains in capacity, as four (4) Assistant Directors' employment fixed term contracts expired at the end of September 2017 and Sagren Chetty (Chetty), the Deputy Director was taken away. He did not succeed in his attempts to get these fixed term contracts renewed during this financial year.
10. He spent thirty two (32) weeks in training, two (2) weeks clearing open items, three (3) weeks cash desk & vault reconciliation and ten (10) weeks in rollout & implementation. He spent 71% of the time on this weight, and yet it is allocated 25% instead of 28.8% weight. Johnson also did not consider that they had clean audit on this financial year on his rating.
11. He dealt with technical and network challenges in various courts. In some instances, the training material was not sent on time and had to assist in changing the banking details which should have been done before the implementation process. He was set up for failure, as courts were not in state of readiness for this implementation.
12. He reported various challenges, as they emerged and he identified risks but there was no plan to mitigate them. The performance agreement remained rigid inspite of the changing plan which was a contravention of Chapter 4 of the Senior Management Service (SMS) Handbook. He had similar challenges in 2016/17 financial year but he receive higher rating than 2017/18 assessment cycle.
13. He was not reprimanded for the alleged inadequate work performance on his half yearly performance review in September 2017. However, Johnson vowed that he will not be panelized for partial system rolling

out. The respondent also contravened the aforementioned Chapter of the SMS Handbook by drawing up the unrealistic plan which changed six (6) times. It not clear which plan his performance assessment was based upon, as a defined plan changed on numerous occasions.

14. Under cross examination, he stated that in 2017/18, he rolled out five (5) provinces with a reduced personnel capacity and a clean audit also qualified him for four (4) rating, as a financial practitioner. The subordinates on his directorates were paid performance bonuses on this financial year.

## **RESPONDENT'S CASE**

15. **Johan Johnson**, the Chief Director: Trust Fund testified as follows:

16. The applicant was expected to rollout Mojapay system in five (5) provinces in accordance with KRA 3 of his performance agreement for 2017/18 financial year. However, he was not fully effective on this KRA which resulted to three (3) rating. He was not penalized for failing to rollout WC province, as he was working with constrained resources.
17. The applicant scored himself four (4) rating on this KRA whilst his output and delivery were equivalent to three (3) rating. The applicant disputed this rating and alleged that he was unable to meet the target, as the respondent failed to address his challenges during this period. However, he maintained that a defined and planned output was not achieved.
18. He projected simultaneous rolling out of KZN and EC provinces for July 2017 – August 2017 but changed to July 2017 – September 2017. He assisted the applicant with EC province roll-out. LP and MP provinces were projected for May 2017-July 2017 but changed to September 2017- October 2017. The WC province rollout was suspended to 2018/19 financial year. LP, MP and WC provinces were outstanding during mid-term assessment in September 2017 and WC province was also not completed during the final assessment in March 2018. GP was still outstanding at the end of 2016/17 financial year but scored him four (4) rating for developing a troubleshooting guide at the early stages of this implementation.
19. The applicant reported Chetty's improper conduct and that he was no longer able to work with him. Subsequently, he transfer him to the National office (as per 31 August 2017 email). The applicant did not object to it otherwise he would have instituted a disciplinary processes against him.
20. The clean audit had no role in the applicant's assessment, as it was based on the performance agreement. He also did not receive a performance bonus along with his Directors due failure on Moyapay's system rollout.

21. Under cross examination, he stated that the rollout was partially implemented which led to the scoring of three (3) rating. The plan changed four (4) or five (5) times in consultation with the applicant but he an ultimate decision maker on this regards. GP was projected for January 2017 but changed to May 2017, LP was projected for May 2017 but changed to July 2017 and WC province was moved from October 2017 - November 2017 to February 2018. The applicant did not appeal for the amendment of his performance agreement. He conceded that courts were not in the state of readiness at the commencement of the implementation process. GP dates changed because of non-readiness, and the delays were not due the applicant's wrongdoing. It was his decision to stop the WC province rollout. In 2016/17 financial year, he scored the applicant four (4) rating because his team went extra mile in developing a troubleshooting guide. In 2016/17, the applicant had two (2) Deputy Directors and five (5) Assistant Directors. GP rollout affected 2017/18 rollout plan, and LP province rollout was late which delayed the WC province. He expected fixed term employees' contracts to be renewed, as has been done on countless occasions since 2010.

