ARBITRATION AWARD

Panellist: A C E Reynolds
Case No.: GPBC1182/2021
Date of Award: 11 October 2021

In the ARBITRATION between:

PUBLIC SERVANTS ASSOCIATION (PSA) obo VAN ECK, OJ

and

DEPARTMENT OF CORRECTIONAL SERVICES
(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. An arbitration hearing relating to the interpretation or application of a collective agreement referred in terms of section 24 of the Labour Relations Act 66 of 1995 as amended (the LRA) to the General Public Service Sectoral Bargaining Council (GPSSBC) was scheduled as a virtual process via Zoom video conferencing on 14 September 2021.

2. Present for the referring employee (the Applicant) were Mr Johann Vorster (Public Servants Association (PSA) Official as Representative), Mr Ockert van Eck (the Applicant) and Mr Andries Hougaard (PSA Chairperson as observer). Present for the Department of Correctional Services (the Respondent) was Ms Marilie Berry (Deputy Director : Dispute Resolution Management Employee Relations Department as Representative).

3. Digital and handwritten recordings were made of the proceedings. The arbitration was conducted in English and Afrikaans, with the Panellist's handwritten notes containing the English translation. A full explanation of the arbitration proceedings was provided for the benefit of the Applicant.

4. No preliminary issues were raised by the parties.

ISSUE TO BE DECIDED

5. I am required to decide whether the Applicant is still entitled to migrate into a Centre Based post in terms of Resolution 2 of 2009 titled Agreement on the Implementation of an Occupation Specific Dispensation (OSD) for Correctional Services Officials (the Resolution) concluded between the parties on 24 June 2009 effective from 1 July 2009, with the relief sought that the Applicant be migrated into a Centre Based post backdated to November 2020 when he first applied for migration in terms of the Resolution. The onus of proof is on the Applicant in this matter.

BACKGROUND TO THE ISSUE

The following facts were established as being common cause:

6. The Applicant is currently employed as Supervisor Customer Relations Management Information Technology (IT) at salary level 7 in the Respondent's Pollsmoor Management Area located in Tokai, Cape Town. He commenced service with the Respondent on 29 November 1982 and joined the IT Unit in 1996. Prior to that he performed the functions of a Centre Based Correctional Security Official at Robben Island and Pollsmoor Correctional Centres. The Applicant completed his six months' basic training as Correctional Officer at Kroonstad Training College during 1983. He applied for migration from a Non-Centre Based (NCB) post to a Centre Based (CB) post on 4 November 2020. He was informed on 3 May 2021 that the application was disapproved due to the migration window having closed in October 2010. The Applicant lodged a grievance against this decision on 24 May 2021. The outcome of the grievance was received on 8 July 2021 upholding the decision to disapprove to his application. As at 1 September 2021 there were 15

vacant posts at Pollsmoor Correctional Centre that the Applicant would have been eligible to have migrated to should he meet the requirements attached to the vacant positions.

7. The Applicant referred a dispute to the GPSSBC on 16 July 2021 in terms of section 24 of the LRA relating to a collective agreement, which was set down for a virtual conciliation on 13 August 2021. The Respondent did not participate in the virtual conciliation and a certificate of non-resolution was issued on 13 August 2021. The dispute was subsequently referred to arbitration in August 2021. An arbitration award was issued under case reference GPBC2239/2018 on 23 June 2018 by Commissioner C M Bennett in the matter between PSA obo S J Olivier vs Department of Correctional Services (WC) relating to the interpretation of paragraph 16.2 of Resolution 2 of 2009 (the Resolution).

8. Two Directives were issued by the Respondent relating to this Resolution. Directive 5/4/4 dated 12 July 2009 with subject Circular: Migration of Officials Eminating (sic) from the Occupation Specific Dispensation, provided guidelines on how the migration process was to take place and the Choice Forms that employees had to complete to elect whether they wished to migrate or not, which had to be done by not later than 17 July 2009. Directive 7/1/4/4/1 dated 19 March 2010 with subject Filling of Critical Posts: Migration Process: Physical Movement of Officials: Levels 2 – 12: Department of Correctional Services, gave the opportunity to Officials to change their original choices by providing reasons for changing and completing a new Choice Form to be submitted by 25 March 2010, with the physical movement of Officials on Levels 2 to 7 to be finalised by 31 March 2010 and for Officials on Levels 8 to 12 to be completed by 30 April 2010. The date of 31 March 2010 for Officials on Levels 2 to 7 to be finalised was subsequently extended to 30 April 2010. None of the documents, being the two Directives and the Resolution refer to a closure date of October 2010. When OSD was implemented the Applicant was translated into a Non-Centre Based post and has now applied to migrate to a Centre Based post.

