ARBITRATION AWARD

Case No: PSCB316 18/19

Date: 18 July 2019

Panellist: Vuyiso Ngcengeni

In the matter between

PSA obo Tsewu VV and 3 Others **Applicant**

And

Department of Health- KZN **1st Respondent**

And

DPSA **2nd Respondent**

Applicant representative: Mbongeni Mbanjwa

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Email: Mbongeni.Mbanjwa@psa.co.za

Respondent Rep: Sphiwe Sithole

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2nd Respondent Rep: Ellen Nkosi

Telephone: 012 336 1504 / 074 443 3090

DETAILS OF HEARING AND REPRESENTATION

1. This is an award in the arbitration between the Applicant and the two respondents cited above. The arbitration was held on 05 June 2019 at the Department of Health premises in Pietermaritzburg, KZN under the auspices of the Public Service Co-ordinating Bargaining Council ("the Council") in terms of section 24 (4) 24 (5) of the Labour Relations Act, No 66 of 1995 as amended ("the Act").
2. The dispute is about the interpretation and application of a collective agreement – Resolution 3 of 2009 ("the Resolution"), clause 3.6.2.2.
3. The dispute arose in May 2018 and was referred to the Council for conciliation on 21 June 2018 and after conciliation, it remained unresolved and was then referred to arbitration.
4. I ordered the parties to submit written arguments on this matter as follows: -
    - Applicant – Founding arguments by no later than 19 June 2019
    - Respondents – Responding arguments by no later than 26 June 2019
    - Applicant – Reply by no later than 01 July 2019.
5. The submissions were all made as ordered and I received reply from the Applicant on 10 July 2019, following a requested extension which was granted.
6. The Applicant submitted annexures A -Resolution 3 /2009.
7. The Respondents submitted annexures B3, B4 and B5.
8. At first, the Applicant represented four employees and those are: Veliswa Tsewu, Patience Ngqayimbane, Thokozile Ndwandwa and Mr Mtyokose Mlulamisi. The parties agreed that Mtyokose Mlulamisi's matter has been resolved and as a result, he was no longer part of this dispute.

ISSUE TO BE DECIDED

9. I have to determine whether the 1st and the 2nd Respondents correctly interpreted and applied the Resolution when they failed to grade progress the Applicant's three members from salary level 6 to salary level 7 in terms of clause 3.6.2.2 of the Resolution.
10. The Applicant wants the three Employees to be progressed from salary level 6 to salary level 7.

BACKGROUND TO THE ISSUE

11. The Applicant represents all three Employees and those are: -
    - Veliswa Tsewu was employed on 13 July 1990 and she currently occupies a position of Human Resources Officer which is on salary level 6.
    - Patience Ngqayimbane was employed on 16 June 1983 and is currently employed as an Administrative Clerk which is on salary level 6.

- Thokozile Ndwandwa was employed on 25 July 1985 and is currently employed as the Administrative Clerk, which is on salary level 6.

12. All the three Employees ("the Employees") have been receiving satisfactory performance and have completed 15 years since 1999.
13. The dispute arose in 2018 when the 1st Respondent failed to grade progress the employees from salary level 6 to salary level 7 in terms of clause 3.6.2.2 of the Resolution.

SURVEY OF EVIDENCE AND ARGUMENT

The Applicant submitted the argument below:-

14. A collective agreement breeds life and attains majority, inter alia the said collective agreement can only be implemented from the date it attained majority status. It is trite law that the said agreement will supersede any directive, circular and policies for example the clerks were promoted in the past in accordance with PAS to their respective levels more than 15 years ago.
15. The Resolution must be read with Resolution 1 of 2007 clause 1.2, 1.11, 4.15 and 4.3.3.
16. These employees qualify to progresses to next respective salary levels in terms of clause 3.6.2.2 of the Resolution which the respondent is compelled by the collective agreement. Prior to 2001, employees were graded in terms of the Personnel Administrative Standards (PAS) which was utilised as a career path to promote all employees in the Public Service. The aforementioned process was to improve and afford all employees in the public service so that they can enjoy better living standards and benefits.
17. These Employees never benefited from Resolution 3 of 2009 even when all clerks were upgraded from salary level 4 to salary level 5 that was done across the board by DPSA, few years ago, because they were on salary level 6 already by that time.
18. It is important to note that the respondent is practicing double standards by using two implementation dates to effect the 15 years when an employee enters their salary levels.
19. The PAS was replaced by CORE in July 2001. The progression was Rank and Leg Promotion. The PAS system was abolished in July 2001.
20. The two critical objectives underlying Resolution 3 of 2009 which apply to the Employees and they are clearly enunciated in paragraphs 1.1 and 1.2 therefore respectively-
    - Paragraph 1.1 *"Thereof, namely, to give effect to resolution 1 of 2007, by introducing revised salary 1-12 not covered by any Occupational Specific Dispensation (OSD)".*
    - Paragraph 1.2 *"To introduce a career pathing model and grade progression for identified salary levels".*

