



GENERAL PUBLIC SERVICE
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Case No. GPBC 2609/2015

Commissioner: Sugan Reddy

Date: 30 November 2020

In the Arbitration Between:

PSA obo NR HADEBE & 5 OTHERS

APPLICANT

AND

DEPARTMENT OF SPORT AND RECREATION

RESPONDENT

ARBITRATION AWARD

DETAILS OF THE HEARING AND REPRESENTATION

1. The arbitration of this dispute commenced on 15th April 2016 and proceeded thereafter on 10th June 2016, 24th February 2017, 21st July 2017, 15th September 2017, 27th March 2018, 15th November 2018, 24th May 2019, 30th July 2019, and was finalised (oral evidence) on

06th December 2019 at the offices of the Department of Sport and Recreation in Durban. It is also important to take notice of the content of paragraph 11 hereof. The matter was adjourned by this Council on at least 2 (two) other days, at the instance of the parties.

2. All Applicants, i.e. Ms Nompumelelo Hadebe, Ms Bonisiwe Anna Thabethe, Ms Nomusa Mathilda Chiya, Ms Thandi Ntshangase, and Ms Thembanini Yengwa, (hereinafter referred to as 'Hadebe', 'Thabethe', 'Chiya', 'Ntshangase' and 'Yengwa' individually and 'the applicants' / 'Applicants' jointly) appeared throughout these proceedings. Hadebe was represented by Mr K Naidoo, an attorney throughout these proceedings. The remaining Applicants were represented on the first two days of these proceedings by Mr Haralambous, an attorney and thereafter by the said Mr K Naidoo. I dismissed the referral of Mr Johan Louis Wepener, in his absence, on 24th February 2017 after he had advised one of the Applicants that he would not be participating in these proceedings any further. Respondent, i.e. Department of Sport and Recreation, (hereinafter referred to as 'the respondent' / 'Respondent') was represented by Advocate C M Kulati an advocate.
3. I ensured that the parties were, inter alia, advised that I would only have regard to documents in the aforesaid bundles of documents which were specifically referred to by them during these proceedings.

ISSUES TO BE DECIDED

4. Having regard to and because of Applicants' submissions, which I have set out hereunder, I am required to determine whether Respondent unilaterally demoted Applicants and / or committed an unfair labour practice in respect of Applicants, by failing to apply its matching and placement policies and procedures fairly and properly, or at all and / or conducted itself arbitrarily and unfairly in relation to the promotion and / or demotion of Applicants.

BACKGROUND AND EVIDENCE

5. I set out hereunder only that which is necessary to enable me to determine this matter.
6. Applicants are employed by Respondent as Assistant Managers: Sport Promotion and Development or Assistant Managers: Recreation Promotion and Development. Their job designation is that of Assistant Directors. Applicants' claim and the reasons therefore is

set out in its Statement of Claim. It is apposite to replicate herein that part of same, relating to the factual and legal basis underpinning the relief sought. The relevant part of the Statement of Claim reads as follows:

“B. **MATERIAL FACTUAL BACKGROUND**”

9.

During or about 2005, the Respondent appointed the claimants to the post of “*Assistant Manager*”, which carried the primary responsibility for one programme, being Community Sport / Junior Sport / Recreation, at an entry level nine (9) salary range or grade.

10.

As Assistant Managers, the claimants had the following key responsibilities:

10.1 The management of personnel;

10.2 To provide a conducive work environment;

10.3 To ensure the effective and efficient utilisation of resources;

10.4 To manage unit performance;

10.5 To maintain relationships;

10.6 To supply overall assistant management functions/support.

11.

During or about April 2007, the Respondent issued each of the claimants with an interim appointment letter, instructing the claimants to work in line with the Respondent’s interim *restructuring arrangement*, thereby effectively:

11.1 amending the claimants’ job functions and titles to *District Head*, and

11.2 requiring them to perform all duties in accordance with the delegated authorities attached to that new position.