9. The Applicant currently occupies a Non-Centre Based (NCB) post on a personal scale of R360360.00 per annum with PERSAL number 12875112. Centre Based Correctional Officials are Officials based at Correctional Centres and Social Reintegration (Community Corrections) Offices. Centre Based Officials work 45 hours per week and with the implementation of OSD a shift system forms part of their unique salary structure, which makes them eligible for overtime, as well as danger and other allowances, as applicable. Non-Centre Based Correctional Officials are all other Officials not referred to as Centre Based Correctional Officials who work 40 hours per week with certain benefits not applicable to Non-Centre Based posts. The Applicant had applied for migration and not translation in terms of the Resolution, which are two different processes. To qualify for translation an Official must be in the post and perform the work of the post. Even if an Official had been translated into a Non-Centre based post he/she could still request migration into a Centre Based post.

The following facts were established as being in dispute:

10. Whether the time frame is still open for the Applicant to migrate from Non-Centre based to Centre Based since the Resolution does not indicate a window when migration is to close.

11. Whether the Applicant is still eligible to migrate.

12. Whether Directive 5/4/4 of 12 July 2009 can make a determination on a period by which the migration window closes.

13. Whether the Respondent can on its own (unilaterally) issue a Directive to overrule the collective agreement, being the Resolution.

14. Whether the Applicant meets the migration requirements and measures in terms of the Resolution.

15. Whether the Applicant was given the opportunity to migrate in the past and why he did not avail himself of these opportunities.

16. Whether the Respondent consulted with the Unions who were party to the Resolution when the subsequent Directives were issued.

17. What the correct interpretation of a higher post is in terms of paragraph 16.5 of the Resolution.

SURVEY OF EVIDENCE AND ARGUMENT

18. The Applicant, Mr Ockert van Eck, testified under oath. Ms Marilie Berry, Deputy Director : Dispute Resolution Management Employee Relations Department, testified under oath for the Respondent after being requested to do so by the Panellist to explain the documents which the Respondent intended to rely on in their evidence.

19. Documents were handed in by both parties and admitted as evidence.

20. Written closing arguments were requested by the parties, and agreed to that the parties would submit their closing arguments via e-mail to the GPSSBC and one another, as follows:

The Applicant by 20 September 2021
The Respondent by 29 September 2021
The Applicant's reply by 1 October 2021

21. The closing arguments were received by due date, with no reply received from the Applicant by 1 October 2021.

22. Only the evidence relevant to the facts in dispute are summarised below and that which was established as common cause is not repeated, unless relevant. Detail is provided, were relevant. Witnesses' evidence in chief, under cross-examination and re-examination are summarised separately to assist with the evaluation of their evidence.

The Applicant's version and evidence was as follows:

23. The Applicant party's case was that the Applicant had applied in terms of the Resolution to be migrated from a Non-Centre Based post to a Centre Based post in terms of paragraph 16 of the Resolution. The Applicant was provided with feedback that the applications for translation or migration closed in October 2010. An award was issued under case number GPBC2239/2018 on 23 June 2018 for a similar matter stating that migration was still open. Based on that award it was requested that a similar award be issued for the Applicant to be allowed to migrate from a Non-Centre to a Centre Based post backdated to November 2020 when he made his application.

24. Mr Ockert van Eck, the Applicant, testified as follows under oath in his evidence in chief: He confirmed that he joined the Respondent in 1982 and described his past experience and positions held with the Respondent up to 1996 when he was appointed in his current position in IT. He complied with all the requirements for a Centre Based Official and also possessed the necessary experience. Although Centre Based Officials work longer hours, he applied for migration because the salary was better and there were more benefits attached to Centre Based posts, with Centre Based Officials falling under the Correctional Services Act. At the time when the OSD was introduced he decided to remain Non-Centre Based for the reason that the Director of IT at Head Office, Mr Jack Shalibane, and another Head Office IT Official got all the Western Cape IT staff together and advised them not to go to Centre Based as a special OSD was coming out for IT. This never happened and according to the Respondent the window closed and he could no longer go to Centre Based. He heard last year that the Resolution does not have an end date and therefore applied to go to Centre Based. One of the feedbacks that he got was that the window closed in October 2010 and he was encouraged to apply for a vacant Centre Based post. To his knowledge no posts for ordinary Security Officers were advertised, only for Learnerships and Managerial posts. He did not know about any document which stated that the window for applications closed in October 2010. He fell within salary level 3 to 7 as referred to in the Resolution. The Resolution did not mention an end date for migration and an end date should have been included there if it was intended to end at a certain date. He felt that he still qualified to migrate in the absence of an end date. Mr Hougaard of PSA had informed him that the Resolution was still open, with no end date. He read the Resolution and did not see an end date. He also heard later about the arbitration award for Olivier and believed that certain statements in the award also applied to him. He was not aware of any re-negotiations and amendments to the Resolution.