21. Resolution 1 of 2007 which also applies to the applicants, is a collective agreement in terms of whereof the signatories agree to develop and implement a salary progression and career pathing model for employees (such as the applicants) who are not covered by revised occupational specific salary structures (paragraph 5.1) and the implementation thereof commenced from the 1st January 2009 (paragraph 5.2).
22. Resolution 3 of 2009 is a product of that. Pertinently, paragraph 3 of Resolution 3 of 2009 refers to career pathing for Salary Level 1-12 subject to following:

    3.4.*1 Availability of posts (this is applicable to clause3.6.2.3)*

    3.2.4 Following the approved recruitment and selection processes

    3.4.3 Performance

    3.4.4 Continuous years of service in public service; and

    3.4.5 Change in the scope of work (this is applicable to clause 3.6.2.3)
23. The Employees strongly argue that they qualify in all foregoing respects as they were on salary level 6 for more than 19 years now, and therefore they should progress to salary level 7. They have been more than 15 years on salary level 6, means that as of 1st August 2015 they ought to have salary progressed to salary level 7. They amplify the foregoing (see page 3 of applicants bundles) by arguing that clause 3.6.2.2 provides that employees on salary level 4, 5, 6 or 7 who have completed 15 continuous service on a Salary Level (underlined for emphasis), irrespective of notch, and (who have) obtained at least a satisfactory rating in his or her performance assessments (over the last two years) shall grade (salary level) progress to salary 5, 6, 7 or 8 respectively. The Employees are fully compliant with the foregoing.
24. The employer took a unilateral decision to introduce the implementation date of 01 January 2013 without consulting the parties to the collective agreement in regards to the amendment which places the employer in breach of the Resolution in that if there should be any amendments to the said Resolution, parties must comply with the Council's General Provision and implementation on implantation of collective agreements. However, it must be reiterated that the Employer is targeting a certain occupational class which is in direct contrast of the Resolution clause 3.6.2.2 in that this clause makes no specific mention of any occupational class for progress after completing 15 years of continued service in a salary level.
25. The historical background to both Resolutions 1 of 2007 and 3 of 2009 is important in the matter, it is common cause that prior to 2001, employees were graded in terms of the personnel administrative standards which was utilised as a career path to promote all Employees in the Public Service.
26. It is common cause that the three Employees have completed 15 years in Service of the Employer.

27. Further to the above the respondent stated that the rank and leg promotion Dispensation was abolished on the 1st July 2001 in terms of PSCBC collective agreement this meant that eligible employees could have received their rank & leg promotions attached to their post as provided by PAS until 30th June 2001.
28. Clause 1.1 of the resolution states that its objective is to give effect to clause 5 of Resolution 1 of 2007 by introducing a revised salary structure for all occupational categories graded on salary levels 1-12 not covered by any occupational specific dispensation (OSD).
29. Clause 5 of Resolution 1 of 2007 is about pay progression & its sub clauses arguments is as Follows:
    5.1 Parties agree to develop and implement a salary progression and career pathing model for Employees not covered by the revised occupational specific salary structures. The new salary progression & career pathing model to include the following principles.
    5.1.1 Reduction in the number of notches per salary level to 12 notches
    5.1.2 Fixed percent increment between the notches to be 1. 5%.
    5.1.3 Progression to Higher notch to be based on performance
    5.2 implementation of salary progression and career pathing model to commence with effect from 1st January 2009.
30. Clause 3.6.2.2 states that with effect from April 2010 an employee on salary level 4.5.6. or 7 who has completed 15 years of continuous service on a salary level irrespective of the notch and has obtained at least satisfactory rating in his/her performance assessments (the average assessment over the last 2-year period will determine the performance the performance rating) shall grade(salary level) progress to salary level 5,6,7 or 8 respectively.
31. We are stating that a collective agreement breeds life and attains majority status it is trite law that the said agreement will supersede any directive circular or any policy for example the clerks were promoted in the past in accordance with the PAS to their respective levels more than 15 years ago and the directive was issued on the 1st December 2012 the respondent cannot use that directive to confirm an implementation date.
32. We have submitted that the Employees Qualify to progress to the next respective salary levels in terms of clause 3.6.2.2 of the resolution and further that the resolution makes no intention of any occupational cases but refers specifically to salary levels it must also be mentioned that the intention of the said resolution was never to financially prejudice or make the employees worse off.
33. Furthermore we submit that the respondents' reliance on the DPSA directive and the bench marking system to effect clause 3.6.2.2 of the resolution is in direct contrast of the said resolution and by so doing the respondent is implementing the DPSA directive which bench marked the grading level of clerks to salary level 5 dated the 12th December 2012. This is in direct conflict with the resolution

clauses 3.6.2.2 which does not refer to any occupational classes as it would discriminate against a certain group of employees (Clauses 3.5.1 make no such provisions to dates regarding Job evaluation.

