



# JURISDICTIONAL RULING

Panelist: Joseph Wilson Thee

Case No: PSCB821-18/19

Date of ruling: 11 September 2020

In the matter between:

**PSA OBO MBONANI**

**Applicant**

And

**DEPARTMENT OF SOCAIL DEVELOPMENT**

**First Respondent**

**DPSA**

**Second Respondent**

**Applicant's representative:**

Flip Van Der Walt

Email:

flip@psa.co.za

**Respondent representative:**

Elvis Nkosi

Email:

Titus.Nkosi@dpsa.gov.za

## DETAILS OF HEARING AND REPRESENTATION

1. This is the ruling in the matter between PSA on behalf of the Applicant, and the Department of Social Development the First Respondent and the Department of Public Service Administration (“DPSA”), the Second Respondent
2. An arbitration hearing was scheduled on 29 August 2020. The proceedings were conducted virtually.
3. The Applicants were represented by Mr Flip Van Der Walt an official from Public Service Association (“PSA”).
4. Mr. Elvis Nkosi represented the First Respondent, the Department of Social Development.
5. Ms Nozinhle Mzinyane represented DPSA, the Second Respondent.

## POINT IN LIMINE

6. At the commencement of the proceedings the First Respondent advised of its intention to raise a preliminary point as to whether the Council's has the necessary jurisdiction to hear this dispute.

## THE FIRST RESPONDENT'S SUBMISSION

7. **Mr. Alvis Nkosi** raised the following jurisdictional points. He pointed out that when a dispute is referred to Council, the Applicant is required to furnish sufficient detail in particular when the dispute had arisen as it may have implications for the compensation amount.
8. His understanding was that the dispute was referred to Council during February 2019 but the Applicant sought retrospective compensation from 2007. The Applicant therefore did not comply with the requirements of a valid the referral as it was incomplete.
9. He further argued that the document that the Applicant had added to the bundle of documents in support of his case was a confidential document as it contained privilege information between the various Departments and therefore was concerned whether the document was admissible for the purposes of the arbitration.
10. The First Respondent argued that for the reasons given above the Council lacks jurisdiction to hear this dispute.

## THE APPLICANT'S SUBMISSION

11. **Mr Flip Van Der Walt** on behalf of the Applicant opposed the point in limine on the following grounds. He submitted that the dispute related to the payment of danger allowance. The Applicant has tried on many occasions to resolve the dispute internally with the Respondent without success.
12. The dispute remained unresolved since it was lodged by the Applicant and the Respondent's failure to resolve it amicably. In the circumstances the Applicant was left with no alternative but to file an application that the dispute be resolved through arbitration.
13. He rejected the Respondent's argument that the Applicant has fraudulently obtained the Memorandum of Understanding and submit that it was handed to them by the then Respondent themselves prior to the transfer of the affected employees.

## ANALYSIS OF EVIDENCE AND ARGUMENT

14. I must decide whether the Council has jurisdiction to hear the dispute. Mr Alvis Nkosi raised two preliminary points namely:
  - i) That the Applicant's referral lacks sufficient information in respect of the time the disputed has originated
  - ii) The admissibility of the Memorandum of Agreement entered into between the Various Departments and the Applicants'
15. Mr Van Dr Walt opposed the application. I have considered the respective arguments as tendered by the parties and wish to respond as follows. *Jurisdiction is defined as the power of the Council to determine the issues between parties.*
16. I wish to refer to the case of **Gcaba v Minister of Safety and Security & Others [2010] 31 ILJ 296 (CC) [2009] 12 BLLR 680 (CC)**, where *it was held that jurisdiction has to be assessed on the basis of the pleadings and not on the substantive merits of a case. In the circumstances of this case the Applicant seeks a determination of an interpretation of a Collective Agreement in terms of section 24 of the LRA. The judge went further and stated that at the CCMA the referral of the parties does not constitute pleadings, as contemplated in the superior courts. A party is not bound by the labels he /she attaches to the claim. A party may amplify his /her claim or even amend it before the Commissioner.*

17. In **HOSPERSA obo Tshambi v MEC for Health KZN [2016] 7 BLLR 649 (LAC)**, the Court confirmed the above principle as cited in *Gcaba v Minister of Safety and Security* when it held that in arbitration proceedings, the Commissioner is not bound to slavishly follow the party's characterisation of the dispute. He must determine the true nature of the dispute.
18. Having regard for the above legal authority I cannot concur with the argument of the First Respondent. I am satisfied that the Applicant's referral is competent and that an interpretation must be done to the true dispute as the issue is long outstanding and finality must be brought to the dispute between the parties.
19. Regarding the issue of the admissibility of the MOU. Firstly, in the context of this hearing where I am required to determine whether the Respondent has interpreted its decision correctly. In my view the content of the document may be materially relevant to this case. Furthermore, the presiding Arbitrator must determine how much weight he attaches to both oral and documentary evidence during the proceedings.
20. Regarding the issue as to whether the documents was fraudulently obtained. I do not have jurisdiction to make such determination as the case before me is an interpretation in terms of section 24 of the Act. However, beside the Respondent raising the issue, it has not rebutted the Applicant's version that it was received by the Respondent. I therefore do not share the Respondent's contention.
21. I accordingly make the following ruling.

## **RULING**

I find that:-

22. The PSCBC has jurisdiction to hear this dispute.
23. Council is directed to schedule this case under PSCB821-18/19 and serve and notify the parties of the date, time and venue of the hearing, alternatively advise the parties on the nature of the proceedings given the Covid 19 Regulations.



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PSCBC Panellist: **Joseph Wilson Thee**