ARBITRATION AWARD

Panelist: John Cheere Robertson
Case No.: PSCBC295-20/21
Date of Award: 09 March 2021

In the Matter between:

PSA obo EH Dekker
(Union / Applicant)

and

Department of Agriculture, Rural Development and Land Reform
(Respondent)

Applicant's representative: Mr F Van Der Walt (PSA)
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DETAILS OF HEARING AND REPRESENTATION

1 This matter was set down for arbitration on in terms of Paragraph 3.1(c) of the Dispute Resolution Procedures of Council[1] read with Clause 8 of PSCBC Resolution 3/199 (R 3/1999) and section 24(5) of the Labour Relations Act (LRA)[2] on 5 February 2021 by way of a zoom hearing. Mr F Van Der Walt (PSA) represented Mr EH Dekker (applicant). Mr E Mathebula represented the Department of Agriculture, Rural Development and Land Reform (respondent). The matter was digitally recorded. The parties undertook to submit written closing arguments by 19 February 2021.

ISSUE IN DISPUTE

2 The issue to be determined is whether the respondent correctly interpreted or applied PSCBC Resolution 3/1999, in particular whether the respondent should pay the applicant the sum of R 94 000.00 or R 17 797.00 as and for resettlement costs

BACKGROUND TO THE ISSUE

3 The parties were in agreement that the arbitrator determine the matter on the basis of common cause facts, which constitute a statement of case, to the following effect:

Statement of Case

1. *PSCBC Resolution 3 / 1999 applies to this dispute*
2. *The applicant has, since commencement of his employment with the respondent, been required to reside in accommodation provided by the respondent in the Kruger National Park, Skukuza.*
3. *During October 2020, prior to his retirement on 31 October 2020, the applicant purchased a home in Mtunzini KZN.*
4. *The applicant retired on 31 October 2020.*
5. *The applicant obtained 3 quotations to move his effects from the Kruger National Park, Skukuza to Mtunzini KZN, A19, A20 & A21, for R 152 592.99, R 115 868.85 and R 94 000.00*
6. *The applicant has requested payment of resettlement costs in the amount of R 94 000.00 as per A21.*
7. *The respondent has refused the payment of R 94 000.00 and has offered to pay the applicant the sum of R 17 797.00*
8. *The contents of the documents handed up (Exhibit A1-A21) are admitted as evidence and require no further proof as to authenticity, delivery and receipt.*

[1] Annexure A to the Constitution of the PSCBC
[2] The Labour Relations Act, 66 of 1995 (LRA)

9. *The parties are in agreement that the actual cost of resettlement is R 94 000.00 being the amount of the lowest quotation (A21).*

10. *The issue in dispute is whether the respondent should pay the applicant the sum of R 94 000.00 or R 17 797.00 as and for resettlement costs*

SURVEY OF EVIDENCE AND ARGUMENT

The Applicant's Submissions

4 The applicant argues to the effect that the respondent has failed to interpret or apply R 3 / 1999 correctly on the basis that:

- R 3/199 makes clear provision for the payment of the actual resettlement costs within the country on retirement of an employee (Part XV, Clause 1.1, 5.1 & 5.2 R 3/1999)
- The respondent's resettlement policy makes the same provision at Clause 8 thereof.
- The limitation on the amount of settlement costs in Annexure C to the resettlement policy is contrary inter alia to the provisions section 23 and 199 of the Labour Relations Act.
- Whereas the respondent is entitled to determine its own resettlement policy this cannot replace or change the terms of R 3/1999.

5 In the circumstances the applicant seeks payment of the sum of R 94 000.00 as and for the actual costs of resettlement from the Kruger National Park, Skukuza to Mtunzini

The Respondent's Case

6 The respondent argues that:

- The use of the word *shall* and not *must* indicates that payment of resettlement costs to an employee is a privilege and not a right. Further the use of the word may in the same paragraph supports this
- Par. 2.1 of R 3 / 1999 gives the respondent the power to make its own policy on resettlement, including inter alia limits on expenditure
- The respondent has made its own resettlement policy (A10-A18) in terms of which the applicant may only be paid R 17 797.00, not R 94 000.00 see Par. 3 of Annexure C (A18) read with Par 8 (A13 / A14) of the respondent's resettlement policy

- The resettlement policy does not make reference to payment of resettlement costs in terms of locations in South Africa and irrespective of where in South Africa an employee goes, the resettlement amount remains the same.
- The applicant has no right to claim resettlement costs. Payment of resettlement costs is a privilege and not an entitlement.
- The respondent offered the applicant R 17 797.00, for resettlement costs, which he rejected.

