



# ARBITRATION AWARD

Panelist: Q.S Mazibuko  
Case No.: GPBC 1351/2020  
Date of Award: 13 April 2022

**In the ARBITRATION between:**

***Psa obo M.A Reid and one other***

(Union / Applicant)

And

***Department of Sports, Arts and Culture***

(Respondent)

**Union/Applicant's representative:** Mr Francois Clark

Union/Applicant's address:

Telephone:

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**Respondent's representative:** Mr Fallang Mosenene

Respondent's address:

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Telephone:

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## ARBITRATION AWARD

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### DETAILS OF HEARING AND REPRESENTATION

- [1] This matter was scheduled for arbitration on Zoom platform, on the following dates 19 August 2021, 20 September 2021, 01 October 2021, 15 November 2021, 16 November 2021, 14 February 2022 and on the 01 April 2022, both parties presented their oral closing arguments. The employer was represented by Mr Fallang Mosenene and the applicants were represented by Mr Francois Clarck an official of PSA union. The matter postponed for several times as the respondents attempted to engage with applicants in different ways to find a settlement for this matter. The main applicant Mr Malcom Reid was not present in the arbitration proceedings all the dates except the 14 February 2022 when he gave his testimony, as the applicant representative alleged that he was admitted in hospital. Proceedings of arbitration were digitally recorded.

### ISSUE TO BE DECIDED

- [2] Whether the alleged unfair labour practice effected on the Applicants, constituted an unfair act/conduct as contemplated in **Section 186(2)(a)** of the **Labour Relations Act, 66 of 1995** ("the LRA") in related to **Benefits** and also whether applicants qualified for pay progression for circle 2016/2017 and 2017/2018 as per EPMDS

### BACKGROUND TO THE MATTER

- [3] It is a common cause that both applicants are employed by the respondent and currently they are in position of Clerical Assistant (SL3). Both of them were on various contract of employment, since 24 February 2014 until being appointed permanently on the 01 December 2018.

- [4] It is common cause that both applicants declared a dispute in terms of section 186(2)(a) of LRA, relating to benefits as so determined in the respondent, policy on Employee Performance Management and Development System(EPMDS). The employees were assessed in terms of the EPMDS policy and it is not in dispute in terms of assessment, as they are qualified per their ratings. The applicants did lodge an appeal in terms of provincial EPMDS policy 2018, to the employer. It is a fact that this matter was also in an appeal committee of the respondent giving it attention.
- [5] It is common cause that the respondent made a proposal for possible agreement but parties did not agree, on certain issues of quantum from both parties as well as the compensation which applicants requested. Therefore arbitration was reverted back to conciliation process parties did not agree with each other then arbitration had to proceed as it planned. It is also common cause that respondent alerted the arbitration that the matter of applicants is also before their DMC committee, dealing with pay progressions of other employees as well as applicants also.
- [6] This is an **arbitration award with brief reasons** as contemplated in section 138(7)(a) of the Labour Relations Act, 1995.

#### **SURVEY OF EVIDENCE AND ARGUMENT**

- [7] Both parties were afforded the opportunity to present opening statements, calling witness and submit oral closing arguments. The applicant Mrs Nonthuthuzelo Bili, testified on her own behalf , and Mr malcom Reid testified on his behalf. The respondent called Ms O. Mothelesi (EPMDS Manager) to come and give clarity, as she was not under an oath on behalf of the employer about the progress of the internal case of the same applicants of pay progression.
- [8] The applicants representative Mr Clarck, presented his two evidence bundle of

documents and they were admitted to be utilized in the arbitration process and the first bundle was named 'applicants bundle one from page 1 to 291' and 'applicants bundle two from page 1 to 38' and the respondent did not present any bundle but highlighted that they will also rely on applicants bundle in the proceedings.