34. The main point of contention here is whether job grading is a pre – requisite before an employee could grade progress to the next grade as per clause 3.6.2.2 of the resolution.
35. It is Applicant's submission that the Resolution was never meant to financially prejudice the Employees.

RESPONDENTS SUBMISSONS

1st and 2nd RESPONDENTS SUBMISSIONS

36. The Employees are employed by the Department of Health: KZN in the posts Admin Clerks and HR Officer, and "leg" progressed in terms of the then rank/leg promotion system applicable to their respective occupations to salary level 6, the salary level on which they are being remunerated to date. All the Employees progressed in terms of the rank/leg promotion system dispensation, which is the dispensation that prevailed at the time of their promotion to salary level 6 with effect from 1 July 1999.
37. The Employees referred a dispute to the 1st Respondent regarding the "Interpretation / application of collective agreement PSCBC Resolution 3 of 2009" (hereafter referred to as the "Resolution"), requesting that the 1st Respondent must grade progress them to salary level 7 in terms of clause 3.6.2.2.
38. It is common cause that all the Employees completed 15 years of service on 1 April 2013 and 1 April 2014 respectively on salary level 6.
39. The following explanation is provided to the effect of –
    - 39.1 the abolished rank and leg promotion dispensation that applied to various occupations in the Public Service prior to 1 July 2001,
    - 39.2 job evaluation, and
    - 39.3 the introduction of a benchmark job grading for production clerks,
40. On the salary level on which the Employees are being remunerated, which does not correspond with the official job evaluated grade (salary level) attached to their posts.

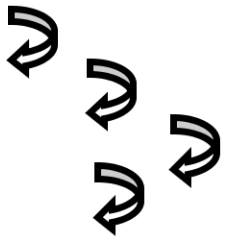
Abolished Rank and Leg Promotion Dispensation

41. Prior to 1 July 2001, the State applied a salary progression dispensation that was referred to as the "Rank and Leg Promotion Dispensation". In terms of this Dispensation, various salary ranks/legs

(salary levels) were attached to a post class (work level) in the (now abolished) Personnel Administration Standard (PAS) for each occupation, as part of a defined career (salary) path.

42. If an employee was appointed/promoted to such a post, he or she could have advanced (progressed) to the higher ranks/legs (scales) attached to the post whilst occupying the same post until he or she eventually reached the last (highest) scale (so-called rank/leg) attached to the post, provided he or she met the prescribed performance criteria and periods of service.
43. In respect of the occupation - **Administration Clerk**, which covered Applicants 1 and 2, the PAS for the occupation provided for a production and supervisory post class (work level) respectively. The following ranks (designations), with salary levels, were attached to the production post class for career pathing purposes:

    43.1 Administration Clerk Grade 1 – salary level 2.
    43.2 Administration Clerk Grade 2 – salary level 3.
    43.3 Senior Administration Clerk Grade 1 – salary level 4.
    43.4 Senior Administration Clerk Grade 2 – salary level 5.
    43.5 Senior Administration Clerk Grade 3 – salary level 6.



44. Although the prefix “Senior” was used in certain of the ranks attached to the production post class, it did not infer that the employee with such designation was occupying a supervisory post. All these ranks, clustered together, constituted the production post class of Administration Clerk.
45. The Rank and Leg Promotion Dispensation for these occupations were abolished with effect from 1 July 2001 in terms of a PSCBC collective agreement. This meant that eligible employees could have received their rank and leg promotions attached to their posts, as provided for in their respective repealed PASes, until 30 June 2001.
46. The Employees occupied a production posts in the occupations Administration Clerk and progressed over time through the ranks (salary levels) attached to their posts until they reached the rank of Senior Administration Clerk Grade 3 (salary level 6), and Human Resources Officer (salary level 6).

Job evaluation

47. Section 41 of the Public Service Act, 1994 provides that the Minister for the Public Service and Administration (MPSA) may make regulations regarding various HR practices in the Public Service.
48. Regulations 41 and 43 of Public Service Regulations (PSR), 2016, stipulate the following regarding the application of job evaluation in the Public Service and the grading of jobs:

Sub-Regulation 41(1)

48.1.1 "The MPSA shall determine –

48.1.1.1 a job evaluation and job grading system or systems that shall be utilised in the Public Service to ensure work of equal value is remunerated equally; and

48.1.1.2 a range of job weights derived from the systems or systems for each salary level in a salary scale".