25. Mr van Eck testified as follows under cross-examination: He agreed that he had about 38 years' service with the Respondent to date, of which 14 years were as Security Officer and 24 years in IT from 1996. When he changed to

IT he did not stop working as a Security Officer and until 2009 still performed duties at the Centre over weekends, hence he has been a Non-Centre Based Official since 2009 for 12 years working 40 hours per week. He only heard verbally, not formally, that the process had been closed and did not find out if he could still migrate. He did not only decide to migrate when he heard about the Olivier arbitration award, but because it would be a better salary and benefits, even though the working hours were longer. He agreed that the Correctional Services Act covered both Non-Centre and Centre Based Officials, but that their salaries and benefits differed and that he received a standby allowance for IT and was paid extraordinary overtime when he was called out over weekends. .

26. Mr van Eck testified as follows under re-examination: He was aware of Centre Based Officials who did not work weekends. The only difference between Centre Based and Non-Centre Based Officials was that the Centre Based Officials worked 45 hours per week and the Non-Centre based Officials worked 40 hours, agreeing that the Centre Based Officials earned higher salaries because they worked longer hours. It was not a prerequisite to work weekends to become a Centre Based Official. He did enquire if posts are available and there were posts available when he applied in 2020, but the Respondent incorporated Army members in these posts. He confirmed that he complied with all the requirements for migration.

The Respondent's version and evidence were as follows:

27. The Respondent's case was that they were aware of the award issued in respect of PSA obo S J Olivier, which was a default award, and that the Arbitrator had stated that there was no closing date to migration. After the default award was issued the dispute was again referred to arbitration and the Respondent allowed the Official to apply for migration. In clause 7 of the Resolution headed Translation Measures for Correctional Officials it is stated that a translation shall be subject to certain principles/conditions such as that the employee must be an incumbent in the post and must be performing the functions of the post or job. S J Olivier in the previous matter did not qualify with the relevant experience in terms of the Resolution and translation measures. There was a table which applied when migration is taking place and a Directive was issued that translation was only granted to October 2010, although it was not contained in the Resolution. They were of the view that the Applicant should apply for vacant posts when they become available. Since salary and working hours are affected when translation to a Centre Based post takes place, it would become more of an alleged unfair labour practice dispute relating to promotion, or a benefits issue. They however concurred that this was a collective agreement dispute, containing certain measures and rights to translate/migrate, as well as overtime.

28. Ms Marilie Berry, Deputy Director : Dispute Resolution Management Employee Relations Department testified as follows under oath in her evidence in chief: She confirmed the documents which the Respondent was relying on in their evidence, being the Resolution and the two Directives relating to the implementation of the Resolution. The arbitration award mentioned by the Applicant of PSA obo S J Olivier was not submitted as evidence by the Respondent, although the Respondent has adhered to the ruling in that arbitration award.

29. Ms Berry testified as follows under cross-examination: She confirmed to whom the first Directive 5/4/4 was issued, as contained in the distribution details for that Directive, which are not repeated here. The Directive was sent to all Management members, but usually if it is sent to Management members, it needs to be cascaded down and also placed on notice boards so that everyone has knowledge of the content. She did not have the information at her disposal if everybody did know about the Directive, but it would definitely be mentioned in meetings and communications in this regard and would be sent to all members with e-mail addresses and to the Unions, which PSA may not have received since they were not party to the Resolution. She confirmed to whom the second Directive 7/1/4/4/1 was sent, according to that distribution list, which was all Regional Commissioners and Corporate Services. Corporate Services should issue the Directive to all Officials. It does not state in any of the two documents (the Directives) that they were concluded after consultation with Labour, but she did not think that Management will ever state in a Directive or Circular that it was after consultation with Labour. She responded to the question on whether the Directives of the Respondent would supersede the collective agreement (the Resolution) that she saw them as two different documents, with the collective agreement having been concluded between Management and the Unions and Directives emanating from guidelines on how to implement the collective agreement, with all of them having equal status or qualities with the Respondent. She was sure that most government Departments are allowed to have Directives, guidelines and policies to guide them to prevent a negative impact on administrative issues. Most Directives are also to give more clarity to the person on the ground. There are a number of OSDs in the broader public sector and as these fall under the Department of Public Service (the DPSA) she was sure that there must have been broader consultation in drafting of Directives.

