



IN THE GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL

Held in Centurion

Commissioner: Elaine Moleko

Case No.: GPBC 326/2020

Date of Award: 17 August 2020

In the Dispute between:

THINAVHUYO MUDAU

(Union/Applicant)

and

DEPARTMENT OF AGRICULTURE, LAND REFORM AND RURAL DEVELOPMENT

(Respondent)

Applicant's representative: Mathavha Mulisa

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Respondent's representative: Njabulo Nsele

Respondent's address: 20 Steve Biko Arcadia

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PARTICULARS OF PROCEEDINGS AND REPRESENTATION

1. This matter was enrolled for arbitration in terms of section 191(5) (a) (iv) of the Labour Relations Act 66 of 1995 and was heard at the offices of the General Public Sector Services Bargaining Council ("GPSSBC") in Centurion on 24 July 2020.
2. The Applicant, Thinavhuyo Mudau, was represented by Mathavha Mulisa, a Legal Representative, while the Respondent, Department of Agriculture, Land Reform and Rural Development, and was represented by Njabulo Nsele.
3. The hearing was conducted in English and was recorded.

THE ISSUE IN DISPUTE

4. I am required to determine whether the Respondent conduct constituted an unfair labour practice towards the Applicant or not.

BACKGROUND TO THE ISSUE

5. The Applicant, Thinavhuyo Mudau commenced employment with the Respondent on December 2011 as an Agricultural Food and Quarantine Technician at Level 7. He submitted that his position should be translated to a higher grade as the collective agreement authorizes, that is, Resolution 3 of 2009. The Applicant relied on the fact that his colleague, a Senior Agricultural Food and Quarantine Technician was successfully translated he got compensation thereafter.
6. The Applicant lodged a grievance but it was never entertained instead he was advised to declare a dispute to the GPSSBC.
7. Both parties exchanged bundle of documents which were marked as bundle 'A' for the Applicant and bundle 'R' for the Respondent.

SURVEY OF EVIDENCE AND ARGUMENTS

The Applicant's version

8. The Applicant testified that he is a qualified scientist who acquired a Bachelor of Agriculture in Science and has Honors Degree in Agriculture where he specialized in Plant Protection. He also submitted registration certificate from South African Council of Natural Scientific Professional ("SACNASP").
9. He started working for the Respondent in 2011 as an Agricultural Food and Quarantine Technician and refer to bundle Page 45 for his appointment letter.
10. He testified that he left the employment of the Respondent in April 2013 when he was promoted to National Department of Agriculture as an Agricultural Training Officer at Level 8.



11. The Applicant testified that during his time at the Respondent, he reported directly to Mr. Ernest Ndwambi, who was working as a Senior Agricultural Food and Quarantine Technician at the time. He stated that they performed the same functions with Mr. Ernest Ndwambi although Mr. Ndwambi was his supervisor.
12. He submitted that after Mr. Ndwambi declared a dispute, an award by an arbitrator ordered that his position be translated, and the Respondent complied and implemented the award fully.
13. He further testified that he expected the Respondent to have translated his position at that time but his was never translated. He submitted that his colleague was compensate money retrospectively. He lodged a grievance for not being translated but he was never afforded an opportunity to state his case.
14. He was advised by Njabulo Nsele that he should declare a dispute to the GPSSBC for his complain decided by an Arbitrator.
15. The Applicant testified that he felt unfairly treated by the Respondent who translated only one position within his department while the Resolution authorized his position to also be translated.
16. He testified that he is a qualified scientist and that he and his supervisor performed the same duties and functions.
17. He submitted an award for case GPBC 3060/2016 which was in favor of his former colleague, Mr. Ernest Ndwambi. He reiterated the fact that the Arbitrator make the correct findings and that his decision was correct, the Respondent never challenged or reviewed the award instead they fully implemented the award immediately.
18. He further testified that Resolution 3 was developed as a Retention strategy of all the scientist because the job of scientist is regarded as a scarce skills within the Agriculture Department. Another reason was because the department was losing a huge number of scientist to the Private Sector, hence the Resolution 3 of 2009 was concluded.
19. He stated the Resolution 3 of 2009 qualifies every scientist to be translated, meaning that scientists' positions had to be graded higher in order for them to be paid a competitive salary.
20. He further submitted that an Annexure B is a document that outlines a job profile of a scientist after the job had been translated, therefore such a document cannot be relevant to him currently because his job has never been translated.
21. He referred to a second award on case GPBC 344/2015 where NEHAWU acted on behalf of its members, this award also ruled in favor of his other colleagues who were scientists within the department.
22. In the award the commissioner ordered the Respondent to translate Messer's. LG Rudzani, KC Brandt, JD Kekana and Boshomane's positions. He stated that some of them were translated even after they left the Department but were paid a monetary compensation by the Respondent.
23. All this employees were scientists and were holding the same job title as the Applicant and he failed to understand why it is a problem to translate his position but not others.