Sub-Regulation 41(3)

50.2.1 An Executive Authority may evaluate or re-evaluate any job in his or her Department, except –

50.2.1.1 Jobs evaluated and graded by the MPSA (e.g. through a coordination process); or

50.2.1.2 Jobs determined in terms of an Occupation Specific Dispensation (OSD).

Sub-Regulation 43 (2)

50.3.1 An Executive Authority shall determine the grade of a post to correspond with –

50.3.1.1 Jobs evaluated and graded by the MPSA referred to paragraph 14.2.1.1 above (e.g. through a coordination process);

50.3.1.2 Jobs determined in terms of Occupation Specific Dispensations referred to paragraph 14.2.1.2 above; or

50.3.1.3 If a job is not covered by the outcome of the above, the evaluation of the job by the Executive Authority.

49. Similar regulations were contained in the repealed 2001 PSR.

50. With the introduction of the prescribed grading of posts through the application of job evaluation in 1999, production Administration Clerks including HR Officers in the Public Service who performed the same job (including the Employees), were scattered across salary levels 2 to 6 in respect of Administration clerks and salary levels 3 to 6 due to the effect of the abolished rank/leg promotion dispensation. With the decentralising of the grading of posts to Executive Authorities, it was incumbent on Executive Authorities to appropriately grade the production posts of Administration Clerks to determine an appropriate (single) job score (salary level) for these production posts in their departments.

51. Due to the non-grading of posts in the occupation Administration Clerk in certain departments, and inconsistencies in grading of similar posts of Administration Clerk in other departments, it was necessary for the Minister for the Public Service and Administration (MPSA) to intervene by addressing these discrepancies through a benchmark job grade for production Clerks.

52. Benchmark job grade (salary level) for General Administration Clerks (Applicants 1 and 2)

53. The MPSA determined benchmark job descriptions and grading levels for the production and supervisory post levels in the following occupations:
    - Finance Clerk.
    - **General Administration Clerk.**
    - **Human Resource (HR) Clerk.**
    - Registry Clerk.
    - **Supply Chain Management (SCM) Clerk.**
54. The MPSA recommended that departments must grade their **production and supervisory** posts in these occupations on salary levels 5 and 7 respectively. The purpose of the benchmark was to ensure uniformity in the grading of production and supervisory clerks in all departments in the Public Service due to inconsistencies in the grading of posts, **and in some instances non-grading of posts,** by departments – therefore to level the playing field between departments regarding the grading (remuneration) of clerks.
55. The benchmark job description and grading level for production and supervisory posts in these occupations were communicated to departments in DPSA letter 16/6/2/1 dated 12 December 2012.
56. The First Respondent confirmed at the arbitration hearing that the posts of Administration Clerk in the Department (including the Applicant's posts) were duly graded on salary level 5 based on the mentioned benchmark job description and grading, while continuing to remunerate those incumbents who already progressed to salary level 6 (including the Applicant), on salary level 6.

PSCBC Resolution 3 of 2009

57. The "Resolution", which provides for the **Grade Progression Model** for non-OSD personnel with effect from 1 April 2010, is in terms of section 5(6)(a) of the Public Service Act, 1994, deemed as a determination made by the MPSA.
58. Clause 3.5 of the "Resolution" stipulates that the **grade progression model** is based on (underpinned by) the following principles:
    58.1 Posts are graded based on the outcome of Job Evaluation {own emphasis}.
    58.2 Recognition of performance.
    58.3 Completed continuous years of service on a salary level irrespective of the notch.
59. The following are also stipulated in the "Resolution" under the heading "salary levels 4 - 5, salary levels 5-6, salary levels 6 to 7 and salary levels 7-8":
    59.1 Clause 3.6.2.1

"Subject to the Public Service Regulations and based on the outcome of the job evaluation exercise **{own emphasis}**, *posts are advertised and filled at the minimum notch of the 1st appropriate salary level".*

59.2 Clause 3.6.2.2

"with effect from 1 April 2010 ...an employee on salary levels 4, 5, 6 and 7 who has completed 15 years of continuous service on a salary level ... shall grade progress to salary level 5, 6, 7 and 8 respectively".

59.3 Clause 3.6.2.6

"When an employee is appointed on a post graded on salary level 5, he/she shall only progress to salary level 6 {own emphasis}".

