

ARBITRATION AWARD

**IN THE GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL
HELD AT DURBAN**

Panellist/s: P JAIRAJH
Case No.: GPBC243/2019
Date of Award: 30 JUNE 2020

In the ARBITRATION between:

PSA obo P.W. KHOZA

APPLICANT

and

THE OFFICE OF THE CHIEF JUSTICE

1ST RESPONDENT

N.A. MSANE

2ND RESPONDENT

Union/Applicant's representative: MR M. SHIBE
Union/Applicant's address:
Telephone: (033) 392 7600
Telefax/e-Mail:

1ST Respondent's representative: MR D. HOLBY
Respondent's address:
Telephone: (010) 439 2658
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2ND Respondent's representative: MS N. MSANIE
Respondent's address:
Telephone: (031) 301 0104
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ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION:

- [1] The matter was scheduled for arbitration hearing at 09h00 on the 2 March 2020 at Department of Justice, 2 Devonshire Place, Durban. The applicant was represented by Mr M. Shibe from PSA, the first respondent by Mr D. Dolby and the second respondent represented herself. The proceedings were interpreted by Ms N.Z. Mdletshe. At the outset I noted the submission of the first respondent that their citation was incorrect and same should be cited as, "The Office of the Chief Justice".
- [2] The applicant lodged a dispute in respect of unfair labour practice relating to promotion. The hearing commenced and the respondent raised a point in Limine that the applicant had not exhausted all the internal processes and accordingly his referral was premature.
- [3] The parties agreed that that they will submit written Heads of Arguments in respect of the point in Limine. It was agreed that the respondent/employer will serve its Heads of Arguments on the Council and the applicant on or before 11 March 2020. The applicant/employee will serve its Heads of Argument (answering) on the Council and respondent on or before the 20 March 2020 and the respondent will serve its replying Heads of Arguments on or before the 31 March 2020.
- [4] Submissions were only received from the first respondent on the 18 March 2020. I enquired about parties' submissions and was informed by Council that they had not received any submissions but when they contacted the applicant; the applicant stated that they had emailed their submissions and same was thereafter forwarded to Council, however there were no replying submissions received from the respondent.

ISSUE TO BE DECIDED

- [5] I am to decide whether GPSSBC has the jurisdiction to hear the matter.

SURVEY OF EVIDENCE AND ARGUMENT

FIRST RESPONDENT'S SUBMISSIONS

The salient aspects of the first respondent's submissions are recorded below.

- [6] The applicant through his union filed a Grievance in terms of a Collective Agreement, PSCBC Resolution 14 of 2002, commonly referred to in the Public Service as the "grievance procedure" on the 03 October 2018.
- [7] His grievance related to his dissatisfaction about not making the shortlist for a post that had been advertised by the Respondent.
- [8] In a letter dated 08 October 2018, the applicant was furnished with a response to his grievance from the respondent's first level of supervision, Ms. M.E Ries, providing him with written reasons why he did not make the shortlist (that being that he did not meet the criteria relating to experience) and that he was to:

"Please take note that the matter has been internally exhausted, you however reserve the right to inform the Chief Director: HRM & D within 5 days, via this office, if you are not satisfied about the outcome."
- [9] The applicant acknowledged receipt on the letter by affixing his signature thereto and dating it, 10 October 2018.
- [10] The applicant did not continue to the next stage of the grievance procedure as prescribed by its rules but 112 days later filed a dispute at the GPSSBC alleging an unfair labour practice regarding promotion.
- [11] The Respondent accordingly premises its application on the binding provisions relating to the Primacy of the Collective Agreement as outlined in Sections 23 and 31 of the Labour Relations Act 66 of 1995 as amended, herein after referred to as the "LRA".
- [12] The Respondent contends that:
 - 12.1 The application before the GBSSBC is premature, as the provisions of Section 23 and 31 respectively have not been complied with, therefore the GPSSBC does not have the jurisdiction to entertain the dispute;
 - 12.2 Secondly that the Applicant be ordered in terms of the enforcement provisions of Section 33A of the LRA, to comply with the provisions of

PSCBC Resolution 14 of 2002 and complete the internal grievance procedure that he initiated 03 October 2018 through his union, the PSA.

THE LEGAL POSITION

[13] Section 23 of the LRA dealing with the "Legal effect of collective agreements" provides that (1) A collective agreement binds –

- (a) the 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 are applicable between them;
- (c) the members of a registered trade union and the employers who are members of a registered employers' organization that are party to the collective agreement if the collective agreement regulates –
 - (i) terms and conditions of employment; or
 - (ii) the conduct of the employers in relation to their employees or the conduct of the employees in relation to their employers;
- (3) Where applicable, a collective agreement varies any contract of employment between an employee and employer who are both bound by the collective agreement.