24. He submitted that the Respondent formed a Task Team to select scientist who should be translated but the Labour Appeal court decision disapproved that committee because it was unfairly discriminated other deserving scientists.
25. During the cross- examination he was asked if NEHAWU's award was implemented and he agreed that his colleagues informed him that they were translated and also compensated.
26. He was asked to read a page 26 of a collective agreement, under heading "Appointment Requirements" and answer who does that process apply to, and he responded that it applies to all those who will be appointed after 2009. He further stated that when his position was advertised, page 26 was never followed which makes that clause not applicable to him.
27. He was further asked if he understand page 29, paragraph 13 of the Resolution which authorizes a once- off compensation to only those who were employed prior 2009 and he respondent that he was appointed in terms of 2009 process because the employer did not implement the requirements of Resolution 3 of 2009 at the time of his employment.
28. He was asked if it is wrong for the Department to appoint a person who is over- qualified into a lower position and he said there is nothing wrong in that. A version was then put to him that this applies in his case and he responded that he is a scientist he deserve to also be translated and be compensated as all the other scientist.
29. He was asked if he performed the job of a scientist and he agreed. He was further asked from which laboratory was he operating from and he stated that he worked at the Port of Cape Town laboratory.
30. A version was then put to him that he was lying there is no laboratory at the Port of Cape Town and he denied it and stated that there is no way that the shipped food can be allowed in the country without first being quarantined and tested.
31. He was asked to explain what they were testing in the lab and he mentioned that foreign substance, species in the food before they can be allowed in the country.
32. He was taken to page 25 of Annexure B and was told that his position had to meet the requirement of page 25 before it can be translated and he responded that all those Key Performance Areas appearing in the Annexure B, is to align a job after a position was translated but cannot be used to a position before it is translated. He further responded that if all those requirements applied to Mr. Ernest Ndwambi then it means they also applies to him because they performed the same job.
33. He was asked to point out if he is performing any of the key activities that appears in the job role of a scientist on page 25 of Annexure B and he pointed three activities that he performed.
34. He was asked why was he registered with a body of scientist and he responded that because he is a scientist and pointed to his qualifications.
35. He was further asked to mention the requirements that a scientist must meet before they can be registered as scientist and he responded that it will be proper if the Respondent can source such information from the SACNASP which is a registration body.



36. A version was put to him that as his position is a technician he is not a scientist because his position is regulated by the legislation and scientists are not regulated by any legislation and he responded that he is a scientist and for that he is performing the job of a scientist. He further explained that the all position are regulated by various legislations.
37. During reexamination he was asked if his appointment followed the requirement of the Resolution 3 of 2009 and he denied.

The Respondent Version

38. The Respondent representative, Njabulo Nsele, demanded to go to lunch at the time he had to lead evidence. After the arbitrator made a ruling and denied parties to take lunch break, he chose to abandon the matter and walked out of the hearing. The hearing proceeded and was concluded in his absence.

ANALYSIS OF EVIDENCE

39. The purpose of the agreement was to give effect to clause 4.1.4.3.3 of the PSCBC Resolution 1 of 2007 in providing an Occupational Specific Dispensation ("OSD") for Quantity Surveyors, Professional Surveyors, Architects, Town and Regional Planners, GIS's Professionals and Scientists. The objectives of Resolution 1 of 2007 concluded at PSCBC amongst others was to revise salary structures as per identified occupants to cater for career pathing, pay progression, pay progression, grade progression, seniority, increased competencies and performance with a view of attracting and retaining professionals and other specialists. Furthermore, to replace the Scarce Skills Framework for the public service with introduction of the revised salary structures.
40. When Resolution 3 of 2009 was concluded in this Council, the aim was to give effect to the PSCBC Resolution 1 of 2007.
41. Clause 13 of the Resolution 3 of 2009 provides for the translation measures. In clause 13.1 the Resolution provides that employees will be translated to appropriate posts and salary grades in accordance with the posts that they occupy at the time of translation (1 July 2009). In terms of clause 13.2.2 translation will be done in three phases, which are, Phase 1 up to and including Phase 3.
42. Clause 13.2.3 and 13.2.4 identifies categories of the employees concerned as Quantity Surveyor and those in the related work stream that were permanently appointed and have been performing the duties of the post satisfactorily as at 30 June 2009.
43. In order to resolve the dispute before I should be guided by the provision of the Resolution as to whether the position in which the Applicant was appointed in was identified as one of those that needs to be translated.
44. It appears that the Applicant occupational category is listed in clause 3.1.4.6. of the Resolution 3 of 2009 as one of the occupations that has to be translated..
45. The Applicant testified that he was a scientist and that he was performing the duties of the post satisfactorily. He also testified and has proven with a registration certificate that he is registered with South African Council of Natural Scientific Professional ("SACNASP").