12.

More particularly, by appointing the claimants to the position of “*Districts Head*”, the job descriptions, responsibilities and duties of the respective claimants were re-formulated by the Respondent, to comprise the following:

12.1 The implementation of strategies for the promotion and development of junior sport, community sport, recreation and the provision of sport facilities; and

12.2 The management of a specific regional district, by ensuring the effective implementation of policies; and

12.3 To ensure the development of operational plans, in order to achieve service delivery targets; and

12.4 To ensure the implementation of sport and recreation programmes through structures and strategic partnerships;

12.5 To co-ordinate the implementation of national intervention and provincial programmes on sport and recreation; and

12.6 To ensure the effective and efficient utilisation of resources.

13.

During 2008, the claimants formally requested the Respondent to perform a job evaluation on the post of “*District Head*”, which failed to materialise.

14.

The Respondent nevertheless issued an “*approved organisational structure*” in January 2009, without evaluating the position of “*District Head*”.

15.

In terms of the approved organisational structure, as at January 2009, the respective claimants occupied the following new positions:

15.1 NR Hadebe: District Head – Ilembe;

15.2 JL Wepener: District Head – Ethekwini;

15.3 Bonisiwe A Thabethe: District Head – Zululand;

15.4 Matilda Chiya: District – Uthungulu;

15.5 Thandi Ntshangase: District Head – Umzinyathi;

15.6 Thembanini Yengwa: District Head – Ugu.

[It is apposite to state that immediately prior to being appointed as District Heads of the districts referred to above Applicants were working as Assistant Managers in the said districts]

16.

During or about 2014/2015, the respondent implemented a further restructuring of its organisational structures, in terms of which it sought to:

16.1 Place and / or *migrate* the claimants to the purported newly created post of “*Assistant Manager: Sport Promotion and Development*”, carrying a level 9 to 10 salary range or grade; and

16.2 Avoid applying its own internal policies and procedures of matching and placing the claimants within the newly created position / post of “*Deputy Manager: District Operations*”, which carries a level 11 to 12 salary range or grade; and

16.3 In certain instances, arbitrarily appointed other candidates to the newly created position / post of “*Deputy Manager: District Operations*” which carries a level 12, to the prejudice of claimants; and

16.4 Purport to contend that the post of “*District Head*” does not align itself with or sufficiently match the post of “*Deputy Manager: District Operations*” and

16.5 Purport to superficially contend the post of “*District Head*” aligns itself with post of “*Assistant Manager: Sport Promotion and Development*”.

17.

On or about 01 July 2015, LC Khumalo and ME Hlaluka were appointed by Respondent to the newly created position of deputy Manager: District Operations, without advertising these posts or allowing the claimants to apply for the position/s.

18.

During or about April 2015, the claimants formally objected to the Respondent’s purported placement and migration of the claimants within the new structure, lodging formal grievances with the Respondent.

19.

The said grievances remain unresolved and as a consequence, combined unfair labour practice disputes were referred to the GPSSBC by the claimants.

20.

The said disputes, as referred, remained unresolved following Conciliation, as at 02 December 2015 and a Certificate of Outcome was issued, thereby entitling the claimants to proceed to arbitration.

C. **CLAIMANTS’ PRIMARY MATERIAL AVERMENTS**

21.

In the first instance, the claimants contend that:

21.1 the post of “*District Head*” has been “upgraded” to that of “*Deputy Manager: District Operations*” (carrying a Level 11 to 12 salary range or grade);

21.2 by purporting to migrate the claimants from the post of “*District Head*” to “*Assistant Manager: Sport Promotion and Development*”, the Respondent has failed to apply its own policy on matching and placement, which obliges Respondent to match and place the claimants within positions according to the degree to which their job duties / functions of a new post, in terms of the recruitment process.

22.

Had the Respondent placed the claimants correctly within the new structure, they would have occupied a position which carries a salary range or grade of Level 10.

