

Council Name

# ARBITRATION AWARD

Panellist/s: Zoliswa Taba

Case No.: GPBC197-19

Date of Award: 23 June 2019

**In the ARBITRATION between:**

PSA obo Z. Mohommed  
(Union / Applicant)

and

Department of Correctional Services  
(Respondent)

**Union/Applicant's representative:** Mr R.P Bindeman

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## **Details and representation**

1. This dispute between PSA obo Z. Mohommed ("The employee") and Department of Correctional Services ("The employer") was referred to arbitration in terms of section 191 of the Labour Relations Act 66 of 1995, as amended ("henceforth referred to as the LRA"). The employee party was represented by Mr R. Bindeman, a representative from the trade union, PSA. The employer was represented by Ms. M. Claasen, an Assistant DCS. The arbitration hearing took place on 10 and 11 June 2019 in Kimberley. Parties requested to submit written arguments no later than 18 June 2019 and both complied with their submissions.

## **Issue to be decided**

2. The issue in dispute is whether the employee was demoted on 13 November 2018.
3. If I find that the employee was demoted, the fairness of the demotion is in dispute.
4. If I find that the demotion was unfair, I need to determine the appropriate relief.

## **Background to the issue**

5. The employee is employed by the employer as a Supervisor Spiritual Care at the Kimberley Correctional. After being placed to external custody, the employee lodged a grievance with the employer. In the absence of positive response received, the employee lodged an unfair labour practice dispute with the Council on the basis of demotion in status. The dispute remained unresolved at conciliation and the employee then referred the dispute to arbitration. The employee sought to be put back to his position and be compensated 5 months for the unfair demotion.

## **Survey of evidence and argument**

6. Initially parties indicated that they were going to be 10 witnesses to be called hence the matter was set down for two days. On the first day of arbitration, the employee was the only one who testified for his case and indicated that no more witnesses would be called. On the second day of arbitration, the employer decided not to call further witnesses and relied on the single witness it had called. All the witnesses gave evidence under oath. Bundle of documents were handed in by both parties and documents were accepted as what they purport to be. The employee's bundle was marked bundle "A" and the employer's bundle was marked bundle "B".

7. ***The proceedings were manually and digitally recorded therefore what appears below constitutes a summary of the evidence deduced by the parties in so far as is relevant for the purpose of the arbitration. It is by no means a minute of what transpired in the course of the proceedings.***

The employee's case

**Z. Mohammed ("the employee")**

8. The employee testified that he started working for the employer in February 1999. Referring to page 34 of bundle 'A', it was the employee's testimony that he was appointed by the employer as a Supervisor Spiritual Care from 01 September 2016 at Kimberley Correctional Centre ("KCC"). His duties included rendering spiritual services for all religious denominations; supervising work; marketing and liaising with external stake holders ,etc. Referring to page 40 of bundle "A" , the employee testified that he had been placed on an alternative placement – external custody at Tswelopele Correctional Centre("TCC") pending the outcome of an investigation against him. The alternative placement was after his suspension was reviewed. He then worked as a production worker reporting to an official who was the same rank as him and he had no one reporting to him.
9. On 06 November 2018, a letter was written by one Mr Chabana to Ms Botes informing her that the investigation was finalised and that the alternative placement of the employee at TCC had to be uplifted. The letter indicated that the employee had to start his normal duties at ("KCC") on 07 November 2018.
10. Another letter was sent by the Area Commissioner to the Head of Centre: Kimberley Tswelopelo indicating that the investigation against the employee was finalised and for the employee to report back to KCC. The employee became aware of the two letters by fax on 12 November 2018. The employee then reported back to his normal post on 13 November 2018. He was prevented from working as a Supervisor Spiritual Care by the Head of Centre. Ms Manake requested him to go back to external custody.
11. On 15 November 2018, the employee wrote an email complaining about not being placed back to his position as per the two letters received. On 19 November 2018, the employee arranged a meeting with

the Head of Centre; Mr Chabana and his union representative to discuss the issue of not placing him back to his post. In this meeting Mr Chabana and Ms Manake decided to permanently remove the employee from spiritual care as they implied that he was guilty of a serious misconduct although he did not stand trial. They later referred to this meeting as a consultation meeting whereas the employee was the one who called the meeting. For the period of 19 November 2018 up to 23 November 2018 the employee was booked at his post of Spiritual Care but he was threatened not to go to his office or he would be disobeying a legal and binding instruction.