7 In the circumstances, the respondent seeks as relief that the applicant's claim be dismissed.

ANALYSIS OF EVIDENCE AND ARGUMENT

8 An arbitrator is empowered to determine a dispute concerning the interpretation or application of a collective agreement by way of an appropriate award that gives effect to such collective agreement[3]. An arbitration hearing in terms of the LRA is an opportunity for an aggrieved employee to challenge a decision of the employer and not a review of the employer's decision. In the event an arbitrator makes a determination contrary to that of the employer, this is not a review of the employer's decision[4] but a determination based on the facts presented by the parties, by virtue of the provisions of the LRA[5]. Awards may vary, depending on the matter at hand[6].

9 Where a dispute exists as to the interpretation or application of a collective agreement an arbitrator is enjoined to adopt a practical and purposive approach to the interpretation of the collective agreement in line with the purpose of and primary objectives of the LRA[7] and adopt *an interpretation and application that is fair to the*

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[3] S 138. CCMA accreditation of bargaining councils in terms of S 127 of the Labour Relations Act 66 of 1995; Section 138(9) of the Labour Relations Act 66 of 1995 provides that: *"The commissioner may make* ***any appropriate arbitration award in terms of this Act, including but not limited to, an award-***
(a) that gives effect to any collective agreement;
(b) that gives effect to the provisions and primary objects of this Act;
(c) that includes or is in the form of a declaratory order" (emphasis added)

[4] See ***Minister of Safety and Security v SSSBC and others*** (2010) 31 *ILJ* 2680 (LC) [24]. Although this matter deals with promotion and S 193(4), the argument is equally applicable to the interpretation or application of collective agreements (S 24 & S 31) and S 138 (9). Arbitration is a hearing *de novo* and accordingly a fresh determination of the dispute.

[5] See ***Western Cape Department of Health v Van Wyk & others*** *(2014) 35 ILJ 3078 (LAC). [21] The managerial powers of the DG cannot, in my view, trump the statutory powers of the arbitrator when interpreting and applying the collective agreement. [21] … The primary objects of the Act are better served by an approach that is practical to the interpretation and application of such agreements, namely, to promote the effective, fair and speedy resolution of labour disputes. In addition, it is expected of the arbitrator to adopt an interpretation and application that is fair to the parties.*

[6] Self-evidently any relief that may be applicable will vary / be relative to the nature of the collective agreement in question

[7] *Assign Services (Pty) Ltd v NUMSA et al* (2018) ILJ 1911 (CC) [42] *The purpose of s 198A must be contextualized within the right to fair labour practices in s 23 of the Constitution and the purpose of the LRA as a whole* (As set

parties[8]*, taking into account the text used in the light of ordinary rules of grammar and syntax; the context in which the provision appears, the apparent purpose to which it is directed and the material known to those responsible for its production*[9].

10 The applicant has referred a dispute relating to the interpretation or application of PSCBC Resolution 3/1999, relating to payment of resettlement costs on his retirement, and I am required to determine whether the provisions, as interpreted apply to the applicant.

11 Clause 5.1 of R 3/1999 provides that where an employee *retires the employer shall meet, at the request of the employee or her or his family, the reasonable actual costs of resettlement of the employee and her or his immediate family, as provided in paragraphs 5.2 …*

12 Clause 5.2 of R 3/1999 provides that *in the case of an employee recruited in South Africa, the employer will pay for resettlement within South Africa.*

13 The use of the word *shall* in Clause 1.1 & 5.1 of R 3/1999 denotes that this is peremptory. The reference to may in Clause 3.1 is not applicable to this case as Clause 3.1 refers to the situation where the employer requires the employee to transfer to a new place of work, in which the case the employer may assist the employee with the associated costs (Clause 3.2-3.9). Clause 5.4 is also not applicable as it relates to the costs of transporting the remains of an employee who has died abroad while on official duty away from her his normal place of work. In such a case the employer may meet the costs of transporting the remains home.