23.

By conducting itself in the manner of the aforesaid, the Respondent has:

23.1 Effectively unilaterally demoted the claimants; and / or

23.2 Committed an unfair labour practice, by failing to apply its matching and placement policies and procedures fairly and properly, or at all; and / or

23.3 Conducted itself arbitrarily and unfairly in relation to the promotion and / or demotion of the claimants generally.

24.

As a consequence, the claimants have suffered damages, as follows:

24.1 Nompumelelo Hadebe, the sum of R 32 783-25 per month, representing the difference between the claimant’s current salary range or grade and that to which the claimant should have been placed;

24.2 Johan Louis Wepener, the sum of R 32 783-25 per month, representing the difference between the claimant’s current salary range or grade and that to which the claimant should have been placed;

24.3 Bonisiwe Anna Thabethe, the sum of R 32 783-25 per month, representing the difference between the claimant’s current salary range or grade and that to which the claimant should have been placed;

24.4 Nomusa Mathilda Chiya, the sum of R 32 783-25 per month, representing the difference between the claimant's current salary range or grade and that to which the claimant should have been placed;

24.5 Thandi Ntshangase, the sum of R 32 783-25 per month, representing the difference between the claimant's current salary range or grade and that to which the claimant should have been placed;

24.6 Thembanini Yengwa, the sum of R 32 783-25 per month, representing the difference between the claimant's current salary range or grade and that to which the claimant should have been placed.

D. RELIEF SOUGHT BY CLAIMANTS

25.

The claimants seek an Award in the following terms:

25.1 That the Respondent match and place the claimants to the correct post of "*Deputy Manager: District Operations*" within the new structure; and

25.2 That the Respondent compensate the claimants by way of back-pay, at the correct salary range or grade level 12, from 01 July 2015 onwards, as follows:

- (a) Nonpumelelo Hadebe, at the rate of T 67 717-75 per month from 01 July 2015 onwards;
- (b) Johan Louis Wepener, at the rate of R 67 717-75 per month from 01 July 2015 onwards;
- (c) Bonisiwe Anna Thabethe, at the rate of R 67 717-75 per month from 01 July 2015 onwards;
- (d) Nomusa Mathilda Chiya, at the rate of R 67 717-75 per month from 01 July 2015 onwards;
- (e) Thandi Ntshangase, at the rate of R 67 717-75 per month from 01 July 2015 onwards;
- (f) Thembanini Yengwa, at the rate of R 67 717-75 per month from 01 July 2015 onwards.

25.3 That the Respondent pays the claimants' legal costs, as allowed by law."

7. Prior to the arbitration proceeding on the merits Respondent brought an Application challenging the power of this Council to take cognisance of and determine the forementioned dispute referred by Applicants. Prior to issuing my Ruling I requested the parties to submit further information for the reasons set out in the following terms:

“1. I intend determining the question of jurisdiction, on all of the information before me at present, in one ruling.

2. Jurisdiction either objectively exists (as a fact) or it does not. Although it is not for me to enquire into same if ex facie the claim this Council has jurisdiction certain facts as alleged by Applicants cause me to raise questions relating to the jurisdiction of this Council. These are the allegations in Applicants’ Answering Affidavit that the Applicants’ “de facto occupied the post of District Operations Managers, carrying a Salary Level 11-12;”

3. Given the foregoing the question that arises is whether I can grant the relief sought without finding that in terms of the Public Service Act and Regulations (legislation and subordinate legislation as opposed to policies or guidelines) Applicants must firstly be upgraded, in law and as a fact to Salary Level 11-12.

4. The parties are required to provide submissions on the following:

- a. If I am unable to upgrade the Applicants as aforementioned then on what basis can the relief sought in the main dispute be granted.
- b. If the answer to the aforementioned question is in the affirmative the parties are required to motivate in detail the reasons for me being able to effect such upgrade given that salary levels and grading are determined by the executing authority in terms of the Public Service Act and the regulations thereto.