12. The employee registered a grievance on 22 November 2018 acknowledging that he was placed back to his place of work but was aggrieved for being placed on an inferior position which amounted to demotion. No response was received from the employer. Referring to the medical reports and certificates attached, the employee testified that the whole treatment he received from the employer had affected his health and he had been diagnosed with depression which had a negative impact in his professional and personal life. He sought to be placed back to being a Supervisor Spiritual Care. The disciplinary processes against him were concluded and the final warning which was issued to him was set aside and withdrawn. Furthermore, there was a standing Court order which ordered the employer to place the employee at TCC in his post as spiritual caregiver. The court order was as a result of an interdict the employee had applied for against his Supervisor/Manager.
13. During cross examination, the employee maintained that although he was employed as a correctional service official, he was appointed to do work as a Supervisor Spiritual Care. Although in November 2018 the employer placed him back at KCC, he was not placed in his position as a Supervisor hence the grievance. The employee maintained that the two letters he received on 12 November 2018 were clear that the alternative placement was uplifted and he had to report back to his original supervisor post as investigations were concluded. The Employee maintained that he was never allowed to work as a Supervisor Spiritual Care from 13 November 2018 and that the meeting held in November 2018 was not a consultative meeting as he was the one who called such a meeting. The employee maintained that he was demoted as he was reporting to one van Wyk who was on the same level as he was and he had no one who was reporting to him.

## The Employer's case

### **Ms J.F Botes ("Ms Botes")**

14. Ms Botes testified that a precautionary suspension could be uplifted by placing an employee on an alternative placement pending investigation. The employee was placed on an alternative position because investigations against him were still not completed. Ms Botes received an email from Mr Chabana indicating that the employee may resume normal duties. She understood normal duties to mean any work officials could do but did not mean actual duties appointed for. The employee was not consulted prior to the email as it was Management's decision. It was the decision of the Head of Centre to place the employee where appropriate and he could be utilised anywhere where he was needed.
15. The employee was placed at external custody reporting to Ms van Wyk who was at level CB12, which was the same level as that of the employee. Ms van Wyk reported to the Senior Correctional Official who was at a higher rank than CB 12. The employee was placed back at Tswelopele based on the Court Judgement. If he had to be taken back to KCC, he would have to report back to the same Supervisor he had an interdict with.
16. During cross examination, Mr Botes confirmed that she knew the employee's normal duties as a Supervisor Spiritual Care and that while working at external custody he was not doing the same duties. She maintained that the placement of the employee to report to Ms van Wyk was due to the pending case against the employee. She confirmed that the email sent to her indicated that the employee had to resume his normal duties. She disputed that the employee was put in an inferior position when he reported to Ms van Wyk. The employee was not demoted because as a Correctional Official, his responsibility was to do any work which was in line with keeping safety; security and rehabilitation of offenders.

### **Employee's argument**

17. It was the employee's argument that his movement to external custody without meaningful consultation to an inferior position and reporting to an equal ranked officer was a diminution of status in itself. The employee's supervisor - ship was not recognised nor his rank when he was moved. Once suspension was uplifted, the employer had one option to place the employee back to his normal duties as per his appointment and this justified the request by Mr Chabana on page 67. The Employee argued its case with reliance to *Moqhaka local municipality v South African Local Government Bargaining Council and others* (JR567/2013) [2015] ZALCJHB 305(16 September 2015) where the court held that when the



employer employed another above the applicant and took away her duties to give to the appointed individual it amounted to a diminution of status. The employee prayed for 5 months compensation and a reversion to Supervisor Spiritual Care at Tswelopele Correctional Centre as per the judgement made by the Magistrate.