59.4 Clause 3.6.2.9

"no employee who was appointed on salary level 4, 5 and 6 can grade progress to salary level 6, 7 and 8 respectively, i.e. grade progress over 2 salary levels. These employees must apply for vacant funded posts graded on those salary levels".

60. The above Clause is in a way provide clarity to Clause 3.6.2.2 of the same resolution, this is further stipulated in Human Resource Management Circular No. 75 of 2012 which was also providing clarity on paragraph 2.3.5 of the same HRM Circular 75 ***"It should be noted that with reference to paragraph 2.3.4 above, the determining factor is the grading of the post- in this instance those employees on level 5 and 6, do not qualify for grade progression to 6 and 7 as the grading of the post is at salary level 4, now at 5 and progression took place as a result of rank/ leg promotions"*** **(Please see attached B4)**

MPSA's Directive (DPSA Circular 2 of 2009)

61. As mentioned, in terms of section 5(6)(b) of the Public Service Act, 1994, the MPSA may, for proper implementation of the collective agreement – therefore his/her deemed determination – elucidate or supplement such determination by means of a **Directive, provided the Directive is not in conflict with or does not derogate from the terms of the agreement**.
62. The Director-General of the DPSA issued Circular 2 of 2009 on 11 September 2009, in which he conveyed/communicated the Directive which the MPSA has made in terms of section 5(6)(b) of the "Public Service Act" to elucidate the determination ("Resolution"). Therefore, DPSA Circular 2 of 2009 is the "vehicle" in which the MPSA's Directive was communicated.

63. It is emphasised in paragraph 7.6 of the Circular that posts **are graded based on the outcome of job evaluation,** and that the grade (salary level) **determined with job evaluation therefore forms the basis from which employees can receive grade progression**.
64. It is also emphasised in paragraphs 7.9.1 and 7.11 of the Circular that "*employees, who occupy posts graded on salary levels 4, 5, 6 and 7 respectively, and who have completed 15 years of continuous service on the particular salary level* ***on which the post is graded*** *(own emphasis), ... , shall progress to salary levels 5, 6, 7 and 8 respectively".*
65. It is further emphasised in paragraph 7.9.4 (b) that in practical terms this means that when an employee is appointed in a post graded on salary level 5, he/she may only progress to salary level 6 while he/she is occupying a post graded on salary level 5. This means that if the employee is already being remunerated on salary level 6, there is not further "room" to grade progress; he or she will remain on salary level 6.
66. Hence, it is concluded in paragraph 7.9.5 that *"no employee who was originally appointed in a post graded on salary level 4, 5 and 6 respectively can grade progress to salary levels 6, 7 and 8 respectively – therefore* ***grade progress over two salary levels*** *(own emphasis) whilst occupying the same graded post".* The applicants have already benefited and cannot further benefit, more so that their posts are graded at level 5 and they are remunerated at level 6 already because of the leg promotions system, to further progress them would unjustifiable advantage them against their colleagues whose post are graded on salary level 5 and remunerated accordingly.
67. The MPSA's Directive, as conveyed in DPSA Circular 2 of 2009, is **not** in conflict with or does **not** derogate from the terms of the "Resolution" when all the clauses in the "Resolution" are read together and interpreted in context. Therefore, the MPSA's Directive, as contained in DPSA Circular 2 of 2009, **cannot** be ignored or discarded. **(Please see attached B3)**

DPSA Circular 2 of 2016

68. The Director-General of the DPSA further issued Circular 2 of 2016 on 15 February 2016 in which he sought to clarify the implementation of grade progression for employees on salary levels 1 to 12 in terms of the "Resolution" and the MPSA's Directive (DPSA Circular 2 of 2009) after it came to light that certain departments did not apply PSCBC Resolution 3 of 2009 correctly.
69. The Director-General: DPSA indicates in paragraph 2 that it *"has come to the DPSA's attention that some departments are implementing grade progression irregularly without taking into account the grading level of the post as determined through job evaluation {own emphasis}. They therefore grade progress employees to higher salary levels for which they are not eligible in terms of the grade progression model as envisaged in the Resolution".*

70. The Director-General: DPSA further explains in paragraph 3 the above situation by means of the following examples:

"Incumbent A occupies a post graded on salary level 4 in terms of job evaluation. This incumbent is remunerated on salary level 4. The employee therefore qualifies for grade progression to salary level 5 (should they meet the qualifying criteria)".

"Incumbent B occupies a post graded on salary level 4 in terms of job evaluation. This incumbent is remunerated on salary level 5. The incumbent of the post is not eligible to grade progress to salary level 6. Salary level 5 is the appropriate level in terms of the grade progression model for incumbents of posts graded on salary level 4 to grade progress to; not salary level 6. Therefore, incumbent B remains on salary level 5 ..."