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out in s 1 of the LRA*); Western Cape Department of Health v Van Wyk & others* (2014) 35 ILJ 3078 (LAC) [22], See also *Tabane v PSCBC and others* (LC) C27/15 (28 September 2017) [15].

[7] ***PSA obo Liebenberg v Department of Defence & others*** (2013) 34 ILJ 1769 (LC) [29] and see ***Spies v National Commissioner SAPS*** [JOL] 21525 (LC) [22] referred to in ***Janse Van Rensburg and others v Minister of Safety and Security*** [2009] 4 BLLR 400 (LC) [25]; and section 23(1) of the Constitution of the RSA

[8] *PSA obo Liebenberg v Department of Defence & others* (2013) 34 ILJ 1769 (LC) [29] and see *Spies v National Commissioner SAPS* [JOL] 21525 (LC) [22] referred to in *Janse Van Rensburg and others v Minister of Safety and Security* [2009] 4 BLLR 400 (LC) [25]; *Tabane v PSCBC and others* (LC) C27/15 (28 September 2017) [15].

[9] *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012) [18]. *SA Municipal Workers Union V SA Local Bargaining Council & others* (2012) 33 ILJ 353 (LAC) [15]. *…the language of the document falls to be construed in the light of its context and the apparent purpose to which it is directed as well as material known to those responsible for its production DENOSA obo Du Toit & another v WC Department of Health & others* (2016) 37 ILJ 1819 (LAC). See also CHEP South Africa (Pty) Ltd v Shardlow NO and others [2019] JOL 40990 (LC) [19]-[20] citing Assign Services (Pty) Ltd v NUMSA et al (2018) ILJ 1911 (CC) [41], Assign Services (Pty) Ltd v NUMSA et al (2018) ILJ 1911 (CC) [41]

14 Clause 2.1 of R 3/1999 provides that an executing authority shall establish and where appropriate negotiate written policies on resettlement, including limits on expenditure, maximum periods of compensation, restrictions on the quantity and kind of personal effects covered and costs of property transfer.

15 In so far as the respondent's resettlement policy serves to limit resettlement costs on retirement to R 17 797.00 this is contrary to the meaning of R 3/1999 which provides that *the employer shall meet the* ***reasonable actual costs*** *of resettlement of the employee* … and as per Clause 5.2 …. *the employer will pay for resettlement within South Africa*

16 In terms of Section 23 and 31 of the LRA, not only the actual parties to the collective agreement, but each member of the trade unions in question[10] / employer's organisations are also bound[11] including the State (as employer) and Union parties[12]. Collective agreements differ markedly from conventional contracts[13], and are binding on and may vary existing contracts of non-signatories by virtue of the LRA.

17 In terms of section 5 (6)(a), 5 (6)(b) of the Public Service Act, 1994, a collective agreement concluded in a bargaining council established for the whole or a particular sector in the public service, shall in respect of conditions of service of employees appointed in terms of the Public Service Act, be deemed a determination by the Minister of Public Service & Administration (MPSA) in terms of section 3(5). The MPSA for purposes of the proper implementation of the collective agreement, may elucidate or supplement such determination by means of a directive, provided the directive is not

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[10] ***eThekwini Municipality (Health Department) v IMATU obo Foster and others*** (2012) 33 *ILJ* 152 (LAC) [27]

[11] See also ***SAMWU and SALGA and others*** (LAC) supra. The Constitutional Court recently upheld the claim of employees, members of a trade union who was not a signatory to the collective agreement in question, where they had referred a claim for payment of a scarce skills allowance, see MEC for Health, WC v Coetzee & others [2020] 20 March 2020 Case CCT137/19.

