



GENERAL PUBLIC SERVICE
SECTOR BARGAINING COUNCIL



Physical Address:
260 Basden Avenue,
Lyttelton, Centurion,
Pretoria

Postal Address:
PO Box 16663,
Lyttelton, 1040

Tel: 012 664 8132
Web: <http://www.gpssbc.org.za>

ARBITRATION AWARD

Panellist/s: R de Wet
Case No.: GPBC226/2020
Date of Award: 15 August 2020

In the ARBITRATION between:

PSA OBO J MANYUWA

(Union / Applicant)

and

DEPARTMENT OF AGRICULTURE, LAND REFORM AND RURAL DEVELOPMENT
(Respondent)

Union/Applicant's representative: Mr O Shiburi

Union/Applicant's address:

Telephone:

Telefax:

Respondent's representative: Mrs M Kanye

Respondent's address:

Telephone:

Telefax:

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION:

- [1]. The dispute was referred to the General Public Service Sectorial Bargaining Council (*hereinafter referred to as the "GPSSBC" or the "Council"*) in terms of section 24 of the *Labour Relations Act, 66 of 1995* as amended (*hereinafter referred to as the "LRA"*). The matter was scheduled for arbitration on 5 August 2020 at 09:00 and was held at the Offices of the Council in Centurion, Gauteng.
- [2]. The Applicant, Mr Manyuwa was present and was represented by Mr O Shiburi, Official from PSA, whilst the Respondent was initially unrepresented, however Mrs M Kanye, Senior Employee Relations Practitioner arrived at approximately 10:00.
- [3]. The Applicant handed up a bundle of documents that was marked Bundle "A". The matter was disposed of by means of testimony of Mr Manyuwa and arguments from both parties. Argument was received from the Applicant immediately after evidence was given, but the Respondent requested time to submit written heads of argument. The Applicant agreed to the request of the Respondent. I will address this point further later on in the award.

INTERLOCUTORY POINT

- [4]. At the commencement of the proceedings, it was noted that the Respondent was not in attendance. The Council accordingly contacted the Respondent to enquire as to their whereabouts. Consequently, an email was received at 09:57 from one Mmathabe Sebela that explains that the official handling the matter is attending another arbitration at Mpumalanga. Mrs Kanye arrived shortly thereafter and indicated the intention to bring an application for postponement.
- [5]. In the application she stated that she was not prepared to continue with the arbitration as she received the call to come to the Council that very same morning. She admitted that the Respondent made an error and tendered costs for the day if the postponement is granted or agreed to.
- [6]. The application was opposed.

- [7]. Having considered the facts before me, I am all but convinced that the Respondent showed good cause for the application to succeed. The notice to attend was clearly received, and no explanation was provided as to why a timeous application that, in compliance with the Rules of the Council, was not filed. The application was denied on the grounds mentioned above. Despite such, the Respondent was nevertheless afforded the opportunity to participate in the arbitration and the request to submit written heads of argument granted.
- [8]. Despite the indulgence, a request was made to grant an extension for the heads to be submitted on 14 August 2020. Albeit a request for extension was received, no heads of arguments were forthcoming from the Applicant.

ISSUE TO BE DECIDED:

- [17]. The issue in dispute pertains to the interpretation of Clause 13.2.3 of Resolution 3 of 2009 *“Agreement on the Implementation of an Occupation Specific Dispensation for Quantity Surveyors, Professional Surveyors, Architects, Town and Regional Planners, GIS Professionals and Scientists”* with reference to Scientists.

BACKGROUND TO THE MATTER:

- [9]. Mr Manyuwa was appointed in July 2005 in the position of Chief Agricultural Food and Quarantine Technician in the Directorate: South African Agricultural Food and Quarantine Inspection Services.
- [10]. The Minister approved the change in his job title in August 2009 to that of Chief Plant Health Officer within the Directorate: Plant Health.
- [11]. In August 2012, he got a promotional transfer to the post of Deputy Director: Sanitary and Phytosanitary Co-Ordination. This is the position that the Applicant is currently occupying.
- [12]. On or about 5 December 2019, Mr Manyuwa lodged a grievance arguing that according to the Occupation Specific Dispensation, his position should have been translated to OSD.
- [13]. The relevant clause in the collective agreement reads as follows:

- i). Clause 13.2.3 of Resolution 3 of 2009:

“For employees on the Quantity Surveyor and related work streams who are permanently appointed and have been performing the duties of the post satisfactorily as at 30 June 2009, but are not registered with the relevant Council upon the implementation of the OSD will as a once-off provision translate to the OSD in terms of phases 1 and 2 translation measures”.

[14]. According to the quarterly and annual performance report of the Applicant, his performance has been rated by his supervisors to be *excellent and above norm*.

[15]. Circular 5 of 2009 item 3 (x) states:

“That appointments and advertisements in the period after 1 July 2009 be dealt with on the following bases:

- *Serving employees appointed in this period not in possession of the appointment/registration requirements set in the OSD will, as a once-off implementation measure, be translated to the appropriate salary scales. The effect is that the employees will be eligible for grade progression to higher grades in the post without having to obtain the relevant qualification. However, for higher or alternative posts these employees will have to comply with the requirements of the relevant posts”.*

[16]. HRM Circular 14/2009 provides in item 4 that:

“the occupations that were included in the OSD’s that are relevant to our department are the following:

- (i).
- (ii). *Scientists (working in a research environment)*
- (iii).”