### **The Applicant Case**

**The evidence of Mrs Nonthuthuzelo Sherline Bili(other applicant) testified under an oath as follows:**

- [10] Mrs Nontuthuzelo Bili, she is currently employed by respondent and holding a position of Clerical Assistant, she testified that she did participate in the performance management and she therefore read in record page 234 on applicants bundle one. She therefore testified that , she was assessed from during circle of 2014/2015. She then reads on record as she gave her evidence in chief on page 232, the EPMDS policy and also page 285 , points a, b and c as well as page 33, and 31. She further testified that the respondent denied her benefits in terms of pay progression of 2017/2018 circle as well. She testified that if she did not challenge the employer about her pay progression about the grievance she made she would have not being given attention by the respondent about her pay progression.
- [11] She further testified, that the intention of the employer was very deliberately by not implementing her pay progression of the circle 2014/2015 and also the circle 2017/2018. She testified that, she suffered a lot financial as she was prejudiced by the employer about her incentives. she suffered a lot in relation to her pension contributions and also in annual increment and her living costs were also affected by the resistance of the employer to adjust her pay progression.
- [12] She elaborated more about how the respondent, especially in EPMDS section by denying her benefits without providing adequate reasons as she referred to page 37, highlighting that she was approved and rated 100% rating , for pay progression. She

testified that, she was told that she is the first participant and she did not qualify for pay progression and there was an investigation taking place to determine if she is eligible to get pay progression. She further gave evidence that, she did not received any report from the employer about so called investigation which she was told about, by the employer. She then testified that on her cross examination, that she did get paid by the employer every month, but that salary was never adjusted due to her outstanding of pay progression. She testified that she suffered a lot as pay progression should have improved her live and financial status. She was then asked if she knows how EPMDS process works, she then replied by saying she is not an expert to say EPMDS itself its a process on its own. She then, confirmed that she got 100% ratings which means she qualifies for circle 2017 /2018, and confirmed that page 176 it was for circle 2017/2018. She further elaborated that, it is now on the 16 November 2021, receiving the outcomes of pay progression from Ms Mothelesi of 2017/2018. She was then asked about page 22 and she confirmed that its a grievance which was lodged by her and she became aware on the 7 October 2019 about her pay progression. She was asked about the outcomes of 2016/2017, she said she was told that she is the first participant and due to her new appointment which was effected on the 01 March 2016, she is automatically not qualifying for the pay progression for that particular circle. She then, confirmed when asked that she is sure that she is also qualifying for the circle 2016/2017 even though she was appointed permanent on the 01 march 2016. She also testified on cross examination that she is aware of the settlement agreement proposal by the employer and they rejected it as it was incorrect because of its calculations from the employer. She also confirmed that, she was upgraded to level 3 but she is not sure about the date as it might happens that it is 01 august 2016.

- [13] She testified that she concluded her assessment for that circle of 2016 and she did qualify as her ratings were also 100% and confirmed that she is eligible for pay progression for that particular circle. She testified that normally the policy says you qualify after 24 months period. She then, confirmed that she is qualifying for period

of 2016/2017 circle, for pay progression despite the fact that she was appointed in the 01 August 2016. She then says, the years which are in dispute is 2016/2017 and 2017/2018 and its a dispute of benefit not interest. She was then re-examined, and she alluded that she did qualify for the circle of 2016/2017 and circle of 2017/2018 and she do understand that on the 01 August 2016, she was upgraded to level 3 from level 2. She also believes that even though she was upgraded she qualifies because she was robbed her rightfully incentives by the respondent.

### **The Applicant case**

**The evidence of Mr Malcom Reid ( Main applicant) testified under an oath as follows:**

- [14] Mr Malcom Reid, he is a Clerical Assistant in the employment of the respondent, he testified as follows giving his evidence in chief, that he was denied a pay progression for EPDMS for circle 2016/2017 and 2017/2018. He testified, that he complied with the EPDMS policy and he was assessed in terms of this policy and he qualified. He further says he did not received any pay progression, since he was employed in the department. He testified, that there is no indication of any record of employment that he received any pay progression. He testified , that on page 53 its his assessment on EPDMS and he rated 100% that made him to qualify for pay progression and it has not been implemented by the respondent. He further says, the omission of the employer was deliberately by not paying him, his incentives. He testified, he even suffered a lot in his finances due to the reason that employer hesitated to adjust his salary as per pay progression concerned. He then, submitted his grievance after realizing that employer he is not implementing to pay his incentives and his grievance was not resolved. On cross- examination, he testified that his salary was not correct because his pay progression was not adjusted as required by the employer. He confirmed that he was getting his salary every month but it was not adjusted as it supposed. He confirmed that, indeed the employer was contributing to his pensions and also towards his medical aid. He further, testified that he became aware on the 7 October 2019 about the omission or unfair labour practice on the said date. He

further says , he submitted his grievance on the date he became aware of it .

