



ARBITRATION AWARD

Panellist/s: Mr Martin Sambo _____
Case No.: GPBC819/2019 _____
Date of Award: 19 November 2020 _____

In the ARBITRATION between:

PSA obo RM NKOTSWE & 1 OTHER

(Union / Applicant)

AND

DEPARTMENT OF CORRECTIONAL SERVICES

(Respondent)

Union/Applicant's representative: Mr Ndlovu SN _____
Union/Applicant's address: PSA _____
Union Official _____

Telephone: _____
Telefax: _____

Respondent's representative: Mr Aaron Mofokeng _____
Respondent's address: DCS _____

Telephone: _____
Telefax: _____

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION

This matter was scheduled for arbitration on 13 July 2020 and 06 November 2020 at the Offices of the Department of Correctional Services, 17th floor East Block, Poyntons building in Pretoria.

The employees party, Mr RM Nkotswe and Mr Selwane TMG (hereinafter referred to as the Applicant), were represented by their union official of PSA Mr SN Ndlovu. The employer party, Department of Correctional Services(hereinafter referred to as the Respondent), was represented by its Labour Relations Manager Mr Aaron Mofokeng.

Both parties were present. The matter is relating to interpretation or application of collective agreement. The parties narrowed down the issues and decided that there was no need for oral testimony and requested that the matter be dealt with in terms of exchange of written heads of arguments. After receiving the submissions I ruled that the submissions were not sufficient to assist me in coming to a decision and ordered the parties lead oral submissions and call witnesses if needs be on the 06 November 2020. The parties still insisted on oral submissions despite being given an opportunity to call witnesses.

The statement of case made during narrowing of issues and oral submissions were electronically recorded

ISSUE TO BE DECIDED

I have to decide whether, in the circumstances detailed hereunder, the Respondent interpreted or applied provisions of the GPSSBC resolution 2/2009 correctly by appointing the Applicants at salary level 5 and not at salary level 7.

BACKGROUND TO THE ISSUES

The Applicants Mr Nkotswe and Mr Selwane are employed by the Respondent since December 2013. The Respondent is a national government department responsible for rehabilitation and safe custody of inmates.

The Applicants alleges that the Respondent failed to interpret or apply clause 4.2.1 of resolution 2/20029 correctly when it appointed them at salary level 5 instead of salary level 7. The Applicants lodged a grievance and alleges that the Respondent gave an unsatisfactory reply. The Applicant referred the dispute to Council, but could not be resolved through conciliation. The Applicant seeks the Respondent to appoint them at salary level 07 as per the organizational structure.

The parties indicated that there was no need for oral evidence and opted to deal with this matter through exchange of heads of arguments. The parties agreed to submit bundles of documents with heads of arguments. After receiving the submissions I ruled that the

submissions were not sufficient to assist me in coming to a decision and ordered the parties lead oral submissions on the 06 November 2020.

SUMMARY OF THE APPLICANT'S CASE

The Applicant's dispute is based on clause 4.2.1 of the GPSSBC resolution 2/2009. The Respondent during September 2013 advertised the position of clerk legal services and clerk employee relation of Gauteng Regional Office. Both positions were advertised under Public Service Act and on salary level 5. Mr Nkotswe was appointed to the position of clerk Legal Service with effect from 10 December 2013 and Mr Selwane to the position of clerk Employee Relations with effect from 12 December 2013. Applicants gross salary is currently R16 761.60.

On or around September 2018, the Applicants came across the organizational structure of Gauteng Regional Office which indicated both positions were graded at salary level 7. The Applicants further researched the source of the Gauteng Region organizational structure and came across the memorandum on the classification of Correctional Services Act and Public Service Act positions as per code of remuneration and OSD for correctional officials. The Applicants lodged a grievance on 17 September 2018 upon discovering further evidence on the memorandum signed by the National Commissioner on 05 April 2011 that the posts are graded at salary level 7. The approval to grade the positions at salary level 7 by the National Commissioner was done after the signing of the GPSSBC resolution on 24 June 2009.