30. Ms Berry testified as follows under re-examination: A Centre Based post would have a higher salary with different notches, and it is assumed from the Applicant's salary advice that he is on a personal notch, which is a higher salary. She clarified the differences between translation and migration in terms of the Resolution and the parties agreed to include this testimony under the facts established as common cause.

31. The parties' written closing arguments were taken into account in arriving at the award.

ANALYSIS OF EVIDENCE AND ARGUMENT

32. I am required to decide, on the balance of probabilities and the circumstances of this case, whether the Applicant, Mr Ockert van Eck, is still entitled to migrate into a Centre Based post in terms of Resolution 2 of 2009 headed Agreement on the Implementation of an Occupation Specific Dispensation (OSD) for Correctional Services Officials (the Resolution and the collective agreement referred to in this matter) which was concluded between the parties on 24 June 2009 and took effect from 1 July 2009, with the relief sought that the Respondent, the Department of Correctional Services, be ordered to allow the Applicant to migrate to a Centre Based post backdated to November 2020 when he applied for migration in terms of the Resolution. The two Directives issued by the Respondent to implement the provisions of the Resolution also form part of this determination.

33. I have considered all the evidence and argument, but because section 138(7) of the LRA requires brief reasons, I have only referred to the evidence and argument that I regard as necessary to substantiate my findings and the determination of the dispute.

34. In order to determine this matter all the documents that were handed in and admitted as evidence, as well as the evidence of the parties' two witnesses require to be considered. The facts of this dispute were by and large agreed by the parties to be common cause. The outstanding issues in dispute which require to be determined are repeated here again for the ease of reference:

- *Whether the time frame is still open for the Applicant to migrate from Non-Centre based to Centre Based since the Resolution does not indicate a window when migration is to close.*
- *Whether the Applicant is still eligible to migrate.*
- *Whether Directive 5/4/4 of 12 July 2009 can make a determination on a period by which the migration window closes.*
- *Whether the Respondent can on its own (unilaterally) issue a Directive to overrule the collective agreement, being the Resolution.*
- *Whether the Applicant meets the migration requirements and measures in terms of the Resolution.*
- *Whether the Applicant was given the opportunity to migrate in the past and why he did not avail himself of these opportunities.*
- *Whether the Respondent consulted with the Unions who were party to the Resolution when the subsequent Directives were issued.*
- *What the correct interpretation of a higher post is in terms of paragraph 16.5 of the Resolution.*

35. Since most of the facts in this matter were established as being common cause and therefore not in dispute, I turn to the arguments and submissions by the parties to deal with the disputed issues, as summarised below:

36. The Applicant's version and argument was as follows: In terms of the Resolution at paragraph 16.1 members on level 3 to 7 can apply for migration from Non-Centre Based posts to Centre Based posts, with no timeframe added to the migration process. The Applicant had applied for migration on 4 November 2020 after he heard the migration process was still open in terms of an arbitration award, after they were previously told by Information Technology (IT) personnel not to apply for migration because there will be a separate OSD to be established for IT, which never happened. Migration to a Centre Based post from a Non-Centre Based post is not a promotion or a higher post, although the benefits may differ, whilst the Applicant would still remain on salary level 7. The Applicant had testified that he met the requirements of a Centre Based Official and that he was appointed in terms of the Correctional Services Act. This was not disputed by the Respondent, as well as that the Applicant had previously worked for the Respondent in a Correctional Centre. The Directives issued by the Respondent referred to did not indicate a closing date of October 2010 for OSD applications. The Respondent could not show whether there were any discussions with Labour to change the Resolution to include end dates for the processes referred to in the Resolution. Their final submission was that the

Applicant met all the requirements to be migrated to a Centre Based post, that the process is still open for migration because no mention of an end date was made in the Resolution and that no re-negotiation was entered into nor amendments made to the Resolution. The remedy that they sought was that the Applicant be migrated to a Centre Based post backdated to November 2020 when he applied to be migrated to a Centre Based post, as well as that he be compensated for the difference in salary scale between Centre Based and Non-Centre Based as from November 2020.