[14] Section 31 of the LRA, confirming the "Binding nature of collective agreement concluded in bargaining council" provides that:

Subject to the provisions of section 32 and the constitution of the bargaining council, a collective agreement concluded in a bargaining council 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 employers' organisation that is such a party, if the collective agreement regulates –
 - (i) terms and conditions of employment; or
 - (ii) the conduct of the employers in relation to their employees or the conduct of the employees in relation to their employers.

[15] Section 33 A, dealing with the "Enforcement of collective agreements by bargaining councils" accordingly provides that:

- (1) Despite any other provision in this Act, a bargaining council may monitor and enforce compliance with its collective agreements in terms of this section or a collective agreement concluded by the parties to the council.
- (3) A collective agreement in terms of this section may authorise a designated agent appointed in terms of section 33 to issue a compliance order requiring any person bound by that collective agreement to comply with the collective agreement within a specified period.

THE LEGAL ARGUMENT IN RELATION TO THE FACTS AND THE LAW

[16] It is the contention of the respondent party that PSCBC Resolution 14 of 2002, was entered into in order to give effect to the provisions of Section 11 of the Public Service Commission Act 46 of 1997, which empowers the Commission to make rules governing how parties are to deal with grievances.

[17] In terms thereof, the Grievance Form, (referred to as Annexure A) at Part 4, 5. 6 and 9 refers to various stages of authority being engaged during the resolution of the grievance process.

The appropriate provisions provide as follows:

- 4. It is important to complete all information accurately. When the form is completed, it must be given to the employee designated to facilitate grievances at your institution. The department will

attach this form to the grievance documentation, and it will be used through all stages of the grievance procedures.

5. At each stage where a person within the relevant structure of authority attempts to resolve the grievance, each party will complete the appropriate part of the form. You will be given an opportunity to respond to each and every comment.
6. At the conclusion of each stage of the grievance procedure, the department will provide you with a copy of the completed form.
9. Part C of the grievance form will be completed by the employer and yourself during the various stages where attempts will be made to resolve the grievance.

[18] In terms of the actual rules, Rule F3, provides that "The Designated Officer must liaise with the relevant structures of authority of the department in an attempt to resolve the grievance."

[19] It is clear therefore that the applicant, who was at all times represented by his Union, Mr. James Kamanga (a PSA shop steward), at the Labour Court, was aware or ought reasonably to have been aware that the grievance procedure has various stages of authority to which the grievance should be escalated for resolution.

[20] In any event, the grievance form clearly indicates this and so did the Respondent's letter, marked Annexure B.

[21] A reasonable inference therefore may be drawn that the applicant and his union was aware that the grievance process, was still at its infancy, given that a response from the first level of management, had only been received.

[22] The applicant was accordingly expected to complete the grievance form, and indicate within 5 days, whether he considered the respondent's reply as acceptable thereby concluding the matter, or indicating that the matter be referred to the next level of management, being the Chief Director HRM & D, substantiating why he remained dissatisfied with the written response he received from his first line of management.

- [23] The Applicant failed to conclude this process, but decided, with the assistance of his trade union, the PSA, to directly lodge a dispute 112 calendar days later, with the bargaining council, the GPSSBC on 1 February 2019.
- [24] In terms of Part 1 Item 3 of GPSSBC Resolution 3 of 2017, Rules for the Conduct of Proceedings before the GPSSBC, dealing with how to calculate time periods, according to these rules, days are defined as CALENDER days.
- [25] The referral by the applicant in this regard was also accordingly filed late and should have been subjected to a "condonation" application.
- [26] The Respondent however did not raise this point as a basis for this application but premised it on the fact that the applicant, under the assistance and advice of his union shop steward, Mr. James Kamanga, failed to comply with the binding provisions of the collective agreement, in terms of Sections 23 and 31 respectively.
- [27] Based hereon, the respondent avers that the application before the Bargaining Council is not ripe for hearing as the Bargaining Council does not enjoy the jurisdiction to entertain same until such time that the agreed upon binding provisions of the collective agreement, PSCBC Resolution 14 of 2002, have been fully exhausted.
- [28] It is the further contention of the respondent in this regard that according to the peremptory provisions of Rule F7 of the collective agreement, the internal grievance procedure will only conclude when the Executing Authority pronounces in writing, the final position of the respondent, on the matter.
- [29] It is only then, that the applicant must within 10 days of receiving the Executing Authority's response, formally in writing, inform the Executing Authority that he remains dissatisfied, in terms of Rule F9 (a) of the collective agreement and accordingly formally notifies the Executing Authority in writing that he intends pursuing the matter through the Public Service Commission in terms of Rule 9 (b).
- [30] It is only after the time lapse of 30 days in terms of Rule F8, that he may refer the matter directly in terms of Rule 11(a) to the PSC or directly to the GPSSBC in terms of Rule 11(b) if it relates to an alleged unfair labour practice.

