



ARBITRATION AWARD

Panellist/s: PD Seopela _____
Case No.: GPBC4732/2017 _____
Date of Award: 21/08/2020 _____

In the ARBITRATION between:

PSA obo MB Mogadime _____

(Union / Applicant)

and

Department of Public Enterprise _____

(Respondent)

DETAILS OF THE HEARING AND REPRESENTATION

[1] This arbitration hearing was heard on the 21st of September 2018, 04th of March 2019, 16th of July 2019, 14th of November 2019 and was finalized on the 30th of November 2019 at 09h00 at the offices of GPSSBC, in Centurion, Gauteng Province. Both parties were in attendance. The applicant, Mr Modise Bennedict Mogadime was represented by Mr Steve Dawson, the Principle Legal Officer of PSA. The respondent, Department of Public Enterprise was represented by Mr Darol Holby of the Labour Relations unit. The proceedings were digitally recorded. The respondent submitted bundle B which comprises of 61 pages. The applicant submitted bundle A which is comprises of 39 pages. The parties were required to submit written heads of arguments and such were considered in this award. I had to determine the duty to begin in this case on the 21st of September 2018 as Mr Dowson, the representative of the applicant argued that the duty to begin lies with the respondent. I ruled that the duty to begin lies with the applicant as this is a case of the alleged unfair labour practice. Mr Holby wanted Ms Mbono to take part in the arbitration on the 04th of March 2019 as an employer whereas she is no longer DDG of the respondent and she was lined up to be a witness. Mr Dowson objected to her presence on behalf of the applicant. I ruled in favour of the applicant party. The other issue which was raised in this case was in relation to PMDS and the parties agreed on the 21st of September 2018 to take it back to the employer. The representative of the respondent applied to have examination in chief opened during cross examination of Ms Ntsiki Mbono on the 30th of November 2019. The application was opposed. I dismissed the application to re-open examination in chief during cross examination stage as the reason advanced by Mr Holby was without substance and it was going to frustrate the process.

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. 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, Mr Modise Bennedict Mogadime is an employee of the respondent. He is employed as Chief Director under Transformation, Skills and Youth Development Directorate which is a component of Economic Impact and Policy Alignment. The applicant was moved during January 2016 to Property Management as Chief Director. It is the case of the applicant that the respondent demoted him arguing that Property Management is not at salary level 14 but that it is

at salary level 13. It is the case of the respondent that the applicant was never demoted but that he was moved to Property Management on a temporary basis in order to accommodate Beverley who was returned to the respondent after she was suspended. It is the contention of the respondent that the applicant remained Chief Director and that he was never demoted. It is the contention of the applicant that he did not agree to the move to Property Management. The applicant prayed for compensation.

SURVEY OF EVIDENCE AND ARGUMENTS

The applicant, Mr Modise Bennedict Mogadime testified under oath as follows:

[4] He is employed as a Chief Director under Skills and Transformation Directorate. He was employed as a Chief Director before demotion. He received page 1 of bundle B on the 11th of January 2019. He was placed on the post of Senior Specialist: Skills and Transformation as per page 1 of bundle B with effect from 01st of January 2019. He accepted the appointment. He joined the respondent as a Director on the 16th of May 2008 under Employment, Skills and development Agency. He became Chief Director on the 01st of January 2013 under Transformation, Skills and Youth Directorate. Chief Director post is at salary level 14 and Director is at salary level 13. Page 7 of bundle B is a decision Memorandum and it says that the person should be employed at salary level 13 which is at Director Post level. It is the position of Senior Manager Property Project. The department never employed a person as per the decision memorandum appearing at page 7 of bundle B. Property was a special project and it was his responsibility. It was about the disposal of properties. He did the handover to DDG as per page 14 of bundle B to Ntsiki Mbono in 2013. Property management is mentioned at page 19 of bundle B titled handover report. The unit had three directorates and he was heading Transformation, Skills and Youth. Ms Mbono wanted him to include property management on his draft performance agreement in May 2015 and he did not agree and requested mediation and such never happened. They had a meeting with Acting DG, Mr Tlhakudi in October 2015 in which he was told to include property management in his performance instrument and that his salary will be increased with one notch. He told the acting DG that the issue is not about money but about principle as the functions were not the same. The meeting ended without agreement.