71. The Director-General: DPSA concludes in paragraph 8 of the Circular that those departments that have implemented the grade progression of employees incorrectly must rectify these irregular progressions in terms of section 38 of the Public Service Act, 1994, as it is regarded as irregular granted remuneration.
72. The Director-General's explanation in DPSA Circular 2 of 2016 is not in conflict with or does not derogate from the –

…

78.4 terms of the "Resolution" when all the clauses in the "Resolution" are read together and interpreted in context; or

78.5 from the MPSA Directive, which was conveyed to departments in DPSA Circular 2 of 2009.

79 Therefore, the MPSA's Directive, as contained in DPSA Circular 2 of 2009, cannot be ignored or discarded by the Commissioner.

<u>Interpretation based on the selective use of clauses of the "*Resolution*"</u>

73. In a gist, the Applicants argue that the **grading of their posts do not play a role** to determine whether they qualify for grade progression in terms of Clause 3.6.2.2, **without taking into account other relevant clauses in the "*Resolution*" regarding the principles underlying the importance of the grading of an employee's posts and job grading requirements** to determine an appropriate grade progression level.
74. The objective with the Grade Progression Model was –

74.1 the introduction of a structured model to facilitate the recognition of service of employees who have completed the stipulated period of service on the official salary level (grade)

attached to their posts in the form of salary progression to the next designated salary (progression) level; and

74.2 that those employees who are already being remunerated on the designated salary level (progression level) attached to the official (job evaluated) grade attached of their posts, would not be eligible to further grade progress in terms of the Model.

75. In the Labour Court case **National Commissioner for the South African Police Services v Mokoena and Others (2013) (18 July 2013) (JR1583/2011),** the Applicant argued the following in its review application, which was upheld by the Labour Court:

76. *"[18] Further reasons why the Applicant said that the arbitration award should be reviewed and set aside relate to the Arbitrator's reasoning as to why Resolution 1/2007 was applicable and include the contentions that:*

18.1 A clause in a collective agreement that an arbitrator is called upon to interpret has to be interpreted in the context of the collective agreement as a whole, whether or not the ordinary principles for interpreting contracts under the common law are applied. It would thus be inappropriate to interpret a clause in a collective agreement in isolation without proper regard to the other relevant provisions of the collective agreement, which, together with the Act, provide a proper context in which the clause is to be interpreted.

18.2 Any interpretation that ignores the context provided by the rest of the document under consideration is not permissible in respect both of ordinary agreements under the common law, and in respect of statutes.

18.3 There is no scope for what the individual respondents described as an "adventurous" approach to the implementation of collective agreements. Such an approach, imprecise as it is, would lead the Court, as did the Arbitrator impermissibly, making a new agreement for the parties. Such is not the role of a Court or an arbitrator under the LRA.

18.4 What is required is a practical approach, constrained by the ordinary rules or interpreting a document, which do not ignore context and give effect to the ordinary meaning of words used."

77. Therefore, a collective agreement must be interpreted in context and in totality; the selective use of only certain clauses is not permissible.

78. However, the Applicants interprets the "Resolution" selectively and out of context by relying solely on clause 3.6.2.2 for their relief; hence, discarding the contents of the entire "Resolution", as well as the MPSA's Directive (DPSA Circular 2 of 2009) and DPSA Circular 2 of 2016.

79. The Applicant's selective interpretation (reading) of the "Resolution" and DPSA Circulars out of context, is therefore incorrect. It was not the intention of the parties to the "Resolution" that employees should receive "open ended" grade progression each time that they complete a period of 12/15 years' service on the salary level on which they are remunerated, **irrespective of the reason how an employee has ended up on a specific salary level, and without taking into account the official grading (salary level) of their posts (salary level 5 in respect of Applicants 1 and 2 in terms of the bench mark grading; ungraded in respect of Applicant 3).**

80. If it was indeed the case, the parties to the "Resolution" would not have captured in –

…

85.4 Clause 3.5 that the Grade Progression Model is, amongst others, based on the principle that "posts are graded based on the outcome of job evaluation";

85.5 Clause 3.6.2.6 that when an employee is appointed in a post graded on salary level 5, he/she shall only progress to salary level 6;

85.6 Clauses 3.6.2.5, 3.6.2.7 and 3.6.2.8 the same principle that is contained in clause 3.6.2.6, namely that if a post is graded on a certain salary level, the incumbent of such post shall only be eligible to progress to the next salary level attached to such post.

