



**IN GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL HELD IN
POLOKWANE LIMPOPO PROVINCE**

CASE NO: GPBC4701-2017

AWARD DATE: 25- JULY-2020

COMMISSIONER: P.D. SEOPELA

IN THE MATTER BETWEEN

PSA OBO P.M.E KGARE _____ APPLICANT

V

**DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT----LIMPOPO
PROVINCE ----- RESPONDENT**

ARBITRATION AWARD

DETAILS OF THE HEARING AND REPRESENTATION

[1] This arbitration hearing was heard on the 26th of February 2019, 10th of May 2019 and was finalized on the 07th of February 2020 at 09h00 at the offices of the respondent in Polokwane, Limpopo Province. Both parties were in attendance. The applicant, Ms Phuti Mologadi Evah Kgare was represented by Mr Phillip Maponya, a union Official of PSA. The respondent, Department of Justice and Constitutional Development was represented by Mr G.J. H Stoltz. The proceedings were digitally recorded. The applicant submitted bundle A which comprises of 41 pages. The respondent submitted bundle B which is comprises of 48 pages and bundle C which comprises of 63 pages. The parties were required to submit written heads of arguments.

The Labour Relations Act 66 of 1995, as amended will in subsequent paragraphs be referred to as the Act.

ISSUE TO BE DECIDED

[2] I have to decide whether the respondent committed an act of unfair labour practice relating to demotion against the applicant by demoting her from salary level 9 to salary level 8 but continue to do the duties of salary level 9. I must determine the appropriate relief, if I find in the favour of the applicant in terms of section 193 of the Act.

BACKGROUND TO THE DISPUTE

[3] The applicant, Ms Phuti Mologadi Evah Kgare was demoted from the position of Assistant Director which is at salary level 9 to the position of Administrative Officer which is at salary level 8. The applicant continued to perform the duties of Assistant Director from December 2017 and that continued even on the day of the arbitration (26-02-2019). The parties agreed on record that the applicant continued to perform the duties of Assistant Director. The applicant was demoted from salary level 9 (R29 996-25) to salary level (R24 727-50) coupled with a final written warning and one month suspension without pay. She served one month suspension during the month of November 2017. The final written warning was valid for six months which means it had already expired at the commencement of the arbitration. The demotion was effected from the month of December 2017. The position of administrative Officer was not yet created at the time of the arbitration as it was not on the structure of the respondent. It is the case of the respondent that the applicant committed a serious act of misconduct. The applicant initially pleaded not guilty during the disciplinary hearing but such was changed later to plea of guilty. There was an agreement between the applicant and the representative of the respondent during the hearing to give the applicant a sanction which falls short of a dismissal. It is the case of the respondent further that there was a moratorium placed on the post not to fill it unless it is critical and the Human Resource department applied to National Office to create administrative Officer post and he was inform that the post was created in November 2018. It is the prayer of the applicant that the respondent should be ordered to reinstate her to the position of Assistant Director and also pay her difference in salaries between salary level 8 and salary level 9 for the period of demotion.

SURVEY OF EVIDENCE AND ARGUMENTS

The applicant, Ms Phuti Mologadi Evah Kgare testified under oath as follows:

[4] It is not clear which position she is occupying as she is Administrative Officer salary level 8 as per her salary advice but she is performing the duties of Assistant Director which is at salary level 9. She is remunerated at salary level 8. She has been performing the duties of Assistant Director since December 2017 to date (26-02-

2019). She was contracted as per Performance Instrument as Assistant Director until the 31st of March 2018. The letter at page 34 of bundle A came when she was to contract for 2018/2019 financial year and it was until October 2018. She submitted midterm report for the same period. She was requested to sign new Memorandum of Understanding or Performance Instrument from the 01st of November 2018 as Administrative Officer. She wrote a letter to Human Resource department requesting for the job description of Administrative Officer on the 12th of October 2018 as per page 37 of bundle A. She has been working without job description and Memorandum of Understanding since from the 01st of November 2018 to date. She does not even know the functions of Administrative Officer. She is reporting to the Assistant Director under procurement unit to date. The respondent is on the process of obtaining approval to create the post of Administrative Officer. Her previous post is still vacant and she is still performing the duties attached to the post of Assistant Director. The demotion was effected on the 01st of December 2017.