[5] The new DG, Mr Richard Seleke was appointed on the 01st of December 2015. Ms Mbono phoned him informing him that there was an urgent matter to be discussed on the 14th of December 2015. Ms Mbono told him that the department is in a dilemma as the Chief Director under Human Resource Management, Beverley who was suspended should be accommodated in their unit. It was said that Ms Beverley Nkumanda, the suspended Chief Director should be placed as a Property Manager although it was referred as Chief Director even if there was no such a thing. The request was for him to move to property management and that Ms Beverley Nkumanda should be placed under skills and Transformation directorate. He

informed Ms Mbono that in principle he was in agreement with the move but indicated that it is subjected to the discussion and confirmation with DG in writing. He was requested to make it in writing as it can be seen at page 26 of bundle A. It was concluded as per email of Ms Mbono dated the 17th of December 2015 that he will remain in his unit. He was on leave during the time of the communication through emails. He was called together with Beverley by Ms Mbono on the 18th of January 2016. Ms Mbono informed them that he had instruction from the DG to move him to Property Management and that Beverley should be placed under Skills and Transformation. The instruction was not in writing. He told Ms Mbono that the matter is closed and that he was not part of the instruction. The meeting was adjourned.

[6] They were summoned to the office of the DG 15 minutes later after their meeting of the 16th of January 2016. The DG told them that he noted the unhappiness but he told them that it was an executive decision. The decision was verbal. The DG told him that he needed not to be an expert in Property Management. He was informed that he will be given people to assist him. Ms Mbono told him that they were on the process of appointing Deputy Director and he received the advert on the 11th of June 2016. He has been asking for the resources since January 2016. He reviewed the advert and sent it to Ms Mbono on the 14th of June 2016 and no appointment was made to date as the advert was never processed. The environment changed and it was no longer possible for him to take leave. He engaged Human Resource Management and he was advised by HR Director to file a grievance. The grievance was submitted on the 21st of July 2016 which was about Performance Instrument and movement.

[7] He had five officials reporting to him as a Chief Director under Skills, Transformation and Youth. Two directors, two deputy directors and Senior Administration Officer were reporting to him. They were no longer reporting to him any more until January 2019. He was working as a Director. Property management post was never elevated to the level of a Chief Director. It remained the post of Senior Manager. He lodged a grievance which was never attended to by the respondent. The property management was done by a consultant since 2006. He was dealing with the disposal of immovable properties under property management. Page 29 of bundle a paragraph 1.3.4 was read and it reads as follows: ***The employee may be required to perform other duties or to work at other places that may reasonably be required by the employer***". He signed page 29 of bundle A. He agreed to the version put to him that the DG gives instructions as an employer. His contract of employment was varied when he was moved to Property Management which was not in writing. He was consulted about the movement to property Management but there was no consent. He was demoted because he was forcefully removed from his position and was placed under Property Management and the people who were reporting to him were also removed. Beverley left in 2017 but he was never allowed to go back to his position. The engagement he had with Mbono was to assist Beverley. His status was not removed but no one was reporting to him.

[8] He was taken back to his original position on the 18th of January 2019. The DG has powers to issue instructions but the DG must also obtain consent. He signed the contract at page 38 of bundle A with the former DG. He is aware that section 14 (1) of Public Service Act requires consultation but added that there must be consent. He prayed for compensation.

