



IN THE GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL

Held in Centurion

Commissioner: Elaine Moleko

Case No.: GPBC1605/2019

Date of Award: 07 August 2020

In the Dispute between:

POPCRU obo BJ MTSHWENI

(Union/Applicant)

and

DEPARTMENT OF CORRECTIONAL SERVICES

(Respondent)

Applicant's representative: Frank Lentsoane

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PARTICULARS OF PROCEEDINGS AND REPRESENTATION

1. This matter was enrolled for arbitration in terms of section 24 of the Labour Relations Act 66 of 1995 and was heard at the offices of the General Public Services Sector Bargaining Council (GPSSBC) in Centurion on 09 July 2020.
2. The Applicant, Babili Jacobus Mtshweni was represented by Frank Lentsoane, a Union Representative from POPCRU. The Respondent, Department of Correctional Services, was represented by Aaron Mofokeng.
3. The hearing was conducted in English and was recorded.

THE ISSUE IN DISPUTE

4. I am required to determine whether the Employer interpreted and applied Resolution 5 of 2014, which is a Collective Agreement, correctly, and if not, to determine whether the conduct of the Employer was fair or not.

BACKGROUND TO THE DISPUTE

6. The Applicant commenced employment with the Respondent on 3rd November 2002 as a Security Officer. He is currently employed by the Respondent although he is doing his articles at the State Attorney. He sought compensation as a relief.
7. Applicant party submitted documents which was accepted and labelled as Bundle 1 while the Respondent party did not submit any documents. The bundle consists of a letter of Response by the Respondent, a copy of an Agreement on Recognition of Improved Qualifications in the Public Services Resolution no 5 of 2014, copy of a Performance Agreement of the Applicant, a copy of the GPSSBC referral by the Applicant and a statement of modules passed from Unisa.

SUMMARY OF EVIDENCE AND ARGUMENT

The applicant's evidence

8. The Applicant testified that he is employed as a Security Officer on Grade 2, at Baviaanspoort. He furthered his studies and obtained LLB Degree with an intention to advance himself.
9. He submitted that part of his daily duties includes, patrolling, guard the environment day and night, escort the offenders to the hospital and court, do body search and manning the gate and post. He is a Shopsteward and had once acted as a Deputy Secretary of POPCRU.



10. He submitted that after he completed his studies, he expected to be compensated a once-off bonus of 10% of his annual salary, as per the Company policy. He took the hearing to clause 4.1.2 of the collective agreement on Recognition of Improved Qualifications within the Public Service, Resolution no 5 of 2014 (the Resolution).
11. He alleged that the Respondent failed to interpret and apply clause 4.1.2. of the Resolution when they denied him a once-off bonus and he referred to Page 13 of the Bundle 1 which is a letter of response by the Respondent.
12. He submitted that he believe that the modules in LLB qualification is in line with his daily duties because it relate to how he contributed to the safety of community and of his colleagues. He further submitted that LLB is relevant to his job as a Security Officer because it helps him to prevent escapes of offenders from prison. He stated that all the modules in the LLB Degree helps him to protect the civil litigations against the Department by the Community.
13. He stated he sees his qualification as an improved qualification as it helps him within the Department of Correctional services. He further submitted that LLB helped him to improve his performance because after he completed his studies he understood the correct handling of offenders and also how to respect to the offenders.
14. He testified that LLB must be recognized as an Improved Qualification by the Resolution because it helped his service delivery and performance to improve. The Applicant testified that LLB is related to his daily duties in that part of his duties is to decide the sanctions of the offenders and to also implement the penalty from the court. He submitted that in terms of the definition provided for in the Resolution, Improved Qualification means is a higher qualification.
15. Under cross examination the applicant was asked if LLB was a requirement in order to be employed as Security Officer and he denied.
16. Under cross examination he was asked what a requirement to become a Security Officer is and he responded that it is a Matric.
17. Under cross examination he was asked whether he followed the requirement of clause 6.4 of the Resolution and he denied.
18. He was further asked if he failed to follow clause 6.4. of the Resolution who approved him to register LLB and he submitted that it is the Head of the Centre.
19. He was requested to produce a written approval by the Head of the Centre and he submitted that it was done verbally.
20. He was referred to clause 6.5. of the Resolution which stipulated that after considering a request by an employee to study a particular qualification on approval the Head of the Centre or his delegate shall consider the employee's request for approval and provide a written feedback within one month from the date of submission of the request, and he confirmed that he did not get a written approval.
21. He was asked if he is the one who is imposing the sentence to the offenders or implementing the sentence by the court and he responded that he is contributing in implementing the sentence from the court. A version was then put to him that he is lying under oath because he is not part of the personnel who implement the sentence by the Court and he stated he believe that he is part and parcel of those who are implementing a sentence.
22. He was further asked how does LLB assist him in doing body search, patrolling and guarding the offenders to the court or hospital and he stated that he knows that they are human beings and how that he needs to treat them with dignity as enshrines in the Constitution.