[5] She pleaded guilty for contravening Departmental Financial Instruction on for charges levelled against her. She admitted that she is lucky that she is still employed based on the seriousness of the charges. She was attending extended management meeting as per page 39 and such was approved by Ms Lucy Saasa. She testified that Jabu was only dealing with budget matters when it was put to her that some of her duties were given to Jabu. It is the prayer of the applicant that the demotion should be set aside and further that the respondent should be ordered to remunerate her as Assistant Director from the 01st of December 2017.

THE CASE OF THE RESPONDENT

The first witness of the respondent, Mr Michael Azwidihwi Ndiitwani, the former employee of the Department of Transport who is currently employed by Road Traffic Management Cooperation Agency testified under oath as follows:

[6] He is currently working at North West of the Road Traffic Management Cooperation. He was the presiding Officer who presided over the disciplinary hearing of the applicant. The applicant pleaded guilty during the disciplinary hearing. The employer and the applicant could not agree in terms of the sanction and such responsibility was left to him as per their plea bargain. The misconduct committed by the applicant warranted dismissal as a sanction. He decided to demote the applicant and also suspend her for one month without pay coupled with final written warning. He was not bound by the plea bargain of Mr Maponya and Mr Stoltz. He did not accept the proposal of the respondent with regard to the sanction as the respondent proposed two months suspension without pay but he issued the applicant with one month suspension without pay. The sanction was fair.

The second witness of the respondent, Ms Mulatwa Thagavhuelelo testified under oath as follows:

[7] She is employed as the Deputy Director under Supply Chain Management since March 2013. The applicant used to be her subordinate. The applicant was reporting to her after she had served her suspension until the end of October 2018. She entered into Performance Agreement with the applicant. Page 15 of bundle A is a Performance Agreement between her and the applicant for 2017/2018 financial year dated 24th of May 2017 as Assistant Director under Asset Management. The new Performance Agreement (April 2018 to October 2018) signed with the applicant was for the position of Assistant Director. The Performance Agreement was not for a full period as the Human Resource unit was busy creating a post. There are some similarities between the duties of Administration Officer and that of Assistant Director as per page 17 of bundle C. The difference is only in relation to the reporting lines. There was an agreement that the applicant will sign a new Performance Agreement with Ms Saasa from the 01st of November 2018. There was a meeting in April 2018 in which she wanted to relieve the applicant of some duties and she said that she will continue to perform them. They were informed by the Human Resource unit that the post was created. The applicant started to report to Ms Saasa, the Assistant Director under Supply Chain Management from the 01st of November 2018. Ms Saasa told her that she submitted Performance Agreement on the 03rd of May 2019. The applicant is currently employed as Administration Officer under Asset Management unit. The applicant was attending meetings as Administration Officer.

[8] Administration Officers are not part of management. The applicant attended management meeting during March 2019. The post of Assistant Director under Asset Management is still vacant and no one was appointed to occupy it and the duties are executed by Ms Saasa. Page 1 of bundle C are the duties of the applicant dated the 13th of March 2019. The post of Administration Officer was created in November 2018 after approval was obtained. The applicant did not want to sign Performance Agreement as per page 24 of C because she wanted job description. She is not fully conversant with Human Resource processes.