5. For reasons

6. Applicant.....”

8. This resulted in Second to Sixth Applicants providing the following written response:

“IN THE GENERAL.....

.....

.....

1.

It is submitted at the outset that the for Arbitrator to make a finding that the Applicants *de facto* occupied the post of District Operational Manager does not does not require him to award any relief that requires the Respondent to actually upgrade the Applicants in fact and in law to the salary level 11 – 12. It is therefore not a prerequisite, for the reasons explained further on.

2.

However, is necessary and entirely permissible for the Arbitrator to determine the extent to which the post-functions being carried out by the Applicants, prior to their alleged demotion *mirrored* or were similar in nature to that which applied to the position of District Operations Manager. Once again, the Applicants are not seeking relief that requires the actual post to be upgraded. What they are seeking a factual finding which determines the extent to which an unfair demotion has occurred in fact and in law. In any event, the issue of upgrading the post was never adjudicated upon in prior proceedings.

See: Royal Sechaba Holdings (PTY) Ltd v Another [2014] Coote and Another [Another} 3 ALL SA 431 (SCA) - Where it was again confirmed that even where issues to be determined were largely the same as those previously determined , there were issues that were not adjudicate upon before, with the results that the Respomdednys could not rely upon the defence of “issue estoppel”.

3.

To the extent that reference has been made by the Arbitrator to the previous Dispute-Referral, which the Applicants lodged during July 2013, it is imperative for the Arbitrator to appreciate that.

3.1 An entirely different cause of action applied to that referral - see copy of Dispute-Referral form, dated 11 July 2013, enclosed herewith; and

3.2 The Settlement agreement which was the product of that referral sought to achieve a job evaluation and consequent upgrade of the post the Applicants were occupying at the time (see annexure NRH5 of Answering affidavit, and

3.3 The application to the Labour Court which followed that Settlement agreement merely sought to make the Settlement Agreement an order of Court, which application was ultimately dismissed (see Annexure NRH9 of Answering Affidavit)

4. The Arbitrator is respectfully misdirected in thinking that he is expected or required to effect such an upgrade, simply because the relief the Applicants are seeking takes the form of compensatory relief for an unfair labour determination in the form of alleged demotion. That unfair labour practice determination does not require the Arbitrator to specifically oblige the Respondent to upgrade the post in question, neither does it by any means require the arbitrator to oblige the Respondent to re-evaluate the post in question.

5. In short, the alleged unfair demotion (being an unfair labour practice cause of action) is simply premised upon the factual history relating to the post in question and focuses upon the consequence of the Respondent's refusal / failure to correctly evaluate the position concerned, in the sense that the omission to do so directly impacts upon the mismatching and misplacement of the Applicants within the Respondent's newly created restructure.

See: Dlulemnayango-Sopotela v GPSSBC & Others (Case Number C188/13): Unreported – Where the factual mismatching and the placement circumstances was recognised to constitute an unfair demotion.

6. Once again, the Applicants are seeking the relief of compensation for an unfair demotion. They are not trying to resurrect a previous cause of action, nor a previous form of relief, let alone that which was agreed to in the Settlement Agreement on 19 August 2013. In any event, the presiding Arbitrator is fully entitled to determine the quantum of compensation within his discretion, according to principles of law and equity, which may or may not align precisely with the quantum claimed by the Applicants in their papers.

7. In all the circumstances, it is again humbly submitted that the GPSSBC has more than sufficient jurisdiction to arbitrate this new cause of action.

8 Alternatively,

9. The relevant aspects of Hadebe's response to my aforesaid request for further information was as follows:

The Commissioner is at liberty to make a finding that the Applicants ought to have been upgraded, without having to order the Respondent to do so, to re-evaluate the posts or promote the Applicants himself.