### **Employer's argument**

18. The employer referred to the Court decision in *Minister of justice and another v Bosch NO and others* (2006) 27 ILJ 166(LC) and argued that the court held that employees deemed demoted only if they lose rank, status or ones benefits to which they are entitled to. It was the employer's argument that the issue of claiming a position of spiritual care supervisor could not be entertained as the employee was appointed as a Correctional official first as per his contract of employment of 01 February 1999 and as per his appointment letter. The employee was not relieved of some of his functions as a Correctional Official, but still applied and performed his duties as per his appointment as a Correctional Official. The employee was suspended and the suspension was uplifted hence he was placed on or transferred to another unit pending the outcome of his disciplinary hearing. It was the employer's prayer that a finding that there was no unfair labour practice committed by the employer be made and the matter be dismissed with costs.

### **Analysis of evidence and argument**

#### Was the employee demoted?

19. The dispute before me relates to an alleged demotion due to the diminution of status. It is not disputed that the employee had been placed on an alternative position at TCC pending investigations against him. Ms Botes testified that the placing of the employee at external custody was due to the pending investigation. Both the employee and Ms Botes testified that there was a letter written by Mr Chabana indicating that the investigations were completed and the employee may resume his normal duties at KCC. The employee testified that he became aware of this letter on 12 November 2018 hence he reported back to KCC on 13 November 2018 to carry out his normal duties as a Supervisor: Spiritual Care. The crux of the employee's case is that the continued alternative placement after he received a letter uplifting the placement amounted to demotion in his status.
20. The letter in question is clear with the subject matter: "*RE: PLACEMENT OF MR Z MOHAMMED FROM TCC TO KCC*". The contents of the letter are stated as follows: " *Kindly take note after careful*

*consideration with reference to the discussion between the CC Staff and HCC based at Kimberley, a decision has been taken that the alternative placement of Mr Z. Mohammed at TCC be uplifted, the investigation has been finalised. Also take note that the disciplinary case is still pending and your good office will be provided with the outcome as soon as when the case are finalised. It will be appreciated if the official can start his normal duties at KCC on the 07 November 2018 at 07h00."*

21. The employer did not dispute that the person who wrote the letter had authority to do so. It is clear from the wording above that the placement of the employee from TCC was uplifted and he had to resume his normal duties. My emphasise is on the words underlined above and there is no ambiguity on the words. As clear as the message is on the letter, it was reasonable for the employee to comply and resume his normal duties the next day on 13 November 2018 after receiving the letter.
22. The employer did not dispute that the employee was prevented from carrying out his duties as a Supervisor: Spiritual Care, at KCC on 13 November 2018 when the he reported for work. Furthermore, the employee's evidence that he was sent back to external custody on the same day was not refuted. Ms Botes testified that although the letter indicated that the employee had to resume normal duties, normal duties did not mean that he had to resume work as a Supervisor Spiritual Care. Although this is the case, Ms Botes was not the author of the letter. She attempted to explain what the sender meant by normal duties although she testified herself that she never contacted the sender to ask what he meant with normal duties when she received the email. Therefore her explanation to what she perceives as normal duties is unreasonable and rejected.
23. What the employer fails to appreciate is that it had conceded that the purpose for the alternative placement at external custody was because the investigation was still pending. Now that there was a letter indicating that the investigation was concluded, what then was the purpose of prolonging alternative placing? Although Ms Botes testified that the employee was placed back to external custody due to the pending disciplinary case, this was against the letter which was issued to the employee. It is therefore reasonable to interpret the letter sent by Mr Chabana to mean that the employee was to resume his normal duties as a Supervisor Spiritual Care as investigations were concluded.
24. The issue of demotion became an issue after the employee was sent back to external custody after receiving a letter informing him that the investigation was completed. Evidence that the employee was carrying out duties of a Supervisor prior to being alternatively placed was not disputed. The employee's evidence that he was made to report to an official of the same rank as him and that he had no one reporting to him at external custody was not disputed. Furthermore, the employer did not dispute that the employee was working as a production worker and no more as a Supervisor.