### **THE RESPONDENT'S CASE**

***The evidence of Mrs O Mothelesi (EPDMS Human Resource Developing Manager) was not under an oath she just gave clarity on the progress of the employer with the current matter.***

[15] Respondent, called Mrs Mothelesi, who gave clarity as follows, that employer went to the employment record of both applicants and employees were on various temporary contracts at level 02 until the employer appointed them permanently on 01 August 2016, both applicants were upgraded to Salary level 3. Employer could not give them the pay progression for the circle 2016/2017 as it falls away as per EPDMS policy, after being promoted . She further alluded, that the employees were qualifying for the circle 2017/2018. Ms Mothelesi further clarified that the employer is aware of its omission and is on its process to rectify the omission.

### **ARGUMENTS (Applicants)**

[16] The applicants submitted that in their arguments, that unfair labour practice relating to benefits is proven in this instance, the respondent is not in disputing the fact neither Mr M.E Reid or Mrs NS Bili has qualified for pay progression which they were eligible to have received in two years ago on 1 July 2018, due to having a score rating of 100% – performance effective, but they were deprived for no reason and or explanations, had they not submitted a grievance in this regard it would have just been kept for them, denied as part of their benefits as employees.

[17] Its furthermore that, the respondent is hiding behind its failure to comply with its own policies, in this case the Northern Cape Provincial Administration -- Policy on Employee Performance Management and development Systems (EPDMS) April 2016 and April 2018, to prejudice the applicants. An employee bringing a claim under



section 186(2)(a) of LRA, merely needs to demonstrate that a dispute payment or practice exists in the workplace and that the entitlement is rooted in a contract, legislation, discretionary advantage or privilege and was unfairly denied to him/her. In this instance the pay progression for 2016/2017 and 2017/2018 EPDMS performance circles were unfairly denied to applicants.

[18] It humbly requests from applicants that, a ruling on the inconsistency biased and unfair manner in which the respondent has violated the implementation of its own EPDMS Policy, Policy o Employee Performance Management and Development (EPDMS) April 2016 and April 2018. The conduct of the respondent deviating from the EPDMS policy does indeed constitute an unfair labour practice.

[19] It is the applicants submission that, the conduct of the respondent was unfair in not paying the applicants their pay progression on all reasons mentioned in the evidence that was led and arguments.

[20] During the testimony this has caused a certain degree of hardship, disappointment and hurt to the applicants and thus they have made a prayer that , I may decide in their favour to grant additionally to my own discretion compensation for them having endured humiliation at the hand of the employer, which no rationale for the act and omission was provided, and that such actions which is arbitrary and capricious must not to those of authority whom presided over such decision.

### **Respondent (Argument)**

[21] Applicants were assessed in terms of EPDMS policy of 2018 for the periods in dispute. A dispute was lodged by applicants and grievances does not stipulates date or the year they became aware of the omission. The dispute was referred before the internal process could be exhausted. Both applicants decide to take the matter outside without ensuring that internal processes are fully exhausted in terms of

EPDMS policy. It is the contention of the respondent that the matter was receiving full attention despite the fact that it took long time to be concluded or get to the finality of its. As the respondent stated, in many sittings of the arbitration that the employer became aware of the matter and noting that more grievances of similar nature were being lodged, therefore employer decided to pro act and check everyone who was initially on contract prior to absorption of whether they were prejudiced or not. It must be understood that this had to be tedious exercise as the respondent had to refer back previous financial years. Initially intention of the employer was to settle the matter whereby the applicants representative agreed to the proposal but later he objects it.

[22] To rectify this error was not an easy process as it requested time as well as accuracy as this had affected almost 78 employees within the department and other 29 additional officials.

[23] Under the cross examination Ms Bili, indicated that she does qualify for pay progression, furthermore, she emphasized on having lost much and suffered financial loss of which to the employer is a bit weird, on how the applicant suffered financial loss yet she was in agreement that she was always been receiving her full salary, employer also contributing towards her medical aid and pension. The merely exception was that, her pay progression or notch was not adjusted of which that did not impact on her financial.