In terms of Public Services Regulations(2001), "the Executive authority shall define the posts necessary to perform the relevant functions while remaining within the current budget and medium term expenditure framework of the department, and the posts so defined shall constitute the department' approved establishment". The Applicants submit that the position at Regional level are graded at salary level 7 and that this is further confirmed by the advertisement of the Administrative employee Relations position at LMN region on salary level 7 (annexure RM, pages 8-9).

The Respondent responded to the grievance via a letter dated 28 January 2019 and indicated that the downgrading of entry level posts in the department are in line with the principle of the GPSSBC Resolution 2/2009 and all production level positions are advertised at entry level upon becoming vacant (see par. 3 on page 23 of bundle A). Clause 4.2 of resolution 2/2009 stipulate that ***"the agreement is not applicable to the following categories of officials employed by the department; Support staff employed in terms of the Public Service Act, 1994, as amended"***.

The Respondent's argument that resolution 2/2009 stipulate that Public Service Act positions should be downgraded to entry level when positions become vacant cannot be supported by any paragraph or clause in GPSSBC resolution 2/2009, hence the Applicants version that the Respondent failed to interpret the resolution accordingly. The Respondent did not comply with the terms of the collective agreement when the Respondent decided without authority from resolution 2/2009 to advertise the position at salary level 5 contrary to the approval of the National Commissioner.

The above is a summary of written submissions by the Applicants. During the oral submissions of the 06 November 2020 the Applicants further submitted as follows:

The Applicants' grievance got a response from the Respondent on the 28th January 2019 as per page 23 of the bundle. The resolution is dated 24 June 2009. There is a period of 10 years in between. Paragraph 3 on page 23 reads thus "***the downgrading of entry level posts in the department are in line with the principle of the GPSSBC resolution 2 of 2009. All production level positions are advertised at entry level upon becoming vacant***". The Applicants submit that, however, the Respondent fails to show a clause in the resolution that says even PSA positions will be downgraded when they become vacant save to refer to clause 15.1 which states that "***new appointees in non-custodial posts, who are non-centre based and who provide general support services to the core business of the department shall be appointed appointed under Public Service Act and their condition of service is regulated by this Act***". The Respondent does not provide such provisions and also the grading of such positions in terms of the PSA. The Applicant submits that as we sit we don't know the grading of this positions in terms of the PSA but what we know is that all CSA positions when they become vacant are advertised at entry level.

Page 54 is a Respondent's document titled "Identification and classification of CSA and PSA positions as per code of remuneration and OSD for Correctional Officials". This document was crafted to give effect to resolution 2/2009 in as far as the identification of positions under the PSA and CSA. The crafters went further on page 72 to classify this positions. On the second line from below it shows the position of the Applicant as been graded at salary level 7 yet the Respondent appointed the Applicants at salary level 5. Therefore this document is very relevant to resolution 2/2009.

The Applicants submits that page 23 response was an incorrect interpretation of clause 4.2.1 by the Respondent. They applied principles of the resolution which affect the Applicants. It says resolution 2/2009 is not applicable to the Applicants. Further the Applicants attached same posts from LMN Region of the Respondent which are advertised at salary level 7. This corroborates the averments by the Applicants that the posts are advertised at salary level 7. The Applicants submit that resolution 2/2009 was not applied correctly.

The Applicants are further disputing that their positions were CSA positions. The document on page 54 shows that already in 2010 those positions were graded at salary level 7. The Applicants submits that if the positions were CSA positions they would be advertised at entry level salary level 5, however, they were not.

The Applicants further submits that on page 14 of the bundle the job title says "Shared Admin Assistant. On page 18 the title says Admin Officer and not even talking to clerks. This are Admin Officer positions and are in line with page 72 of the bundle.

SUMMARY OF THE RESPONDENT'S CASE

The Respondent submits that it is important to mention that clause 4.2.1 of resolution 2/2009 is found under scope of application of the resolution. In clause 4.2 it is stated that "***the agreement is not applicable to the following categories of officials employed by the department (DCS):- Clause 4.2.1 Support staff employed in terms of Public Service Act of 1994 as amended***".