The function of the Commissioner in these proceedings is [sic] akin to that of a Labour Court Judge in Review proceedings. The Judge cannot make a finding for the employer, but he certainly can decide what the employer should or ought to have found. Once this is done he has an array of choices before him, inter alia, compensation.

For this reason, the parties do not have to first be upgraded in law and as a fact to salary level 11-12.

If the Commissioner is unable to upgrade the Applicant's, [sic] then on a finding that they ought to have been upgraded, being a finding of fact, the compensation aspect of the relief sought can be awarded.

It is the Applicant's case that by not evaluating and correctly grading the post of District Head, the Respondent has unfairly demoted them to a lower position of Assistant Manager. 9

Alternatively, the Respondent has unfairly demoted the Applicants by misrepresenting that the new post of Assistant Manager is equivalent to the post of District Head. This is the crux of the issue that the Commissioner needs to decide.

In an absence of a right to be promoted the Applicants must show that the conduct of the Respondent in failing to promote them was unfair.”

10. Hadebe testified on her behalf and on behalf of the four remaining Applicants who also confirmed and adopted the evidence of Hadebe in so far as it was applicable to them. The following witnesses testified on behalf of Respondent:

- a) Mr Poovanasen Naidoo (‘Naidoo’) employed within the office of the Premier the KwaZulu-Natal as a Deputy Director in the Directorate Provincial Organisation Development;
- b) Mrs Gugu Khumalo (‘Khumalo’) a Deputy Director: District Operations in the Department of Sport and Recreation.

11. Respondent intended calling a Mr Mthembu on the 06th December 2019 to testify about the informal and formal review (in terms of the Policy) of decisions regarding the matching and placing of employees who were dissatisfied with the posts they were placed in. In this regard Applicants had lodged grievances regarding the positions they were matched and placed in. Mr Mthembu was, at the last minute unable to attend the proceedings on 06th December 2019. In order to prevent the proceedings being adjourned to enable Mthethwa to testify the parties admitted that the processes that were followed by Applicants in lodging grievances and the outcome of same, including the findings of the MEC. Given that Applicant did not agree with the outcome of same Applicant agreed to file written submissions regarding the MEC’s findings and Respondent was to reply thereto within stipulated time periods. In the event these submissions were only filed by Applicant in August 2020. Respondent takes issue with this late filing without an accompanying Application for Condonation. This becomes academic

given that these submissions do not impact on the reasons employed in the determination of this matter.

12. Except for:

- (a) not denying that the post of an Assistant Manager District head was in fact evaluated at grade and salary level 9 (in 2008) and thereafter regraded by the then MEC to grade and salary level 10, in 2008;
- (b) agreeing when cross-examined that Hlaluka (who was appointed to the position of Deputy Manager: District Operations pursuant to the last restructuring exercise and who is now Hadebe's immediate line manager) was appointed as a Deputy Director on salary level 11/12 sometime during 2007; and
- (c) not taking issue with the evidence of Mrs Gugu Khumalo, (who was appointed to the position of Deputy Manager: District Operations in September 2015, pursuant to the last restructuring exercise) that she was appointed as Deputy Director on grade and salary level 12 in May 2009,

Hadebe's evidence supported the allegations in Applicants' Statement of Claim. She testified that except for her, from (about) the time of the matching and placing of Applicants in July 2015, the remaining Applicants were fulfilling the function of Deputy Managers Operations in their districts. This was confirmed by the remaining Applicants who also adopted the evidence of Hadebe under oath. According to Applicants the posts of Deputy Manager: District Operations were not filled in 9 (nine) of the 11 (eleven) districts in KZN. The functions, duties and responsibilities of Deputy Manager: District Operations (grade and salary level 11-12) in some of these posts that were not filled, were being performed by the applicants (apart from Hadebe), who worked in the district, in their capacity as Assistant Managers: Sport Promotion and Development. According to them these functions, duties and responsibilities of a Deputy Manager: District Operations were the same as the functions duties and responsibilities of Assistant Managers: District heads, ie the positions they held prior to their matching and placing pursuant to the last restructuring exercise. Nine of the 11 (eleven) of the vacant posts of Deputy Manager; District Operations were frozen. They were advertised (for the purpose of being filled) in terms of the Public Service Regulations but the said advertisements were subsequently withdrawn. Prior to same being withdrawn all Applicants had applied for appointment to one of these posts. According to Applicants the vacant posts have been re-advertised and they intended