46. According to the Oxford Dictionary South African (3rd edition) a scientist is a person who has expert knowledge of one or more of the natural or physical science. In this instance the Applicant testified that he was involved in food testing at the laboratory and quarantining them prior to them being authorized entry into the land, he was performing a research as part of his responsibilities.
47. Unless proven otherwise, I have confidence that the Applicant was performing a job of a scientist which is in line with clause 3.1.4.6 and 5.1.1 of Resolution 3 of 2009.
48. The Respondent failed drearily to prove why it was fair to exclude the Applicant when they translated all other positions similar to that of the Applicant.
49. The Applicant's version that the Labour Court and the two Arbitration awards ruled in favor of the employees who were in similar positions as his was never disputed.
50. The issue before me is not to determine whether the Applicant is a scientist or not, but to determine whether the conduct of the Respondent constituted an unfair labour practice when they translated other jobs similar to the Applicant but not his.
51. The Respondent confirmed on record that they implemented an award in favor of Mr. Ernest Ndwambi. According to the evidence presented Mr. Ndwambi was a supervisor of the Applicant who performed similar responsibilities and duties as the Applicant. I see no reason why would the position occupied by the Applicant should be excluded.
52. On perusing a collective agreement, it stipulate that all the listed occupational categories must be translated and the Applicant occupation is one of those on the list. A claim by the Respondent that the Applicant is not a scientist has failed the test as the Applicant has successfully proven that he is a registered with a Council of Scientists and is performing the duties of a scientist satisfactorily.
53. The Respondent alleged that the Commissioner in the case of Ernest Ndwambi committed an error by ruling in favor of Ernest Ndwambi. But there was no evidence to prove what the error was or how was an error committed.
54. The Responded confirmed that the award of Ernest Ndwambi was not reviewed, it is baffling my mind as to why would they not challenge an award where they know and can prove that the commissioner committed an error. The fact that they fully implemented the award is sufficient evidence to prove that the commissioner made a correct ruling and that the Applicant position should also be translated.
55. It is not fair to deny the Applicant to be translated on the basis of just an assumption that an award is wrong when they still proceeded and implemented it. I find the Applicant being unfairly treated by the Respondent when they translated and also processed pay progression to others but not to the Applicant.
56. I do not find it assisting the case of the Respondent when they insisted on challenging the daily duties or responsibilities of the Applicant when they are the ones who actually created, developed and approved the job profile and outputs of the Applicant. There was no evidence led to prove that Mr. Ndwambi's job profile and outputs were different to that of the Applicant, and the Respondent as the employer, is expected to be in a better position to prove this fact.

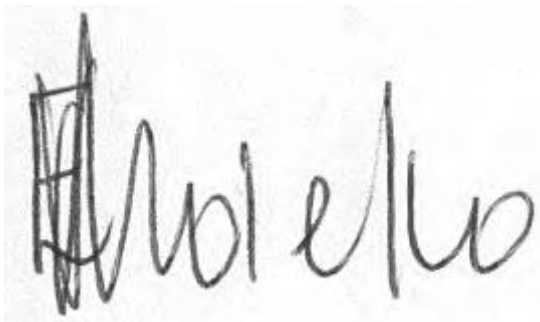


57. The Applicant was successful in proving that the Respondent conduct towards him constituted an unfair labour practice, and I am influenced by the evidence led by the Applicant in this case.

AWARD

58. The Respondent, Department of Agriculture, Land, Reform and Rural Development committed an unfair labour practice towards the Applicant, Thinavhuyo Mudau.
59. The Respondent, Department of Agriculture, Land, Reform and Rural Development is ordered to comply with clause 3.1.4.6 and 5.1.1 of Resolution 3 of 2009 and translate the Applicant as a Scientist with effect from 05 December 2011 to 30 May 2013, in terms of the translation measures.
60. The Respondent is ordered to comply with the award on or before 15 September 2020.

GPSSBC Commissioner: Ms E. Moleko



Signature: _____