37. The Respondent's version and argument was as follows: Reference was made to what was established as common cause and the Applicant's submissions and arguments, which are not repeated here. The Respondent added that when the Applicant was notified that his grievance was unsuccessful he was encouraged to apply for advertised vacant Centre Based (CB) posts. The Applicant had testified that according to his knowledge the posts for Security Officers are never advertised by the Respondent, which is not true since posts are advertised both internally and externally, which includes Security Officer posts. The Resolution was signed on 24 June 2009 by Labour and the Department of Correctional Services (the Respondent). The Resolution was not amended but the Respondent is allowed to issue Directives as guidelines on Resolutions. A Directive is not a policy document and there is therefore no need for consultation with Labour as it is the prerogative of the Respondent as employer. The Minister of Correctional Services and the National Commissioner for Correctional Services have the powers to issue Directives and Circulars which are not intended to interfere with the Collective Agreement or Resolutions struck between the parties to the negotiation process. The two Directives and their contents/purposes were referred to, which are not repeated here again, save to highlight that the Choice Form referred to in Directive 5/4/4 dated 12 July 2009 was for Officials to indicate whether they chose to migrate from a Centre Based (CB) post to a Non-Centre Based (NCB) post, and vice versa, with the closing date for submissions being 17 July 2009. Migration was done in two Phases as contained in the two directives. During phase 1 the Applicant indicated that he will remain in a NCB post and will not migrate to a CB post. During phase 2 the Applicant still did not choose to migrate or make a decision to migrate from NCB to CB. The Applicant had alleged that he was unaware of the Directives which were issued by National Office but the Respondent had indicated that all Directives are sent out to all the Regional Offices and are disseminated to the lower levels in the Regions, with interaction with staff always done through circulars, notices and internal communication via e-mail. The Respondent could not be held liable if any Officials are allegedly not aware of Directives, circulars and other communications and it was questioned how they would then know about migration and the options if they were not aware of these documents and communications. The Applicant had testified that his aim to migrate from NCB to CB was for a better salary and that because he is appointed in terms of the Correctional Services Act, he receives exactly the same benefits as a CB Correctional Officials, whilst there were other benefits attached to CB that he was not entitled to as NCB, being compensation for working on Sundays and Public Holidays, a higher salary notch as per the new salary bands introduced for CB Officials and a 45 hour working week. It was common cause that the Applicant is on salary level 7 but the salary notch or band for a Correctional Services Official that is CB is higher than that of a NCB Official, therefore this migration cannot be regarded as a horisontal migration due to the difference in the unique salary structure, different shifts and working hours as referred to in the Resolution. The related details of the Resolution and the Directives were referred to, which are also not repeated here. They were of the view that the current dispute is not about interpretation of a collective agreement (the Resolution) but rather about the fairness of the Respondent's decision

not to allow the Applicant to migrate from a NCB post to a CB post. The Respondent was therefore of the opinion that this matter should be regarded as a unfair labour practice dispute relating to benefits since the migration from a NCB post to a CB post entailed advancement to a position classified at a higher salary notch with additional benefits not currently included in the NCB post that he occupied. In conclusion it was submitted that the Respondent interpreted the Resolution regarding migration from a NCB to a CB post correctly and requested that the application should be dismissed.

38. I now turn to my findings after considering the foregoing, which are as follows:

39. The Respondent had raised a jurisdictional issue at the conclusion of their closing arguments relating to the nature of the dispute, with their view that the real dispute did not relate to the interpretation or application of a collective agreement (the Resolution) but rather to an alleged unfair labour practice concerning benefits since migration would afford the Applicant enhanced earnings and benefits. It is noted that this point was not raised as a preliminary issue or point *in limine* at the commencement of the proceedings when parties were given the opportunity to do so, nor was it established as being an issue in dispute on which evidence was to be led or presented during the arbitration. The Respondent had however raised this point in their opening statement, and had at that stage concurred that the dispute related to a collective agreement. It is nevertheless accepted that as the evidence and proceedings evolve parties may become alerted to issues which may *inter alia* cause them to later question whether the dispute has been referred correctly and whether an Arbitrator can entertain and determine the dispute as it has been referred, and then address these issues in closing based on the evidence presented during the proceedings.