THE CASE OF THE RESPONDENT

The first witness of the respondent, Mr Ms Henriette Strauss, the Director under Human Resource Management Directorate testified under oath as follows:

[9] He joined the public service in 1985. The current delegation authority was signed in 2014. The HOD has got the powers to do certain things. The HOD or executing authority may direct an employee under his or her control temporarily to perform any functions other than those ordinarily assigned to the employee or appropriate to his or her grade or post in terms of section 32 (1) of delegation authority. Transfer in Public service is in terms of Section 14 of Public Service Act. Temporary is something which is not permanent. Demotion should be communicated in writing. The applicant was never moved out of his position as Chief Director. The applicant was allocated the functions of property management as per section 31 (1) of Public Service Act. The applicant was only allocated functions but his position remained the same. The applicant's position was never changed.

The second witness of the respondent, Ms Nontsikelelo Mbono, the former Deputy Director General testified under oath as follows:

[10] She is currently an Advisor in the department of Forest and Fisheries. She was employed as Deputy Director General under Economic Impact and Policy alignment. She was appointed as DDG on the 11th of September 2013. She was the DDG at the time of the case of the applicant. The applicant was not forced to be in Property management. The applicant was consulted and the arrangement was temporary. The arrangement was triggered by an additional Chief Director who was placed under their Directorate. She compared the skills of the applicant and Beverley. The proposal was to place Beverley under Transformation and Skills and the applicant be moved to Property Management with additional responsibilities. She discussed with the applicant. The applicant was properly consulted. The applicant agreed in principle to be moved to Property Management. The applicant and Beverley agreed and she was to brief the DG. The applicant went on leave in December 2015. The DG took the decision. She informed transformation team about the arrangement. The applicant was the acting DDG before she was appointed in 2013. The applicant was very knowledgeable. The applicant was to assist and someone who is at senior level was needed.

[11] The applicant was already doing property management functions before she was employed. The applicant was even refusing to sign PI regarding Property Management. 10 to 15% of applicant normal work falls within the ambit of property management. The PMDS of the applicant change due to the temporary arrangement and he had 100% work volume. The applicant was still Chief Director responsible for Property Management. There was no change of employment conditions. The Property Management was at DDG level and it was about managing disposal. No post was created she only asked for assistance. The applicant was never demoted. The applicant was given students to supervise. She was also appointing him to act as DDG. The applicant told her that he has changed his mind about moving to property management. She told the applicant that the DG has already taken the decision after it has become clear that the applicant has agreed. The Minister delegates powers. The DG did not require the consent of the applicant as it was a consultative process.

[12] The applicant was already employed as Chief Director before she joined the respondent. Beverley was on suspension and she was later returned to work. Beverley was given other functions upon her return. Beverley was placed under Transformation, Youth and Skills directorate. The applicant was placed as Chief Director under Property Management which was elevated at a director level. Property Management was not a position but assistance. She was in charge of property management as it was a special project which falls within the functions of the DDG. No position of Chief Director was created under Property Management, the applicant was only asked to assist. There was no transfer. Beverley was to manage property management initially but she proposed the applicant due to his experience. She relinquished some of her duties to the applicant. The Property management required Chief Director because of its strategic nature of the work.

ANALYSIS OF EVIDENCE AND ARGUMENTS

SUBSTANTIVE FAIRNESS

[13] This matter was referred in terms of section 186 (2) (a) of the Labour Relations Act 66 of 1995 as amended. To be precise, it is referred as alleged unfair labour practice 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 the case of the applicant that he was demoted as the property management is not at the level of Chief Director but at a level of Senior Manager salary level 13 as per page 7 of bundle B. It is the case of the respondent that the applicant was never demoted but that he was moved to property management which was a temporary arrangement which was occasioned by an added Chief Director under Economic Impact assessment and Policy alignment who was on suspension.