[24] Mr Reid on, cross examination could not elaborate on when asked about the date he became aware of the omission as it is not stated in his grievance. It is furthermore, noted that the applicant confirmed that he is still receiving his full salary, medical aid and pension contributions. This testimony attest to the respondent previous objections to the fact that the applicants never suffered any financial, except the fact that their notches were not adjusted accordingly.

- [25] Testimony of Ms Mothelesi, clarified issues that were put on record that the applicants cannot claim a pay progression for circle 2016/2017 as during that year on 01 August 2017, the applicants were promoted or upgraded from level 2 to level 3 of which the employer policy emphasized that on paragraph 11.5 of EPDMS policy that “ an employee shall not qualify for any performance financial rewards for the financial year promoted”.
- [26] It is not in dispute that the applicants were assessed and also found that they have complied with EPDMS policy, however it should be noted with careful considerations that in terms of their change of nature of their appointment from contract to permanent employment they are not qualifying for circle 2016/2017. It is to be noted that this matter was not left unattended however, it was discovered that the disputes actually is affecting almost 78 other employees as well hence employer decided to address the matter holistically. It is not true that the employer was ignoring the dispute, the dispute was receiving full attention, simply the delay was that accurate and proper calculations had to be made and also taking into considerations the employees affected.
- [27] In conclusion respondent, humbly request that his evidence to be considered for the following reasons, the applicants dispute of pay progression has been implemented, notches and pension contributions were adjusted accordingly and monies were paid into the banks account of both applicants on the 21 February 2022. Also to dismiss / set aside request of circle 2016/2017 as the the employees were upgraded therefore could not qualify for pay progression in terms of EPDMS policy. The relief of compensation sought by an employee be dismissed as the applicants had never suffered any financial loss and their pay progression had since been implemented accordingly by paying money into their bank accounts. Issue of compensation will be a double jeopardy as the matter should be dismissed and struck off roll. The nature of business, of the respondent is to serve people of the Republic and not to be a

profit making entity.

## **ANALYSIS OF EVIDENCE AND ARGUMENT**

- [28] The ***South African Constitution, Act 109 of 1996*** in **Section 23(1)** pledges to everyone the “*right to fair labour practices*”. In the employment context, this constitutional right is narrowed down in **Section 185(b)** of the ***Labour Relations Act, 66 of 1995*** (“the LRA”). This particular section in the LRA unequivocally guarantees that “*every employee has the right not to be subjected unfair labour practice*”.
- [29] It is trite law that he/she who alleges unfair labour practice must prove. The Applicants party in this matter alleged that the Respondent’s failure to pay, pay progression constituted unfair labour practice relating to the benefit as contemplated by the provisions of Section 186(2)(a) of the LRA.
- [30] As the onus rests upon both applicants proved their case on a balanced of probabilities that the employer had committed an omission by not implementing their pay progressions of the circle 2016/2017 and 2017/2018. After i heard this matter which was in front of me the applicants could not convince me that indeed, the employer must pay them the pay progression of circle 2016/2017. They just said that an employee is qualified after completing twenty four months as per the employer policy but it they did not highlighted to me where in the EPDMS saying so, if the employee has been promoted he / she is still qualifying for the pay progression as the employer did that in EPDMS policy in clause 11.5 it is stating that “ employee shall not qualify for any performance financial rewards if the employee has been promoted or upgraded in the same financial year”<sup>1</sup>.

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<sup>1</sup> EPDMS POLICY(2018) Employee Performance Management and Development System

[31] Indeed the employer committed an unfair labour practice on circle 2017/2018, and the employer had shown remorse on his actions that he wanted to fix his department and he clarified further that he wanted to settle this matter, but both parties did not agree on certain terms especially about the calculations as well as the issue of compensation. It is also noted that the employer is not in dispute with the fact that both applicants were assessed and qualified as per the EPDMS policy.

[32] Applicants both of them stated that they suffered financially due to the failure of employer to adjust their salaries and that had affected them in their living costs and also had a bad impact towards their pension contributions and also feeling the humiliation from the employer. The employer then argued that applicants did not suffered any financial constraints as they received their full salaries and medical aid as well as pension contributions every month. I am therefore persuaded that both applicants suffered an unfair labour practice and were financially prejudiced by the employer.