40. It would therefore be remiss of me not to address the issue of jurisdiction and to firstly determine the true nature of the dispute, namely whether the dispute indeed related to an unfair labour practice or the interpretation or application of a collective agreement as it was referred for arbitration.

41. With respect to determining the true nature of the dispute, I am guided by the judgment in *HOSPERSA obo Tshambi v MEC for Health KwaZulu Natal* [2016] 7 BLLR 649 (LAC) in which the Court reaffirmed that in arbitration proceedings the commissioner is not bound to slavishly follow the parties' characterisation, but must determine the true nature of the dispute, as well as the judgment in *James v Eskom Holdings Ltd* (CA8/16) [2017] ZALAC 39 (13 June 2017) in which the Court acknowledged the duty of the commissioner to determine the true nature of the dispute, with the Court considering the referral form as a starting point in such determination. The Court however added that while a commissioner is not bound by the description in the 7.11 form he or she should consider the detailed description of the summary of the dispute contained in the form and in the event that this falls short in revealing the true nature of the dispute the commissioner may assume provisional jurisdiction and consider the evidence in a bid to determine the true nature of the dispute and his or her power to pronounce on same.

42. In this instance the Applicant had referred his dispute as the interpretation or application of a collective agreement, being Resolution 2 of 2009 (the Resolution). Unfortunately the original 7.11 dispute referral form was not

contained in the parties' bundles of documents, hence I could not refer to it to establish the content of the referral and how the dispute was described in the referral.

43. Section 186(2)(a) of the LRA relating to unfair labour practices with respect to benefits states as follows:

(2) 'Unfair labour practice' means any unfair act or omission that arises between an employer and an employee involving –

(a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee;

44. Based on the evidence presented at the arbitration and the documents, in particular the formal grievance that was lodged by the Applicant on 24 May 2021, it is supported that the dispute did indeed relate to the interpretation or application of a collective agreement as provided for in section 24 of the LRA, and not an unfair labour practice relating to benefits as described above. I will accordingly proceed to determine the latter dispute.

45. It was common cause that the Applicant had applied to migrate to a Centre Based post on 4 November 2020. In this application he had provided the following background:

I am currently in a non-centre based post as the Supervisor of Customer Relations Management. In 2009 we, as IT. were promised that there will be a separate OSD for us and it will be better than the OSD for centre-based officials. Therefore I did not migrate to centre-based. As you are aware, this promised OSD for IT officials never happened. I recently found out that there is no end date on the resolution for migration, Resolution 2 of 2009, and members can still apply to migrate to the centres, if a post is available. There are several COI posts open at the centres due to members taking early retirement.

This also corresponds with the testimony that the Applicant presented at the arbitration, which was not disputed by the Respondent, and could attribute to the delay in him submitting his application for migration.

The Area Coordinator: Corporate Services for Pollsmoor Management Area had commented as follows on 5 November 2020 on the Applicant's application:

HR Office must prepare a formal submission through the normal channels after checking all the policy provisions regarding migration.

46. A response to the application dated 3 May 2021 was received from the DD: Manager: HR Administration Pollsmoor Management Area which stated as follows:

The above mentioned matter refers to your internal memorandum dated 2020/11/26.

The purpose of this communication serves to inform you that your application to migrate from Non-Centre to Centre-Base is disapproved due to the following reasons

- *The migration window closed already in October 2010 for the last group of official's (sic) who opted and applied to migrate from Centre-Based to Non-Centre Base*
- *You are advice (sic) to apply through open competition for the Centre-Based post.*

It is assumed that the internal memorandum of 26 November 2020 referred to would have been the formal submission by the HR Office requested by the Area Coordinator: Corporate Services.

47. It was common cause that the Resolution did not include an end date for Officials to apply for either translation or migration. It was also common cause that the Applicant had in the first Phase (Directive 5/4/4 of 12 July 2009) elected to remain in in a Centre Based (CB) post, did not make an election again in the second Phase (Directive 7/1//4/4/1 of 19 March 2010) when another opportunity was granted to apply for migration and that he then applied for migration on 4 November 2020 when he was in his version informed by his Union Official that there was no closing date in terms of the Resolution, after which he was informed by the Respondent that he had missed the window period for migration which closed in October 2010. It was also common cause that neither the Resolution nor the Directives contained any mention of a deadline date of October 2010. In the Respondent's opening statement reference was made to a Directive which was issued that translation/migration was only granted to October 2010, but this Directive was not produced as evidence in the arbitration. What was in dispute is whether the two Directives with the deadline dates for submission of applications for migration in terms of the two implementation Phases could override the Resolution, which itself contained no end date.