The third witness of the respondent, Ms Sefara Lucy Saasa, the Assistant Director under Supply Chain Management testified under oath as follows:

[9] The applicant started to report to her on the 01st of November 2018. She was informed that the applicant was demoted to salary level 8. The applicant was having a problem with Human Resource management. The applicant entered into Performance Agreement with her. The applicant compiled the Performance Agreement but it was discussed with her. She was also approving the leaves of the applicant from the 01st November 2018. She was informed by the Human Resource Department in a meeting that the post of Administration Officer was created. The applicant did not want to enter into Performance Agreement with her due to the issue of job description. She (Saasa) received job description for the applicant from the HR unit long ago. She gave the applicant job description during the month of April 2019. Page 10 of bundle C is an application of the applicant to take official journey as Administration Officer.

[10] The duties of Administration Officer and Assistant Director are the same except that reporting lines are not the same. The post was approved for creation as per page 3 of bundle C. She does not know what the applicant was doing after she was demoted. She used the job description for 2015 as per page 12 of bundle C which was for a temporarily employee which is at salary level 7. All Administration Officers are employed at salary level 7. She does not know why the applicant was demoted to level 8 as Administration officers are at salary level 7. She relied on the HR that the post was created. She denied a version put to her that the demotion was only effected in terms of the salary only.

The fourth witness of the respondent, Mr Toutela David Masemola testified under oath as follows:

[11] He is employed as a Deputy Director under Human Resource Management in the office of the Chief Justice in Limpopo Province. She was employed as the Assistant Director under Human Resource unit at the time of the incident at the Regional Office in Polokwane. They were stopped from filling the post as per the moratorium issued by the Director General as per circular number 93 dated September 2016. Demotion was implemented and the applicant was placed against the post of level 8. The applicant did not suffer any prejudice after she was placed against the post of level 8. The related post of Administration is at salary level 7. There are other Administration Officers who are doing the duties of Assistant Director at the regional office. The applicant was demoted to level 8 whereas there was no post. The post of Assistant Director under Asset and Disposal Management was advertised on the 05th of February 2020. There was no attempt to create the post but it was discussed. He is the author of page 3 of bundle C.

ANALYSIS OF EVIDENCE AND ARGUMENTS

SUBSTANTIVE FAIRNESS

[12] This matter was referred in terms of section 186 (2) (a) of the Labour Relations Act 66 of 1995 as amended relating to demotion. Everyone has a right to a fair labour practice in terms of section 23 of the Constitution of the Republic of South Africa. It is common cause that the applicant was demoted from salary level 9 to salary level 8 with effect from the 01st of December 2017. It is worth stating that the applicant was sanctioned for one month suspension without pay, final written warning and demotion. Final written warning and suspension are not in dispute. The applicant is disputing the demotion.

[13] It is worth noting that I was not informed about the charges which were preferred against the applicant that resulted in a demotion, suspension for one month without pay and final written warning. The applicant pleaded guilty during the

disciplinary hearing on four charges of contravening Departmental Financial Instructions. The applicant confirmed that she was lucky that she was not dismissed due to seriousness of the charges. I will be guided by the prayers or reliefs sought by the applicant in determining issues in dispute. It is the prayer of the applicant that the demotion should be set aside and that she should be reinstated to her position of Assistant Director and to be paid difference in salaries between salary levels 8 and 9 for the period of demotion.

[14] The parties agreed on the 26th of February 2019 that the applicant continued to perform the duties of Assistant Director after she was demoted. The applicant testified that she has been performing the duties of the Assistant Director even after she was demoted on the 01st of December 2017. Ms Thagavhuelelo confirmed that she concluded Performance Agreement with the applicant as Assistant Director under Asset Management which commenced on April 2018 which ended on the during October 2018. The Performance Agreement in question was not for full period because the Human Resource unit was still creating post for the applicant. The evidence of Ms Thagavhuelelo confirmed that the applicant continued to work as Assistant Director after she was demoted. The evidence of Ms Saasa is that the applicant started to report to her on the 01st of November 2018 after she was informed in a meeting that the applicant was demoted. I am convinced that the applicant continued to perform the duties of Assistant Director as confirmed by both Ms Saasa and Ms Thagavhuelelo.