The Respondent therefore submits that clause 4 (4.2)(4.2.1) of GPSSBC resolution 2/2009 is irrelevant to the dispute of the Applicants in that it does not talk about appointment of any employee including the Applicants. The rational of the clause is that it clarifies which

categories of employees are covered by the resolution at the time of signing the resolution by parties at the Council. It is further the Respondent's submission that the resolution only caters for employees appointed under the Correctional Services Act 111 of 1998 as amended.

The Respondent submits that the Applicants were appointed in terms of clause 15(15.1) of resolution 2/2009 as new appointees in non-custodial posts, who are non-centre based and who provide general support services to the core business of the department. They are appointed under Public Service Act and their condition of service is regulated by this Act.

The Respondent submits that the two positions occupied by the Applicants were advertised on salary level and accordingly both Applicants were successful and they were appointed on salary level 5 by the Respondent in December 2013. The claim by the Applicants that they want to be appointed at salary level 7 is misplaced, misleading and without substance because it does not have any supporting documents that suggest as such.

The Respondent submits that the organizational structure of the Respondent which was mentioned by the Applicants in its opening statement was not an advert from which the Applicants relied on to apply for the two posts they currently occupy. Furthermore the organizational structure of DCS is not a collective agreement and no employee including the Applicants can declare a dispute of interpretation and application from it.

The Respondent submits that the Applicants dispute is premised on the wrong clause of resolution 2/2009, and as a result of that wrong citation to the resolution the dispute of the Applicants can be defined as frivolous, capricious and misleading.

The Respondent submits that the Applicant's appointments in the current positions of salary level 5 is correct and it conform to the advertisement which was put out by the Respondent when this positions were nationally advertised.

The above is a summary of written submissions by the Respondent. During the oral submissions of the 06 November 2020 the Respondent submitted as follows:

When as employee is appointed under the Correctional Services Act (CSA) at salary levels 6 and 7 moves out of that position, and that position remains vacant, that position will be turned to a Public Service Act (PSA) position and advertised at salary level 5 which is the entry level for PSA positions. The letter on page 23 of the bundle which was the Respondent's response to the Applicants' grievance is correct. It states that ***"the downgrading of entry level posts in the department are in line with the principle of the GPSSBC resolution 2 of 2009. All production level positions are advertised at entry level upon becoming vacant"***. Clause 15.1 of the resolution states that "new appointees in non custodial posts, who are non centre based and who provide general support services to the core business of the Department shall be appointed in terms of the PSA and their conditions shall be regulated by the said Act".

The Respondent submits that resolution 2/2009 is irrelevant in this case since the entire case of the Applicants is based not on the resolution but on the document titled "Identification and classification of CSA and PSA positions as per code of remuneration and OSD for Correctional Officials" which is on page 54 of the bundle. However this document is not attached nor is it an annexure of the resolution.

The Respondent submits that the Applicants relied on clause 4.2.1 of the resolution which states that ***the agreement is not applicable to the following categories of officials employed by the department (DCS):- Clause 4.2.1 Support staff employed in terms of Public Service Act of 1994 as amended***". The heading of the resolution reads thus "Agreement on the implementation of OSD for correctional officials". The resolution is only for people who have been appointed under the CSA. As an employee of the Respondent appointed under PSA one does not derive any benefit in terms of resolution 2/2009. Therefore based on the submissions of the Applicants and reliance on a different document their dispute is misguided.

The Respondent submits that this dispute does not come from resolution 2/2009. The Applicants were not downgraded. The positions that the Applicants applied for previously existed under CSA. There were people appointed in those positions and the positions were viewed as support staff positions as found in Regions and Management Areas. The principle of resolution 2/2009 is that when this posts are vacated by the incumbent, this support staff posts will be downgraded to entry level under PSA salary level 5 and will be advertised as such. If this positions were under PSA at salary level 6 and 7 they would not have been downgraded.