81. Therefore, an employee must comply with all the stipulated criteria, as underpinned by the mentioned principles, before his or her employer may grade progress him or her in terms of the Grade Progression Model, namely –

81.1 His or her post must have been duly graded by means of job evaluation;

81.2 Prescribed years of service on the salary level on which the post is graded; an

81.3 At least satisfactory performance rating during the last two performance assessments of the qualifying period.

82. This is confirmed in the judgement in the Labour Court of South Africa (Cape Town) between **Tabane vs. De Vlieger-Seynhaeve and others (Case no. C 27/15)**, where the following was concluded regarding the interpretation of PSCBC Resolution 3 of 2009:

"[17] The Applicant seeks to have the award reviewed on the basis that the Commissioner incorrectly concluded that the grade determined with job evaluation formed the basis from which employees could receive grade progression. He contended that conclusion was not based on the provisions of the Resolution…

[19] The objectives of Resolution include giving effect to clause 5 of Resolution 1 of 2007 by introducing a revised salary structure for all occupational categories graded on salary

levels 1-12 not covered by any Occupation Specific Dispensation (OSD), and to introduce a career pathing model and grade progression for identified salary levels. In this regard, it is not in dispute that the Applicant is within the salary levels in question, and is also not covered by the OSD.

[20] *The essential elements of the Resolution to the extent that they are relevant for the determination of this application are to provide for a grade progression model, to be based on, inter alia, the principle of completed continuous years of service on a salary irrespective of the notches, and for employees who have performed above satisfactory over a period of 12 years.*

[21] *With a view of ensuring proper implementation of the provisions of the Resolution, the Director-General and Deputy Director-General (Corporate Services) of the DPSA had issued Circular 2 of 2009 and Circular 29 of 2011. The intervention of the Minister of the DPSA in the implementation of collective agreements concluded in the Public Service, is permissible within the context of section 5 of the Public Service Act (PSA). These provisions permit the Minister to issue directives to elucidate or supplement collective agreements, with a proviso that any act performed by the Minister under the PSA may not be contrary to the provisions of any collective agreement concluded at a bargaining council for the Public Service as a whole or for a particular sector.*

[22] *A proper interpretation of clause 3.6.2.12 of the Resolution needs to take into account other provisions of the Resolution, more specifically the other parts of Clause 3 which provide;*

"3. *PARTIES TO THE COUNCIL AGREE*

Revised salary structure

3.3 *progression to a higher notch within the scale attached to a salary level will be based on performance in terms of the existing department performance management and development system.*

Grade progression Model

3.5 *The grade progression model is based on the following principles:*

3.5.1 *Post are graded based on the outcome of job evaluation.*

3.5.2 *Recognition of performance; and*

3.5.3 *Completed continuous years of service on a salary level irrespective of the notch."*

[23] In line with the above, it is agreed with that the submissions made on behalf of the Department that clause 3.5 of the Resolution should be read conjunctively with clause 3.6, which set out the salary structure of the model. Accordingly, the fact that an employee has served 12 cumulative years in a grade is not a basis for an automatic grade progression, as any grade progression is based on a variety of factors, including job evaluation, recognition of performance and obviously the cumulative 12 years."

86 As confirmed in the mentioned Labour Court Judgement, it was definitely not the intention of the parties to the PSCBC to introduce a Model based on the profile of the employee only that would perpetuate current disparities (disjuncture) caused by previous service dispensations between, on the one hand, the salary levels on which employees are remunerated and, on the other hand, the official grade (salary level) of the post. Allowing employees the opportunity to grade progress *"open-ended",* without being based (anchored) on the grade of the post, will perpetuate this situation.

87 Because the Labour court has confirmed that clause 3.6 must be interpreted together with clause 3.5, it is clear that DPSA Circular 2 of 2009, in which the importance of the grading of an employee's post is emphasised to determine whether he or she is eligible for grade progression, as was confirmed in DPSA Circular 2 of 2016, **is not contrary to the *"Resolution".***

Conclusion

88 The Employees i.e Tsewu V.V, Ndwandwa T.G and Ngqayimbana are already remunerated on the salary level to which they are eligible to progress to in terms of the **Grade Progression Model.** Therefore, they have already enjoyed, and still continue to enjoy, the financial benefits of the grade progression level (salary level 6) attached to their posts. Any further progression to salary level 7, as prayed for, would unjustifiably advantage them against their peers whose posts are graded on salary level 5, and who are remunerated on salary level 5, and who therefore are eligible for grade progression to salary level 6 only. Progressing the Applicants to salary level 7 will therefore negate the principle of **"work of equal value is remunerated equally".**

89 Accordingly, it is the 1st & 2nd Respondent's plea that the Employees' application be dismissed.

ANALYSIS OF EVIDENCE AND ARGUMENTS

90 It is common cause that the three Employees have all completed 15 years in 2014 as they have been on salary level 6 since 1999.