[33] The employer as highlighted that he was busy with this matter internal and finally has finalized this matter of both applicants by making an assurance that he implement the pay progression and adjusting their salaries, by paying both applicants on the 21 February 2022, an amount of R13041,50 per person in their bank accounts. This money which was paid by the employer is for the circle 2017/2018.

[34] Respondent raised an issue of double jeopardy if applicants may be granted a compensation as their are receiving full salaries and other benefits such as medical aid and pensions. In my view employer committed an unfair labour practice and the applicants were humiliated and their constitutional rights in terms of section 23(1) of the Constitution of the Republic,<sup>2</sup> were violated by the employer as it provides clear that everyone has a right to fair labour practices. I therefore carefully consider that

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<sup>2</sup> Constitution of the Republic of South Africa,1996

employer is aware and attempting to fix his house to other employees who are affected by this pay progression issue in terms of EPDMS policy, but this does not cease me to compensate the applicants in this matter.

## REMEDY

[35] It is instructive to note that the Labour Appeal court, said in **ARB electrical Wholesalers (PTY) Ltd v Hibbert**<sup>3</sup> “The compensation that an employee, who has been unfairly dismissed or subjected to an unfair labour practice, may be awarded is not aimed at making good patrimonial loss may play a role evince the impact of the wrong upon the employee and thus assists towards the determination of appropriate compensation, but compensation under LRA is a statutory compensation and must not be confused with a claim for damages under common law or a claim for breach of contract or claim in delict. Hence, there is no need for an employee to prove any loss when seeking a compensatory relief under LRA. Compensatory relief in terms of LRA is not strictly a payment for the loss of job or the unfair labour practice but in fact a monetary relief for the injured feeling and humiliation that the employee had suffered at the hands of the employer. Put differently, it is a payment for the impairment of the employee's dignity. This monetary relief is referred to as a solatium and it constitutes solace to provide satisfaction to an employee who's constitution protected right to fair labour practice has been violated. The solatium must be seen as monetary offering or pacifier to satisfy the hurt feeling of the employee while at the same time penalizing the employer. It is not however a token amount hence the need for it to be just and equitable and to this end salary is used as one of the tools to determine “what is just and equitable”.

[36] In **Minister of Justice & Constitutional Development V Tshinga**<sup>4</sup>, This Court in an award of solatium referred to a delictual claim made under actio iniuriarum for guidance in what would constitute just and equitable compensation for

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<sup>3</sup> [2015] 36 ILJ 2989 (LAC)

<sup>4</sup> 2009 9 BLLR 862 (LAC)

non-patrimonial loss in the context of an unfair labour practice.

[37] I therefore being guided by the section 193(4) of LRA, which states that an arbitrator appointed in terms of this Act may determine any unfair labour practice dispute referred to the arbitrator, on terms that the arbitrator deems reasonable, which may include ordering reinstatement, re-employment or compensation<sup>5</sup>.

[38] Section 194(4) of LRA, states that the compensation awarded to an employee in respect of an unfair labour practice must be just and equitable in all the circumstances, but not more than the equivalent of 12 months remuneration<sup>6</sup>.

[39] In my view the applicants both of them were financially prejudiced and their constitutional rights were violated at the hands of the employer and they qualify to be compensated as they were treated unfairly by the employer.

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<sup>5</sup> Labour Relations act, 66 of 1995

<sup>6</sup> Labour Relations Act, 66 of 1995

## **AWARD**

[40] In the premises i make the following order:

**[a] There was unfair labour practice effected on the Applicants.**

**[b] I therefore set aside the circle of 2016/2017 pay progression, as the applicants were promoted from level 2 to level 3 as per their EPDMS Policy on paragraph 11.5.**

**[c] The respondents must pay each of the applicants a compensation of 3 (three) months of their salaries an amount of R39 124.50 and this amount is subjected to tax as per employer policy to be adhered to. This amount must be paid in their banking accounts before the 25 May 2022.**

**[d] The period of circle 2017/2018 has been paid by the respondent on the 21 February 2022, an amount of R13041,52 per applicant in their banking accounts as per the proof submitted during the arbitration.**

**[e] There is no costs , as to order.**

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**Name: Qinumuzi Samson Mazibuko**

**(GPSSBC) Arbitrator**