The Respondent further submits that the Applicants are not authors of the document on page 54 to 75 of the bundle and therefore cannot speak to it. The Applicants were appointed as clerks and page 72 does not speak of clerks. The fact that the Applicant is not the author, he further defines the Administrator as a Clerk. The Applicants were not appointed as shared Administration but as Clerks. How they then say they were at level 7. A Clerk can be from level 5 to 7. The only people who can speak to page 72 are the authors. Persal can define this posts as such but the person who can speak to that is a person from persal and not the Applicants. Further the persal documents are not an annexure to the resolution but just printouts. The Applicants were appointed as Clerks as per their appointment letters on pages 11 and 15.

The Respondent submits that the Applicants says they came in 2013 and that the resolution is not applicable to them but they do not mention that the positions were downgraded from CSA salary level 7 to PSA salary level 5 in 2009. If those positions were not vacated there would have been no vacancies for Applicants.

The Respondent further submits that the Applicants avers that recently in 2019 those positions were advertised on salary level 7. However, their positions were advertised at salary level 5 in 2013 yet they are comparing it with a situation in 2019. The Respondent argues that such cannot be a matter of interpretation or application of a collective agreement and that narrative is incorrect. The dispute is misguided and misplaced as the Applicants rely on classification of posts

ANALYSIS OF EVIDENCE AND ARGUMENTS

I have to decide whether, in the circumstances detailed hereunder, the Respondent interpreted or applied provisions of the GPSSBC resolution 2/2009 correctly by appointing the Applicants at salary level 5 and not at salary level 7.

When considering both the written and oral submissions of the parties it clearly becomes common cause that when a CSA position which was at salary level 6 or 7 becomes vacant, it is advertised at entry salary level 5. What is not clear is what happens to a PSA

position at salary level 6 or 7 when it becomes vacant. Is it also advertised at entry salary level 5? The Respondent during oral submissions indicated that PSA positions would not change but would remain at salary level 6 or 7 upon being vacated.

The Applicants were not downgraded to salary level 5. Their positions were advertised at entry level 5. The Respondent claims that this were CSA positions that should be advertised at salary level 5 when vacated. The Respondent justifies its action in terms of the principles of resolution 2/2009 and refers to clause 15.1 which states that **“new appointees in non-custodial posts, who are non-centre based and who provide general support services to the core business of the department shall be appointed under Public Service Act and their condition of service is regulated by this Act”**. I have not been led to any provision of the PSA that states that CSA positions at level 6 or 7 are advertised at entry level 5 as PSA positions when vacated. Neither have I been led to any clause of the resolution that states so. I am only show clause 15.1.

The Applicants on the other hand argues that this were not CSA positions but PSA positions in 2013 when they were appointed. The Applicants uses the Respondent's 2010 document which indicates that the Respondent has classified this positions as PSA positions in 2010 already and has graded them at level 7 already in 2010.

There is no evidence before me that this were CSA positions. The Respondent argues that this were initially CSA positions that were vacated and that is why Applicants were appointed in them. However, even if I were to accept that they were initially CSA positions, from the evidence before me, the Respondent has in 2010 classified them as PSA positions and graded them at salary level 7. I then do not understand why the Respondent would continue from then to regard those positions as CSA positions. Further there is no evidence before me that indicates that this are just clerical positions that could be at salary levels 5, 6 or 7. There is just page 72 of the bundle that indicates that the positions have been graded by the Respondent in 2010 at salary level 7. I therefore do not see or find how the principles of resolution 2/2009 or clause 15.1 of the resolution justify advertising this positions at entry salary level 5.

From the circumstances outlined above I find on a balance of probabilities that the Respondent has not interpreted or applied GPSSBC resolution 2/2009 correctly when it advertised and appointed the Applicants at salary level 5 when the positions were graded at salary level 7.

AWARD

1. The Respondent is ordered to appoint the Applicants at salary level 7 with effect from their dates of appointments being 10 December 2013 for Mr Nkotswe and 12 December 2013 for Mr Selwane.
2. The Respondent must effect clause 1 (one above) on or before 15 January 2021.
3. I make no order as to costs.

A handwritten signature in black ink, appearing to read 'Martin Sambo', enclosed within a thin black rectangular border.

MARTIN SAMBO
PANELLIST
04 December 2020