#### **ANALYSIS OF THE EVIDENCE AND ARGUMENT**

22. In terms of section 138(7) of the Labour Relations Act, 66 of 1995 (LRA), I am required to issue an award with brief reasons, and what follows is a summary of the evidence and argument that I regard as necessary to substantiate my findings and determination of the dispute.
23. This dispute relates to section 186 (2) (b) of the LRA, which defines the *"unfair labour practice as any unfair act or omission that arises between an employer and employees that involving the unfair conduct by the employer relating to promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) training of an employee or relating to the provision of **benefits** (my emphasis) to an employee"*.
24. In **Apollo Tyres South Africa (Pty) Ltd v CCMA [2013] 5 BLLR 434** (LAC) *"the court held that the benefit in terms of the LRA means existing advantages or privileges to which an employee is entitled ex contractu, ex lege or granted in terms of a policy or practice subject to the discretion of the employer"*. In this matter, there is no evidence led to show that the alleged entitlement is not prescribed in the respondent's policies. However, the applicant bears the onus to prove that the unpaid performance bonus was not accordance with the respondent's policies.
25. This dispute emanated from 2017/18 financial year's performance agreement KRA 3 which was weighted *25% for implementation, roll-out and support of new Mojapay system nationally and oversee financial*

*accounting operations, systems, Standard Operating Procedures (OPS), and Policy and prescripts formulation.* The evidence also shows that this KRA was similar in 2016/17 financial year.

26. It evident that Mojapay rollout was partially implementation in 2016/17 and 2017/18 financial cycles. However, the applicant was score four (4) rating in 2016/17 assessment cycle. Johnson averred that he qualified for it for developing a troubleshooting guide during this phase. The SMS Handbook stipulates that **Level 4: Performance significantly (above expectations)** – *“Performance is significantly higher than the standard expected in the job. The appraisal indicates that the member has achieved above fully effective results against more than half of the performance criteria and indicators and fully achieved all others throughout the year”*. It probable that the development of the troubleshooting guide was above the expected performance and accordingly justifies this rating.
27. However, the applicant argued that he would have fully achieved the set performance standard if the plan was not occasionally changed. The evidence led shows that the plan was also changed in 2016/17 assessment cycle, as GP was brought forward to 2017/18 financial year. This feature remained constant except that there was no evidence led to show that it also frequently changed in 2016/17 financial year. The delayed of GP rollout also had ripple effect, as this province was only completed May 2017 instead of March 2017.
28. The applicant further argued that he rolled out four (4) provinces (KZN, EC, LP and MP) inspite the capacity constraints. There was no evidence led to show that the Assistant Directors and Chetty’s positions were filled within this period. However, the applicant did not dispute that Johnson assisted in rolling out EC province but his capacity could not been equivalent to the services which could have been rendered by two (2) or three (3) officials. Therefore, it probable that these changes crippled his team work performance.
29. The applicant also argued that the respondent did not consider the unqualified “*clean*” audit obtained in 2017/18 financial year in assessing his performance. However, Johnson argued that it had no role, as his assessment is based on the performance agreement. It probable that government expect clean audits from its officials. However, there was no evidence led to show that he was penalized in the past for failing to obtain it. Therefore, it probable that it signifies a higher performance standard which must be encouraged to boosts the staff morale.
30. He averred that he spent 71% of the time on this weight, and yet it is allocated 25% weight instead of 28.8%. It improbable that he pulled such weight on this KRA, as other three (3) KRAs were also weighted

25%. If so, he would not have been achieved four (4) rating on them. Therefore, this evidence was not properly substantiated.

31. He further argued that he was not reprimanded for the alleged inadequate work performance during his half yearly performance review. I noted that this evidence was not disputed therefore it is what it purport to be. It further support Johnson's version that he re-assured him that he will not be penalized for partial rollout.
32. The chapter 4 clause 10.4 (2) of the SMS Handbook stipulates that, *"it is important to realise that there must be flexibility when agreeing on performance objectives and measures. There should be a mutual understanding that the performance agreement may have to be adjusted during the course of the financial year because of changed circumstances"*. The records shows that the applicant reported various challenges, as they emerged and further identified the risks to his supervisor. However, there was no evidence led to show that he requested the adjustments on his performance agreement.
33. In addition, there was also no evidence led to show that the applicant was unaware his rights in this regards. Therefore, it would have been proper for him for make such an appeal, as this had an effect on his overall output. The applicant's evidence would have carried more weight if he had done so, and denied this opportunity. However, the supervisor also has a crucial role of providing a proper guidance to his subordinates.
34. Therefore, the applicant has discharge a burden of proof to shows that the respondent's conduct was not fair. The relief sought will be granted.

## **AWARD**

35. I make the following order:
36. The respondent's (Gauteng Department of Justice and Constitutional Development) conduct was unfair, and ordered to pay the applicant (Anand Moodley) the performance bonus for 2017/18 financial year, as stipulated on the SMS Handbook.
37. It must be paid to the applicant on/or before the 31 May 2021. Failing which it shall bear interest from the date of the award to the date of payment at the rate of interest applicable to the judgement debt.
38. I make no order as to costs.



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**(Nozibusiso Faith Gumedes) Arbitrator**