[14] It is imperative to give a background of the dispute. I am not going to deal with parachuted issue of the alleged forced transfer as the dispute before me is not about the transfer. Ms Beverley was issued with a precautionary suspension. The

respondent decided to uplift the suspension and she was not returned to her position as the Chief Director under Human Resource Management Directorate. It is common cause that the applicant, Beverley and the Deputy Director General, Ms Ntsiki Mbono engaged each other on the issue of placement of Ms Beverley. The meeting in question took place in December 2015. The applicant agreed in principle as per his email dated the 14th of December 2015 to the DDG to relocate as Chief Director under Property Management. It is common cause that the proposed arrangement was to place Beverley as Chief Director under Transformation, Youth Skills Development and to move the applicant to Property Management.

[15] The applicant stated in his email dated the 14th of December 2015 in response to the email of DDG in addition that the changes are subject to confirmation in writing by the Director General. It is common cause that no written confirmation was communicated to the applicant in this regard. The applicant went on leave during the month of December 2015. There is no dispute about the fact that the applicant was called together with Ms Beverley on the 18th of January 2016 to be verbally informed that the DG took a decision on the matter that the applicant be moved to Property Management and that Beverley be placed under Transformation, Skills and Youth Development Directorate.

[16] The issue before me is not whether the respondent obtained consent from the applicant to move him to Property Management as the Chief Director. The issue to be decided is whether the applicant was demoted. It is common cause that the applicant was consulted before the decision to move him to Property Management was taken even though he testified that he did not give his consent. The applicant was employed as Chief Director under Transformation, Skills and Youth Development before he was moved to Property Management as a Chief Director. Ms Mbono testified that Property Management was part of the functions of the applicant as the applicant was doing 10 to 15% of Property management and further that it was a special project. It is clear from the handover report made by the applicant appearing at page 19 of bundle B that Property Management was part of the functions of the applicant. The evidence of Ms Ntsiki Mbono that the applicant was given 100% or full responsibility of Property Management was not challenged.

[17] It is my considered view that the respondent never created a post of Chief Director under Property Management but that an arrangement was made with consultation with the applicant to accommodate Beverley. Page 7 of bundle B talks about a request to appoint a Service Provider to serve as a Senior Manager salary level 13. A service provider is not an employee but an independent contractor and such cannot be used to argue that Property Management is at salary level 13 as it was a project and not a position. The applicant did not have a problem with regard to the move to head property management as per his email dated the 14th of December 2015. It is my view that the applicant never regarded the move to Property Management as a demotion hence he agreed in principle that he was willing to be moved to property management.

[18] The applicant was fully aware that the arrangement was to have him as Chief Director under property management and this is evident from the wording of his email as per page 26 of bundle A dated the 14th of December 2015. The applicant is not foreign to property management and it was in the best interest of the operations of the respondent to place him under property management. The contention of the applicant that he had two Deputy Directors, two Senior Managers and Senior Administration Officer reporting to him is no indication that he was demoted. The applicant remained been a Chief Director after he was moved to property Management. The applicant did not suffer any financial loss consequent to the move in question. The applicant did not suffer any form of prejudice as a result of his move to Property Management.

[19] I make a finding that the applicant was never demoted. The applicant was employed as a Chief Director during December 2015 when an arrangement to accommodate Beverley was done and he remained a Chief Director after he was moved to Property Management. The applicant agreed in principle to be moved to Property Management as a Chief Director and it was never the case of the applicant that he regarded the movement as demotion during December 2015. The evidence of Henriette Strauss is of no consequence as it has nothing to deal with demotion but the delegation authority. The case of the applicant is about demotion and not about whether the DG has got powers or not. The applicant was returned to his initial directorate on the 01st of January 2019 which also indicates that it was a temporary arrangement. The case of the applicant stands to be dismissed.

AWARD

[20] The applicant was never demoted.

[21] The case of the applicant is hereby dismissed.

A handwritten signature in black ink, appearing to read 'D. Seoela', with a horizontal line extending to the right.

DANIEL SEOPELA
COMMISSIONER: GPSSBC LIMPOPO