[31] Based on the above submissions, it is the unequivocal and indisputable contention of the respondent that the applicant has dismally failed to comply with the binding provisions of the collective agreement, in that he has prematurely referred his dispute to the GPSSBC without first exhausting the peremptory internal procedures for grievance resolution as outlined in the collective agreement.

[32] In this regard refer to the position of the courts on the primacy of the collective agreements as outlined in *PSA obo N Mtembu-Tala vs The National Prosecuting Authority* in Case no: PSCB 384-17/18 before Commissioner John Robertson, who at paragraph 11 of his award, confirmed that:

"Maintaining the primacy of collective agreements is quintessential to sustaining a viable and vibrant collective bargaining system" –

quoting with authority a decision of the Labour Court in *IMATU v SALGA & - others* (D476/09) (2010) 31 ILJ at 1407 (LC)[11].

[33] It is therefore the reiterated submission of the respondent party that the Bargaining Council (the GPSSBC) does not have the requisite jurisdiction to entertain the dispute until such time that the agreed upon internal dispute resolution mechanisms agreed upon by the parties, in the collective agreement, PSCBC Resolution 14 of 2002, have indeed been fully exhausted.

APPLICANT'S SUBMISSIONS

The salient aspects of the applicant's submissions are recorded below.

[34] The applicant applied for the post of Registrars Clerk based at the Durban Labour Court, he was not shortlisted and lodged a formal grievance.

[35] The respondent's relevant authority or designated official, Ms. M.E. Ries informed the applicant that the grievance was internally exhausted. Internally means that he reserves the right to utilize any external platform that may assist in resolving the grievance. The applicant was not informed at any given stage that there were other avenues or platforms that he could utilize internally to resolve the grievance. The assertion by Ms Ries was that the applicant may inform the Chief Director but this lacks the information that would give an applicant an impression that the grievance could be resolved by the Chief Director.

- [36] After giving the applicant a response to his grievance, at no stage thereafter, the employer made the applicant and the employer's representative fill out Part C of the grievance form. Therefore applicant was not aware that the grievance could be escalated to a higher level of authority, he was only told that the grievance had been exhausted internally.
- [37] It is incorrect to state that the applicant was represented by Mr. James Kamanga. There was never a grievance meeting where the applicant was represented and the parties had deliberated on the matter. PSA was unaware that the applicant had lodged a grievance. Had there been notice of a grievance meeting with the listed rights of the aggrieved employee, including the right of representation, the applicant would then have informed his union.
- [38] The applicant should not be prejudiced by the fact that the respondent at the grievance stage failed to issue a notice of a grievance meeting; to make him to fill the part C of the grievance form and to clearly indicate that the grievance should still be dealt with at another stage or level of authority.
- [39] The applicant initiated the grievance, was given a written response without being given an opportunity to fill in Part C of the grievance form as prescribed on the PSCBC resolution 14 of 2002. The response of the respondent is silent about the other levels of authority that have powers to resolve, since the conclusion of the written response indicates that the matter is "exhausted internally".
- [40] The applicant decided to approach the PSA to declare the dispute since the respondent failed to ensure that the grievance was resolved to his satisfaction.
- [41] It will be prejudicial to the applicant if the case is not set down for arbitration, the respondent will not be prejudiced as it is their case that the applicant did not meet the minimum requirements.

ANALYSIS OF EVIDENCE AND ARGUMENT

I have considered all the arguments of the parties as well as the documentary evidence submitted.

- [42] The respondent raised a point in limine contending that the GPSSBC lacked jurisdiction, in respect of the applicant's unfair labour practice dispute regarding promotion as the applicant failed to exhaust his internal remedies before

approaching the bargaining council and as a result failed to comply with binding provisions of the collective agreement, PSCBC Resolution 14 of 2002.

[43] In terms of the Labour Relations Act, General provisions for arbitration proceedings, section 138(1) reads as follows:

“The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly but must deal with the substantial merits of the dispute with the minimum of legal formalities.”

[44] The Court in *South African Maritime Safety Authority v McKenzie* [2010] 5 BLLR 488 (SCA) (15 February 2010) at par [6] stated “When a jurisdictional challenge is raised the court must necessarily dispose of it before entering upon any further questions that arise in the case.