23. During re-examination he was asked why the Respondent denied him a once-off bonus and he stated that the Respondent alleged that LLB qualification does not fall within the scope of his work.

The respondent's evidence

24. The Respondent adduced evidence through Phehello Aaron Mofokeng, employed by the Department of Correctional Services.
25. He testified that in this case the Respondent has complied entirely with the Resolution. He reiterated that the reason why the Applicant request was denied was because his LLB qualification was irrelevant to his scope of work.
26. He further submitted that the evidence presented by the Applicant and his Representative was irrelevant to the interpretation and application of Collective Agreement.
27. He submitted that the requirements of the Resolution is that any employee before they pursue to study they need to get an approval of their desired qualification from the Department and referred the hearing clause 6 of the Resolution.
28. He further submitted that the if the Applicant did not follow that process he cannot expect to be paid his once-off bonus because it was found that his qualification is not in line with the scope of work and that cannot be mean the Department failed to apply or interpret the Collective Agreement correctly.
29. He stated that a Security Officers are not required to have LLB qualification for them to be able to perform a job of a Security. There are other relevant qualifications that can be approved which are in line with the scope of a Security Officer's job.
30. He was asked under cross – examination whether a Security Officer jobs does not require LLB and he denied.
31. He was further asked if it is true that the duties of the Security Officers are not in line with a Constitution or legislation of South Africa and he stated that body search needs to be done in accordance with the requirement and procedure of Correctional services but not Constitution per se.
32. He was asked if he thinks that Constitution is irrelevant to the job of a Security Officer and stated that for a Security Officer to be able to perform their jobs as Security, they are send to training by the Department either at Kroonstad or Sonnerwater to qualify as a Security Officer at the Department hence LLB is irrelevant for the job of a Security Officer.
33. He was asked if the Applicant would have work better if he was in a legal field and he responded that the Legal Department of the Department is performing a relevant legal service for the Department.
34. He was asked why is the letter on page 13 only refer to the Applicant scope of work but not the procedure in clause 6.4 and he stated that because LLB qualification does fall within the scope of work of the Security Officers.
35. He was asked why he thinks that the clause 1.1 excluded the Applicant and he stated that the clause allows any employee to study any qualification as long as the that qualification is within the scope of work of that employee and that will make him to be paid bonus when obtained that qualification.



Closing arguments

36. The Respondent did not submit closing arguments.
37. The Applicant submitted that the employer had misinterpreted Resolution 5 of 2014 as the Applicants qualifications meet the requirements of the collective agreement.
38. They argued that the Applicants qualification is a recognised improved qualification. And that the qualification is relevant as it fits into his scope of work.
39. Their arguments is based on section 35 of the Constitution of the Republic of South Africa, which state that everyone is detained, including every sentenced prisoner, has the right to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at a state expense, of adequate accommodation, nutrition, reading material and medical treatment and communication with, and be visited by, that persons, spouse or partner, next of kin, chosen religious counsellor and chosen medical practitioner.

ANALYSIS OF EVIDENCE AND ARGUMENTS

As to what is a dispute and what disputes about interpretation or application of a collective agreement are, the Labour Appeal Court (LAC) has pointed out that a dispute:

40. Logic requires at minimum, a difference of opinion about something between two or more persons.
41. About the interpretation of a collective agreement, at minimum, a difference of opinion about what a provision of the agreement means .e.g. the situation where the parties differ over the meaning of a provision of the collective agreement.
42. About the application of a collective agreement requires at minimum, a difference of opinion about whether it can be invoked (including .e.g. whether the collective agreement is applicable at all) or whether the activity which gives rise to the controversy is covered by the collective agreement and includes whether the an agreement applies to the facts in question and the manner in which the agreement is applied, which includes non-compliance.