48. The Applicant party had referred to an arbitration award under case number GPBC2239/2018 in the arbitration between Public Servants Association (PSA) obo Olivier S J and Department of Correctional Services issued by Commissioner C M Bennett on 23 June 2018 relating to a dispute involving the interpretation and application of Resolution 2 of 2009 and whether certain provisions of the Resolution were still applicable. In this arbitration the Arbitrator had made the following award at paragraph 9:

9. The migration process, as set out in the Resolution, without addition or subtraction, is still available to Correctional Officials to use an (sic) Respondent is obliged by it (sic) signature on the Resolution to process such applications without any impediment that does not form part of the Resolution. Respondent must consider Applicant's application to migrate to the advertised position in accordance with paragraph 16.2 of the Resolution <u>prior to and separate from</u> the normal promotional process.

The Respondent had confirmed that they had complied with and had implemented the above award.

49. It is accepted that the circumstances and merits of cases may differ and that Arbitrators are not bound by the awards issued by other Arbitrators, but only by the precedent created by higher Courts such as the Labour Court, Labour Appeal Court and the Constitutional Court in labour matters. However, it is important that for the sake of consistency and certainty in labour matters that Arbitrators do not digress materially in their findings when faced with a similar set of facts and circumstances. After studying the above arbitration award and relating it to the facts of this matter, I concur with that Arbitrator's finding that the relevant clause to be interpreted with respect to the Resolution is clause 16, which states as follows under the heading Measures Applicable to the Migration of Correctional Officials:

16.1 Non-Centre Based Correctional Officials at current salary level 3 – 7 will be given a choice to migrate to correctional centres where operational needs exist and shall be placed and translated to the OSD for Centre Based Correctional Officials.
16.2 All other non-Centre based Correctional Officials will be given a choice to migrate to correctional centres subject to the availability – and complying with the appointment requirements of the vacant post.
16.3 Non-Centre Based Employees who choose not to migrate to the centre based work streams will retain their benefits and appointment status under the Correctional Services Act as amended.
16.4 Centre Based Correctional Officials who choose to migrate to the non-centre base work streams will on transfer translate to a salary notch applicable to the non-centre based work stream and will not retain the salary earned in terms of the 45 hour week.
16.5 Appointment to a higher post shall be in accordance with departmental appointment requirements.

50. The foregoing should be read with clause 3 Objectives of the Resolution, which reads as follows:

3.1 To introduce an Occupational Specific Dispensation (OSD) for Centre Based and Non-Centre Based Correctional Officials that provides for –
3.1.1 a unique salary structure;
3.1.2 career-pathing opportunities based on competencies, experience, performance and scope of work;
3.1.3 pay progression;
3.1.4 grade progression based on performance;
3.1.5 recognition of appropriate experience;
3.1.6 increased competencies;
3.1.7 protection of current compensation;
3.1.8 the introduction of differentiated salary scales for different categories of Correctional Officials;
3.1.9 the introduction of 45-hour work week for the implementation of OSD and the implementation of a 7-day establishment/shift system for Centre Based Correctional Officials;
3.1.10 the appointment of new recruits as learners.

51. Under clause 2 Definitions the following are also applicable:

*"**Centre Based Correctional Official**" means all categories of employees, based at Correctional Centres and Social Reintegration Offices and include all other employees who fall under the establishment of the Correctional Centre, working 45 hours per week.*

*"**Non-Centre Based Correctional Official**" means all categories of employees, not referred to as centre-based correctional officials, working 40 hours per week.*

52. It is common cause that the Applicant currently falls under the definition of a Non-Centre Based Correctional Official in the post that he occupies as a Supervisor in the IT Unit, that he falls under the scope of the Resolution, that he is at salary level 7 and that his application relates to migration and not translation as provided for in the Resolution. He would therefore be eligible for migration in terms of Clause 16.1 of the Resolution, which is repeated here again for ease of reference:

16.1 Non-Centre Based Correctional Officials at current salary level 3 – 7 will be given a choice to migrate to correctional centres where operational needs exist and shall be placed and translated to the OSD for Centre Based Correctional Officials.