25. Ms Botes confirmed that from 13 November 2018, the employee reported to one van Wyk who ranked as a CB12, which is the same rank as that of the employee and that the employee had no one reporting to him. The same van Wyk reported to an official of a higher rank. It is therefore clear that as at 13 November 2018, the employee was not doing work as a Supervisor Spiritual Care.
26. The employer's argument that the issue of the employee being appointed as a Supervisor Spiritual Care cannot be entertained is far-fetched. Evidence was led through the employee's appointment letter on page 34 of bundle "A" that the employee was appointed as a Spiritual Care Supervisor with effect from 01 September 2016. No contract of employment was submitted and led as evidence to prove the contrary. It goes without saying that by virtue of the employee being employed by Correctional Service Department, he is an official of the department but what the evidence proves is that he was appointed as a Supervisor Spiritual Care.
27. It is the employee's case that by being placed at external custody reporting to a co-worker of the same rank; not being allowed to do his duties as a supervisor anymore and not having anyone reporting to him, he was demoted. It is therefore important to look into the definition of the term demote/demotion and to determine whether the facts before me falls within such a definition.
28. The 'New Shorter Oxford English Dictionary, 1993 edition: 631' defines the word demote being "to reduce to a lower rank or class". Demotion is the reduction of dignity, importance, responsibility, power or status of employee even if salary and benefits, rank are retained.
29. In *SA Police v Salukazana & Others (2010) 31 ILJ 2465 (LC)*, the employee was notified by a letter headed 'lateral transfer' that he had been permanently transferred to a new position. The effect of the transfer was that although he remained on level 13 and his salary and benefits were not changed, his status had been diminished. In the past he reported to the area commissioner, in his new position he was expected to report to a person below the area Commissioner. The court held that demotion can manifest itself in many ways. It can arise through a reduction of salary, a change of terms and condition of employment and a transfer. If a movement leads to a reduction in status, it is a demotion
30. Although the facts of the case above are not exactly the same as in this case, they are similar. The employee was moved from his duties as a Supervisor Spiritual Care where he reported to an official of a higher rank than him to now reporting to an official who was on the same level as he is. What is clear from both parties testimonies is that on 13 November 2018, the employee was not allowed to resume his normal duties as per the letters on page 66 and 67. It is clear that he did not perform his duties as a



Supervisor Spiritual Care; that he reported to a co-worker in the same rank as he is and that he had no one reporting to him as per his normal duties as a Supervisor.

31. Therefore, I find that the employee's movement led to a reduction of responsibility, power and status. I say this because the employee was no longer supervising anyone, he was not doing any duties as a Supervisor and he was now reporting to a co-worker who is on the same level as he is. The employee was employed to perform work and duties of a Supervisor and was now instructed to perform work of a more menial nature. Therefore, the employee was demoted.

Was the demotion fair?

32. The LRA permits an employer to demote employees provided only that this is done fairly. Demotion cannot be unilaterally effected by an employer without consulting with the employee because it entails changing of an employee's terms and conditions of employment.
33. In *Matheys v Acting Provincial Commissioner, Correctional Services & Others* (2001) 22 ILJ 1653 (LC), the court held that before a demotion can be fair, it must be justifiable on substantive grounds. The court in *Van der Riet v Leisureniet t/a Health and Racquet Clubs* [1997] 6 BLLR 721 (LAC) held that failure by the employer to consult with an employee prior to his demotion constituted an unfair labour practice.
34. Demotions may be implemented as an alternative to retrenchment provided this is done in consultation with the employee; as a disciplinary measure where a dismissal is justified but due to mitigating factors the employer decides not to dismiss the employee or demotions may be based on poor performance with consultation with the employee.
35. In *Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services & Others* (2008) 29 ILJ 2708 (LAC) the court considered whether the decision to transfer the employee temporarily to Pollsmoor constituted a demotion. It was held that "the status, prestige and responsibilities of the position were relevant to the determination of whether or not a transfer constituted a demotion. In the light of the detailed and uncontested evidence of the employee in regard to the status, prestige and responsibilities of his position in Cape Town, the court had no hesitation in concluding that that position was of a higher status and prestige and held greater responsibilities than the position he was to occupy at Pollsmoor. The employee's transfer to Pollsmoor therefore constituted demotion. Since the employee did not consent to the demotion, it was unlawful in terms of common law and unfair in terms of the LRA".