[12] Section 23 (3) of the LRA provides that:
"*[W]here applicable, a collective agreement varies any contract of employment between an employee and employer who are both bound by a collective agreement.*"
Section 31 of the LRA provides that a collective agreement concluded in a bargaining council, subject to section 32, binds:

(a) the parties to the bargaining council who are also parties to the collective agreement;
(b) each party to the collective agreement and the members of every other party to the collective agreement in so far as the provisions thereof apply to the relationship between such a party and the members of such other party; and
(c) the members of a registered trade union that is a party to the collective agreement and the employers who are members of a registered employer's organization that is such a party, if the collective agreement regulates-
  (i) terms and conditions of employment; or
  (ii) the conduct of employers in relation to their employees or the conduct of the employees in relation to their employers.

[13] See also ***Fakude & others v Kwikhot (Pty) Ltd*** (2013) 34 *ILJ* 2024 (LC [24], [25]

in conflict with or derogates from the terms of the agreement. In terms of section 5 (4)(b) of the Public Service Act, 1994, any act by any functionary in terms of the Act may not be contrary to the provisions of any collective agreement concluded by a bargaining council established in terms of the said Act for the public service as a whole or for a particular sector in the public service

18 Section 199 of the Labour Relations Act provides as follows:

> *199. Contracts of employment may not disregard or waive collective agreements or arbitration awards.*
>
> *(1) A contract of employment, whether concluded before or after the coming into operation of any applicable collective agreement or arbitration award, may not –*
>
> *(a) Permit an employee to be paid remuneration that is less than that prescribed by that collective agreement or arbitration award;*
>
> *(b) **Permit an employee to be treated in a manner, or to be granted any benefit, that is less favourable than that prescribed by that collective agreement or arbitration award; or***
>
> ***(c) Waive the application of any provision of that collective agreement or arbitration award**.*
>
> *(2) A provision in any contract that purports to permit or grant any payment, treatment, benefit, waiver or exclusion prohibited by subsection (1) is invalid.*

19 It is self-evident that the provisions of R 3/1999 expressly provide that on **retirement** of an employee, the employer shall meet, at the employee's request, the **reasonable actual costs of resettlement** of the employee and his or her family **within South Africa**[14].

20 Neither the Minister of Public Service and Administration nor the respondent as employer may disregard or waive the provisions of R 3/1999[15]

21 The applicant, an employee at the time had retired and requested the employer / respondent to pay R 94 000.00, being the lowest of three removal quotes, as and for his resettlement costs from the Kruger National Park, Skukuza to Mtunzini KZN. The parties agreed that R 94 000.00 was the actual cost of resettlement. This quote was the lowest of three quotes obtained and there is nothing to suggest that this cost is not reasonable. In the circumstances all the requirements of Clause 5.1 and 5.2 of R 3/1999 are met and the respondent in failing to pay the actual cost of resettlement R 94 000.00 and offering a payment of R 17 797.00 has not applied R 3/1999 and has acted contrary to its provisions.

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[14] Note that where a collective agreement has been **applied correctly,** the Bargaining Council does not have jurisdiction to decide whether this is unfair *Department of the Premier, Western Cape v Plaatjies NO & others* (2013) 34 *ILJ* 2876 (LC) per Steenkamp J Par [46]-[47]

[15] See sections 5 (6)(a), 5 (6)(b) and 5 (4)(b) of the Public Service Act, 1994 and Section 199 of the Labour Relations Act, 66 of 1995

22 I find that R 3/1999 interpreted and applied correctly requires the respondent to pay the applicant's reasonable and actual costs of resettlement from the Kruger National Park, Skukuza to Mtunzini KZN and that the reasonable and actual costs of resettlement is R 94 000.00

23 In the circumstances I find that the respondent has failed to interpret and apply the provisions of Resolution 3/2009 correctly in offering the applicant the amount of R 17 797.00 and not R 94 000.00 for the actual costs of his resettlement from the Kruger National Park, Skukuza to Mtunzini KZN. I make the following award.

AWARD

24 The applicant, Edgar Henry Dekker, is entitled to payment of the amount of R 94 000.00 being the reasonable and actual costs of resettlement, from the Kruger National Park, Skukuza to Mtunzini KZN.

25 The respondent, The Department of Agriculture, Rural Development and Land Reform, is ordered to pay the applicant the amount of R 94 000.00 within 14 days of date of this award.

John Cheere Robertson
PSCBC Panelist