53. The Applicant had provided evidence, which was not disputed by the Respondent, that operational needs did exist based on the schedule of vacant posts as at 1 September 2021 for Security Officers at the Correctional Centre in the Management Area where he is currently based. It was common cause that the Applicant had initially exercised the choice not to migrate and did not avail himself of the second opportunity to migrate in terms of the two Directives. These Directives were issued in 2009 and 2010 respectively and in November 2020 he decided to apply again for migration to a CB post, 10 years later and two years after the arbitration award referred to was issued. The Resolution furthermore does not specify how many times an Official can apply for migration back and forth between NCB and CB posts and whether there is a time constraint attached to this. As already pointed out, it was common cause that no end date for migration is specified in the Resolution.

54. To turn to the two Directives, being Circular reference 5/4/4 issued on 12 July 2009 and the circular document reference 7/1/4/4/1 issued on 19 March 2010, which the Respondent submitted it had the prerogative to formulate and issue such Directives as guidelines on how the Resolution's provisions should be implemented administratively, I am inclined to agree with the Arbitrator's finding in case reference GPBC2239/2018 where it is stated as follows at paragraph 7:

Following on from this, it is my finding that Respondent cannot simply amend a collective agreement as it sees fit, or assume that because the agreement makes no express reference to the administration of the agreement, that Respondent can administer it as it sees fit – in this case imposing time limits that do not appear in the agreement. It cannot do this. A collective agreement is, in theory, a record of a meeting of the minds. The parties have agreed to the content of the agreement. If a party to a collective agreement no longer wishes to be bound by the agreement, in whole

or in part, it can give reasonable notice to withdraw and if appropriate, renegotiate. What it cannot do is limit or change the agreement for the sake of administrative convenience.

55. Based on the foregoing I find that the collective agreement, being Resolution 2 of 2009 concluded on 24 June 2009 and effective from 1 July 2009, in particular clause 16 relating to measures applicable to the migration of Correctional Officials, applies to the Applicant. Since no time limit nor a limit on the number of opportunities that an Official can avail him/herself to apply for migration in respect of NCB and CB posts is specified in the Resolution, the interpretation is further that the Applicant is still entitled to choose to migrate into a CB post provided an operational need exists at the particular Correctional Centre. The parties did not present evidence and make submissions with respect to the issue in dispute relating to the correct interpretation of a higher post in terms of paragraph 16.5 of the Resolution, therefore I shall not address this, save to comment that it would be assumed to be post at a higher salary level.

56. An observation requires to be made about the status of the Directives in relation to the Resolution. It is accepted, and is good practice, that the Respondent formulates and issues measures to guide on how a Resolution is to be implemented administratively and uniformly across its operations. The problem that I experience with the time limits contained in the two Directives is the same as identified by the Arbitrator in GPBC2239/2018, namely that these time limits do not find support in the Resolution which they are intended to give effect to. It would in my view be prudent for the Respondent to either re-negotiate or amend the Resolution in consultation with the party Unions to iron out some of the shortcomings identified in the Resolution, to limit further challenges in this regard.

AWARD

57. The collective agreement, being Resolution 2 of 2009 concluded on 24 June 2009 and effective from 1 July 2009 (the Resolution), applies to the Applicant, Mr Ockert van Eck, and the Respondent, the Department of Correctional Services.

58. No time limit for migration between Non-Centre Based and Centre Based posts is specified in the Resolution.

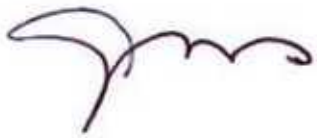
59. The Applicant is entitled to migrate into a Centre Based post where an operational need exists at a Correctional Centre or Social Reintegration Office.

60. Such migration is to be backdated to 3 May 2021, the date when the Applicant was informed by the Respondent that his application of 4 November 2020 to migrate from a Non-Centre Based post to a Centre-Based post was disapproved.

61. The parties are to agree what the calculation of the difference in the Applicant's remuneration will be between a Non-Centre Based post and a Centre Based post, effective from 3 May 2021 to the date of the Applicant's Centre-Based appointment.

62. The difference in remuneration, if any, will be paid by the Respondent to the Applicant by not later than 30 days after the date of the Centre Based appointment.

63. No order as to costs is made.



A C E Reynolds
Panellist