[45] I have noted that respondent’s assertions pertaining to the applicant’s late referral to the Bargaining Council being subjected to a condonation application however they did not raise this point as a basis for this application but premised it on the applicant’s failure to comply with the binding provisions of the collective agreement in terms of Section 523 and 31 of the LRA.

[46] In terms of the Grievance Rules for the Public Service, Rule F: Departmental Stages to Address a Grievance provides as follows:

1. An employee may lodge a grievance with an employee designated to facilitate the resolution of grievances in the department.
2. The prescribed form at Annexure A must be used when a grievance is lodged.
3. The designated employee must liaise with the relevant structures of authority of the department in an attempt to resolve the grievance.
4. The grievance may be resolved by any person within the relevant structures of authority who has the requisite authority to do so.
5. The aggrieved employee will be duly informed by the designated employee about the status and progress made towards the resolution of the grievance.

6. If the grievance is resolved to the satisfaction of the aggrieved employee the confirmation thereof will be reduced to writing by the designated employee.
7. If a grievance cannot be resolved, the executing authority must inform the aggrieved employee accordingly.
8. The department (including the executing authority) has 30 days to deal with the grievance. The period may be extended by mutual agreement in writing.
9. If after the aggrieved employee is informed of the outcome of the grievance and he/ she remains dissatisfied –
 - (a) he/ she must inform the executing authority in writing within 10 days;
 - (b) the executing authority must in terms of section 35 (1) of the Public Service Act, 1994, forward the grievance and the relevant documentation to the Public Service Commission for a recommendation within five days of being informed by the aggrieved employee.
10. If the grievance constitutes an alleged unfair labour practice as defined in the LRA, the employee may inform the executing authority in writing that he/ she wishes to utilise the dispute resolution mechanisms provided for in the constitution of the PSCBC or the relevant sectoral council (whichever is applicable) and that the Public Service Commission should therefore not consider the grievance.
11. If there is failure on the part of the department to respond to the grievance within the period referred to in clause 8, the aggrieved officer may lodge his or her grievance with –
 - (a) the Commission directly; or
 - (b) in the case of an alleged unfair labour practice, with the PSCBC or the relevant sectoral council (whichever is applicable) in terms of its dispute resolution procedure.

- [47] The respondent contended that the applicant is bound by the Resolution 14 of 2002 which contains the Grievance Rules for the Public Service and Rule F prescribes the mandatory procedure to be followed.
- [48] The respondent argues that the applicant lodged a grievance pertaining to his dissatisfaction of not being shortlisted for a particular post, to which the respondent furnished him with written reasons of him not making the shortlist. The applicant further failed to exercise his rights in terms of the Rules in Resolution 14 of 2002 and his time limits have prescribed.
- [49] The applicant contended that he was not informed that there were other avenues or platforms internally available that could resolve the grievance.
- [50] It is evident that the applicant did nothing to take his matter further in terms of the Grievance Rules for the Public Service. The respondent in this regard provided proof that the applicant was notified in a letter that his matter was internally exhausted and should he remain dissatisfied, the process he had to follow to take his matter forward, of which he acknowledged receipt.
- [51] In *Johnson v Rajah NO and Others* (JR33/15) [2017] ZALCJHB 25 (26 January 2017), the court held at par [60] “In *Kruger v Commission for Conciliation, Mediation and Arbitration and Another* (2002) 23 ILJ 2069 (LC), (2002) 11 BLLR 1081 (LC) the employee did not follow a grievance procedure as she believed that the grievance procedure was no longer an option. The Court found that employees should not second guess the outcome of lodging a complaint in terms of the employer’s grievance procedure”
- [52] In *Madondo v Safety and Security Sectoral Bargaining Council and Others* (D305/2013) [2015] ZALCD 9; (2015) 36 ILJ 2314 (LC) (28 January 2015), the court refused to come to the aid of the applicant who referred his dispute to arbitration but had failed to exhaust all the internal remedies to which he was bound in terms of a collective agreement.
- [53] I am in agreement with the respondent that the applicant has not exhausted all the internal remedies available and mandatory to him. It is apparent that the applicant must adhere to the prescribed peremptory Grievance Rules for the Public Service in respect of his grievance, as dictated to by Resolution 14 of 2002.

[54] As a consequence of the above I determine that the GPSSBC does not have the requisite jurisdiction to arbitrate the matter.

AWARD

[55] The Council does not have jurisdiction to determine the matter.

[56] There is no order as to costs.

A handwritten signature in dark ink, appearing to be 'P. Jairajh', with a stylized, cursive script.

GPSSBC Commissioner: P. Jairajh

DATED: 30 June 2020