SURVEY OF EVIDENCE AND ARGUMENT:

[18]. *For purposes of this award, it is not my intention to record verbatim the submissions made by any of the parties. Only the salient points that have a bearing on the issue in dispute to be decided, are recorder hereunder.*

Evidence AND Argument

Respondent’s version:

[19]. No evidence or argument was submitted by the Respondent.

Applicant's version:

[20]. Mr Manyuwa commenced his employment with the Respondent on 4 March 2002 and is currently earning an annual salary of R801 774.00. He explained that he applied for the position when it was advertised and that he met all the requirements. He is a scientist with the required qualifications but is not registered with the Council. During the quarterly and annual performance evaluations, he was evaluated, and it was determined that his performance is satisfactory.

[21]. He is of the view that the correct interpretation of the collective agreement is that he should have translated to the OSD as from 1 July 2009.

ANALYSIS OF EVIDENCE AND ARGUMENT:

[22]. The dispute resolves around the proper interpretation of clause 13.2.3 (dealing with the Occupation Specific Dispensation for *inter alia* Scientists) of the collective agreement between the Employer and the Union/s.

Correct approach to be followed when dealing with a dispute under section 24 of the LRA

[23]. Section 24 (2) of the LRA reads if there is a dispute about the interpretation or application of a collective agreement any party to the dispute may refer the matter to the Commission or the Council in this regard.

[24]. In *Hospersa obo Tsambi v Department of Health, Kwa-Zulu Natal*¹ the Court held that section 24 of the LRA, provides for the arbitration of disputes about the “*interpretation OR application*” of collective agreements and that such section provides for a disputes resolution device or mechanism ancillary to collective bargaining, not to be used to remedy a dispute incorrectly categorized, such as for instance where the Employee was suspended without pay. The Court cautioned that the phrase “*interpretation or application*” is not to be used disjunctively. The “*enforcement*” of the terms of a Collective Agreement is a process which follows on a positive finding about “*application*”, it is not a facet of “*application*”. The Court went on to say that arbitrators must characterize a dispute objectively

¹ [2016] 7 BLLR 649 (LAC)

and should not slavishly defer to the parties' subjective characterization and a failure to do so, will constitute an irregularity.

- [25]. The Court further held that there is no need nor any justification to understand **section 24** in a sense so broad that any alleged breach of a term of a collective agreement means the dispute automatically falls within **section 24**. In the result, the arbitrator in **Hospersa** misdirected himself by not determining objectively the true dispute and had he done so he would have found that the true dispute was one contemplated by section 186(2)(b) of the LRA, and, in consequence, startlingly out of time, requiring an application for condonation.
- [26]. To that end, it is necessary to establish the relevant facts and construe the category of dispute correctly. An arbitrator must make an objective finding about what is the dispute to be determined. This Court in **Wardlaw v Supreme Mouldings (Pty) Ltd (Wardlaw)**² addressed directly the question of whether the employee's characterisation of a dispute should enjoy deference and rejected that approach. Distinguishing the formalistic school of thought from that of the substantive school of thought, this Court held that the latter should prevail. As a result, in **Wardlaw**, an arbitrator was held to have incorrectly assumed jurisdiction over a dispute that was about an automatically unfair dismissal, a category of dispute reserved for adjudication by the Labour Court. The Constitutional Court disposed of this issue in **CUSA v Tao Ying Industries and Others**³:

'A commissioner must, as the LRA requires, 'deal with the substantial merits of the dispute'. This can only be done by ascertaining the real dispute between the parties. In deciding what the real dispute between the parties is, a commissioner is not necessarily bound by what the legal representatives say the dispute is. The labels that parties attach to a dispute cannot change its underlying nature. A commissioner is required to take all the facts into consideration including the description of the nature of the dispute, the outcome requested by the union and the evidence presented during the arbitration. What must be borne in mind is that there is no provision for pleadings in the arbitration process which helps to define disputes in civil litigation. Indeed, the material that a commissioner will have prior to a hearing will consist of standard forms which record the nature of the dispute and the desired outcome. The informal nature of the arbitration process permits a commissioner to determine

² (2007) 28 ILJ 1042 (LAC)

³ (2008) 29 ILJ 2461 (CC)

what the real dispute between the parties is on a consideration of all the facts. The dispute between the parties may only emerge once all the evidence is in.'

[27]. The Court in **Hospers** further dealt with the issue of what a "dispute" is and explained that the manner in which the arbitrator goes about to recognise it, demands scrutiny. Logically, a *dispute* requires, at minimum, a difference of opinion about a question. A dispute about the interpretation of a collective agreement requires, at minimum, a difference of opinion about what a provision of the agreement means. A dispute about the application of a collective agreement requires, at minimum, a difference of opinion about whether it can be invoked.

[28]. Significantly there is no evidence before me as to what is in dispute in relation to the clause before me. It would appear that the Applicant lodged a grievance, but nothing was presented to me to show the response from the Respondent.

[28]. The Court in **Hospersa** further made it clear that there is no need nor any justification to understand section 24 in a sense so broad that any alleged breach of a term of a collective agreement means the dispute automatically falls within section 24. Having regard to the dispute before me in the context of the **Hospersa** matter, I am of the view that the dispute before me is not an interpretation or application of the collective agreement but rather an enforcement dispute as per section 33A of the LRA.

AWARD:

[29]. In light of the above, the Applicant did not establish that the dispute falls within the ambit of section 24 of the LRA.

A handwritten signature in black ink, appearing to read 'R de Wet', with a stylized flourish underneath.

Name: R de Wet
Council Arbitrator