[15] The respondent used job description for Administration Officer appearing at page 12 of bundle C. The post unfortunately is at salary level 7 and it is dated 2015. This job description is misleading at it is at salary level 7. It is further misleading as the respondent wrote to the Head Office to ask for the permission and approval to create a new post after the applicant was demoted. The applicant was demoted in December 2017 and the job description is for 2015 hence I say it is not applicable in this case.

[16] The applicant has made a case for unfair labour practice relating to demotion in that she was demoted only in terms of salary level but continued to perform the duties of the Assistant Director. Mr Masemola testified that the applicant was demoted to level 8 post which did not exist.

[17] The demotion of the applicant is only unfair to the effect that she continued to perform the functions of level 9 after the demotion. The first prayer of the applicant is that the demotion should be set aside and that the respondent should be ordered to reinstate her to the position of Assistant Director. The applicant did not challenge the reasons which led to her demotion or differently put, she did not challenge the charges levelled against her. It is my considered view that the applicant would not have referred the case if the post of Administrative Officer at salary level 8 existed. The dispute of the applicant was triggered by the fact that she continued to perform

the duties of the Assistant Director after she was demoted from salary level 9 to salary level 8.

[18] The applicant confirmed in her evidence that she consider herself fortunate that the respondent did not dismiss her which was based on the seriousness of the charges. The demotion cannot be set aside on a technicality. Demotion stands as the applicant did not challenge the charges. The applicant is not challenging the sanction meted out by the chairperson of the disciplinary hearing. The applicant is only challenging the implementation part of her demotion not that she did not commit the offences alleged by the respondent. The applicant pleaded guilty to the charges during the disciplinary hearing and any attempt to interfere with the sanction will result in gross miscarriage of justice.

[19] The second prayer of the applicant is that she should be paid difference in salaries between salary level 8 and 9 for the duration of the demotion. The prayer of the applicant in this regard is permissible in law as she proved that she continued to perform duties of Assistant Director which is at salary level 9 whereas she was remunerated in terms of salary level 8. The applicant signed Performance Instrument for the functions of Assistant Director with Ms Thagavhuelelo for 2018/2019 financial year which was from the 01st of April 2018 to the end of October 2018. Ms Thagavhuelelo further testified that the PA was not for the full period because the Human Resource unit was still creating the post for the applicant.

[20] I make a finding that the applicant succeeded in proving that she performed the functions of Assistant Director which is at salary level 9 but the respondent remunerated her at salary level 8. The respondent committed an act of unfair labour practice relating to demotion by remunerating the applicant at salary level 8 whereas she was performing the functions of level 9. The applicant is eligible to be paid difference in salaries between salary level 8 and 9 from the 01st of December 2017 to the 31st of October 2018. I capped the payment to the 31st of October 2018 as the applicant was informed on the 06th of November 2018 about the approval for the creation of the post of administration Officer Level 8.

AWARD

[21] The respondent, Department of Justice and Constitutional Development committed an act of unfair labour practice relating to demotion against the applicant.

[22] The respondent, Department of Justice and Constitutional Development is ordered to pay the applicant, Ms Phuti Mologadi Evah Kgare in the amount of R57 956-25 (fifty seven thousand nine hundred and fifty six rand twenty five cents) which is the equivalent of the difference in salaries between salary level 9 (R29 996-25) and salary level 8 (R24 727-50 calculated as R29 996-25 minus R24 724-50 = R5 268-75 x eleven months = R57 956-25.

[23] The amount mentioned at paragraph 22 above is to be paid to the applicant on or before the 31st of August 2020.

A handwritten signature in black ink, appearing to read 'D. Seopela', with a long horizontal stroke extending to the right.

DANIEL SEOPELA
COMMISSIONER: GPSSBC. LIMPOPO