91 It is also not in dispute that the Employees have been promoted through the now abolished Rank and Leg system from lower levels until their current salary level.

92 The Applicant submitted that the Employees qualify to progress to salary level 7 in terms of clause 3.6.2.2 of the Resolution and the respondent is compelled by the Resolution to do so.

93 The Applicant further submitted that the Employees never benefited from the Resolution even when all clerks were upgraded from salary level 4 to salary level 5 that was done across the board by DPSA a few years ago, because they were on salary level 6 already by that time.

83. The Applicant stated that Resolution 1 of 2007 which also applies to the Employees as they are not covered by occupational specific salary structures. Further, a collective agreement supersedes any directive or circular or any policy and also that the directive referred to by the Respondents was issued on the 1st December 2012 and as such, it is incorrect for the Respondents to use the aforementioned directive to confirm an implementation date.

84. The Respondents mentioned that the determining factor is the grading of the post- in this instance those employees on level 5 and 6, do not qualify for grade progression to 6 and 7 as the grading of the post is at salary level 4, now at 5 and progression took place as a result of rank/ leg promotions.

85. The Respondents further emphasised in paragraph 7.9.4 (b) that in practical terms this means that when an employee is appointed in a post graded on salary level 5, he/she may only progress to salary level 6 while he/she is occupying a post graded on salary level 5. The Respondents went further and stated that this means that if the employee is already being remunerated on salary level 6, there is not further "room" to grade progress; he or she will remain on salary level 6.

86. The Applicant averred that the Respondents are targeting a certain occupational class which is in direct contrast of the Resolution clause 3.6.2.2 in that this clause makes no specific mention of any occupational class for progress after completing 15 years of continued service in a salary level.

87. I do not agree with the Respondents conclusion as stated above, based on the fact that at the time the Resolution was concluded, all parties were alive to the fact that employees within the Public Service were most probably occupying positions that were already on various salary levels. The fact that the parties decided to not speak to there being no further room for salary progression for Employees being remunerated on salary level 6 (as in this case) by itself nullifies any reliance on this ground by the Respondents.

88. The Employees in this matter were already at salary level 6 at the time of the coming into effect of the Resolution and in my view, they are entitled in terms of the Resolution to grade progress to salary level 7.

89. The Respondents averred that it was not the intention of the parties to the "Resolution" that employees should receive "open ended" grade progression each time that they complete a period of 12/15 years' service on the salary level on which they are remunerated.

90. I agree with the above submission, as the grade progression in this dispute is one that speaks to 15 years of service being one of the primary conditions to be met. At a normal work life expectancy period, the employee would only benefit about three times at most. So this progression is not open ended.
91. The Respondents submitted that the MPSA recommended that departments must grade their **production and supervisory** posts in these occupations on salary levels 5 and 7 respectively. The purpose of the benchmark was to ensure uniformity in the grading of production and supervisory clerks in all departments in the Public Service due to inconsistencies in the grading of posts, **and in some instances non-grading of posts,** by departments – therefore to level the playing field between departments regarding the grading (remuneration) of clerks.
92. The Respondents mentioned that the objective with the Grade Progression Model was –
    92.1 the introduction of a structured model to facilitate the recognition of service of employees who have completed the stipulated period of service on the official salary level (grade) attached to their posts in the form of salary progression to the next designated salary (progression) level; and
    92.2 that those employees who are already being remunerated on the designated salary level (progression level) attached to the official (job evaluated) grade attached of their posts, would not be eligible to further grade progress in terms of the Model.
93. Clause 91.2 above is not supported by the Resolution and therefore cannot stand for the purposes of this dispute.
94 The Respondents' reliance firstly on separating the job classes into multiple categories, and then grading them a number of years later, is not done within the spirit and object of the Resolution and has no foundations from the Resolution.
95 Clause 3.6.2.2 of the Resolution is quite clear in stating that with effect from 1 April 2010, the employees at various levels will grade progress on two conditions only, viz. 15 years of continuous service on a salary level and satisfactory rating in performance assessments over the last two years.
96 Nothing in the Resolution speaks to the effective date of implementation being one upon which the official job evaluation shall have been concluded.
97 The Employees therefore in my view are entitled to grade progress in terms of clause 3.6.2.2 of the Resolution to salary level 7, with effect from 01 April 2016.

AWARD

98 The Respondents have incorrectly interpreted and applied clause 3.6.2.2 of Resolution 3 of 2009.

99 The Respondents are ordered to grade progress the three employees from salary level 6 to salary level 7 with effect from 01 April 2016.

100 The Respondents are further ordered to implement the aforementioned order by no later than 31 August 2019.

Panelist

Vuyiso Ngcengeni