36. In the case before me, no convincing evidence was led as to why the employee was still in an alternative placement and demoted. Evidence led was that the employee had been on an alternative placement which had been uplifted in November 2018. It has been proven through evidence that the continued placement resulted in the status diminishing and the employer failed to provide a plausible explanation as to why the employee was demoted. Furthermore, it is clear from the evidence that the employee received a letter on 12 November 2018 uplifting the alternative placement and on 13 November 2018 he was alternatively placed without any prior consultation.
37. In this case, both parties testified that the employee was placed alternatively for the purpose of concluding investigations. A letter was sent to the employee indicating that investigations were concluded and the placement was uplifted. Therefore, based on the evidence that the investigation was concluded, I see no justifiable reason as to why the employee was not allowed to resume his duties as a Supervisor Spiritual Care. Furthermore no evidence was led to prove that the demotion was a sanction imposed to the employee after he was found guilty of misconduct.
38. Therefore, in the absence of any plausible reason for the demotion and the absence of a fair procedure being followed, I find that the demotion was substantively and procedurally unfair. Having considered the evidence before me, I find that the employee has on balance of probabilities proved that an unfair labour practice was committed against him.

### **Remedy**

39. I had asked both parties to address me on the issue of the remedy with regard to the court judgement which was part of the employee's bundle of documents. The Court order indicated therein that the employee had to report for work at TCC. The employer did not make any submissions in its closing arguments with regard to this issue.
40. The employee requested compensation for 5 months and for his duties as the Supervisor Spiritual Care to be reinstated but requested to be kept at TCC as per the court order which ordered the employer to place the employee at TCC due to the interdict between him and his Manager at KCC.
41. I cannot ignore the order of the court which ordered placement at TCC and the employer did not argue against the employee working at TCC. Therefore, the employee is reinstated to resume his duties as a Supervisor Spiritual Care at TCC and to report to an official more senior than him.

42. Based on the merits of this case, the employee has been subjected to unfair labour practices since November 2018. The medical evidence submitted was not disputed by the employer and it indicated that the employee suffered from depression throughout this process while fighting against the demotion. The same conduct of the employer still continued up to the day of arbitration even though investigations were concluded. Moreover, the disciplinary case was also concluded and the warning which was issued against the employee was withdrawn. Therefore I find it fair to also order compensation as requested by the employee.
43. Although the employee requested 5 months as compensation, I note that he has been receiving all his benefits and salary. Furthermore, compensation is not to punish the employer but to be fair to both parties. I therefore find it fair and just to order compensation equivalent to the employee's 3 months' salary.
44. Compensation is calculated as follows: R 25 390.25 x 3months.

### **Award**

45. The employee Z. Mohammed is found to have been demoted by the employer, Department of Correctional Services.
46. The demotion is found to be substantively and procedurally unfair.
47. As a result of the unfair demotion, the employer is ordered to pay to the employee as compensation a total amount of R 76 170.75 minus such amounts as the employer is in terms of the law obliged or entitled to deduct.
48. The employer must pay the above amount by no later than 12 July 2019.
49. The employee is to report back to his position of Supervisor Spiritual Care no later than 07 July 2019.
50. There is no order as to costs.

Signature:



Commissioner: Zoliswa Taba