43. Accordingly, although there is a difference in the meanings of the terms interpretation and application respectively, they should not be read disjunctively but as related .i.e. dispute about what the agreement means and what it is applicable to. While application does not extend to enforcement, once application is proven, the referring party can procure more than just a declaratory order, and can obtain pursuant to such finding, substantive relief. This is in line with section 24 of the LRA, as set out by Tlhotlhemaje J in *Tabane v PSCBC and Others*, he said:

“the purpose of section 24 of the LRA is to resolve disputes where a party to an agreement is alleged to have been in breach of the provisions of that agreement by failing to apply its terms either correctly or at all.
44. A collective agreement in terms of the Act is not an ordinary contract and the context within which a collective agreement operates under the Act is vastly different from that of an ordinary commercial contract. 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/employer’s organization are also bound including the State as the employer and the Union parties.
45. The following examples from case law, in this regard are instructive:
 - Collective agreements are subject to the principle of legality and cannot trump regulations/legislation unless expressly provided for,
 - A Bargaining Council is empowered in terms of section 33A of the LRA to enforce a collective agreement which it has concluded through a dispute resolution procedure provided”.
46. In the case of *Department of the Premier, Western Cape v Plaatjies NO & Others* (2013) 34 ILJ 2876 Steenkamp J stated, “Where a collective agreement has been applied correctly, .i.e. there is no dispute as the interpretation or application, the Bargaining Council does not have jurisdiction to decide whether this is unfair”.
47. In interpreting the collective agreement, the arbitrator is required to consider the aim, purpose and all terms of the collective agreement. Furthermore, the arbitrator must bear in mind that a collective agreement is not like an ordinary contract. In addition, it is expected of the arbitrator to adopt an interpretation and application that is fair to the parties.
48. In this case, Resolution 5 of 2014 makes a provision in clause 6.1.4. and clearly stipulate a process that needs to be followed by the employees who intend to study and be reimburses after they successfully completed their studies. The Applicant as the employee, is also required to follow that process.
49. I failed to find a failure to interpret and apply a collective agreement when the employee himself failed to apply the agreement from the onset but expect the employer to overlook the requirements of that agreement before they pay a bonus. It is not logic for the Applicant to expect to be shielded by the agreement at the end of his studies and cannot prove why did he overlooked the requirement of the agreement which would necessitate a once off bonus if it was properly followed.
50. I fund the Applicant to be selective when presenting his evidence as he never refer me to clause 6.2. of the collective agreement but he only showed be a clause which state that an employee who completed his studies must be paid a once-off bonus. I find it incorrect where he expect me to find the employer as the party who failed to interpret and apply the agreement.



51. The agreement is clearly require that before an employee register or pursue or further their studies for any qualification they must first get an approval from the Department Head, and the Applicant testified that he did not get a written approval to study but a verbal approval.
52. The agreement further require a written approval from the Head of the Department, all this information will be relevant at the end of the studies when they should be paid a bonus.
53. If the Applicant obtained a verbal approval, I expect the very same Head of Department who gave such approval to be called as a witness for the Applicant in order to confirm that LLB qualification was approved as a relevant qualification which falls under the scope of his work, but s/he was never called.
54. I believe that a case before me is not the one for interpretation and application of the collective agreement as there is no difference of opinion in any of the clauses. The issue before me is the one where the Applicant need me to make a finding that LLB qualification must be seen to be relevant to the Security Officers scope of work.
55. The agreement makes a provision that the relevance of any qualification will be decided by the Head of Department or his delegates but not a Commissioner/Arbitrator in the arbitration process.
56. I find that the Applicant, Babili Jacobus Mtshweni failed to follow the procedure of a collective agreement from the beginning of his studies and such failure has resulted in the Respondent not being afforded an opportunity to assess whether the qualification form a scope of the Security Officer or not, and to also advise the Applicant accordingly.
57. The issue whether LLB is an Improved Qualification should have been assessed and approved by the relevant committee as per the internal processes.
58. In the circumstances, I do not see where the Respondent failed to interpret or apply a collective agreement.

AWARD

59. The application is dismissed.

GPSSBC Commissioner

Signature:



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SECTOR BARGAINING COUNCIL



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