applying to be appointed to one of the 9 of such vacant posts. It is apposite to state that Hadebe conceded that were she to be appointed to one of the posts of Deputy Manager: District Operations (as a result of the said applications) same would constitute a promotion. Hadebe testified that in respect of the district in which she had held the post of Assistant Manager: District Head one Hhlaluka had been appointed to the position of Deputy Manager: District Operations and that she now held the position of an Assistant Manager Sport Promotion and Development in terms of the last matching and placing exercise. According to Hadebe her functions duties and responsibilities, which were the same as that of a Deputy Manager: District Operations prior to her being matched and placed as an Assistant Manager: Sport Promotion and Development, had now been significantly reduced and that her the matching and placing subsequent to the last restructuring process had therefore resulted in her being demoted. Applicants testified that they ought to have been matched and placed as Deputy Managers: District Operations at grade and salary level 12 given that they had performed the same functions as the latter whilst they were District Heads. Hadebe testified that although they had requested that their posts of district heads to be evaluated since 2008 same was not done. Under cross-examination however Hadebe conceded that that the post of a District Manager was evaluated by the PJEC but stated that she disagreed with the manner (“how”) in which the said Committee dealt with it. As stated Applicants also did not take issue with Respondent’s case that the post of District Heads were also (job) evaluated in 2008. Hadebe testified that after Applicants had exhausted attempts at addressing their grievance with regard to being initially placed on grade and salary level 9 and then 10 (when the previous MEC of Respondent had deviated from the evaluation of District Heads at salary level and grade 9 to salary and grade level 10) they lodged an (unfair discrimination) dispute with the CCMA. The said dispute resulted in the parties hereto entering into a Settlement Agreement into which it was, inter alia, agreed that the post of District Head would be (job) evaluated by the Provincial Jobs Evaluation Committee and that the parties would abide such evaluation. According to Hadebe this agreement was not complied with given that although it was evaluated by the PJEC, the PJEC had simply accepted the recommendation of the Provincial Job Evaluation Screening Committee (PJESC) that because the job content of the job of a District Head had not changed in content by more than 20 percent in relation to their previous position as Assistant Managers, the post of District Head could not be evaluated. It is not in dispute that the Settlement Agreement was made an arbitration

award. It is also not in dispute that (despite the fact that Settlement Agreement was entered into between all of the parties hereto) only Hadebe brought an application to the Labour Court to make it an order of Court. The Application was dismissed because of the Court's finding that the said Settlement Agreement had been complied with by Respondent. It is apposite in this regard to refer to what the Court stated at paragraph 9 of its judgment:

“[9] In this case, it is clear that what the Applicant is aggrieved with is the process that was adopted in accordance with the settlement agreement. She had conceded that the Job Evaluation Committee dealt with the job evaluation, and her only complaint was that she was not informed through minutes, as to how the committee had arrived at its findings, I had pointed out to her representative that what she sought did not form part of the settlement agreement. It is not for the Court to impute terms into settlement agreements that are not there in the first place. If Applicant was not satisfied with the outcome, she was nevertheless bound by it in terms of the agreement. Since she appears not to be satisfied with the process taken by the committee, that was another dispute she could have pursued, instead of burdening the Court and the Respondent with this application.”

13. The relief sought by Applicants when testifying was *that as claimed in their Statement of Claim. They, however, in addition claim pay progression from the date that they were matched and placed. [my emphasis]*

14. Respondent in its Statement of Defence denied that when Applicants were appointed as District Heads in 2007 their job description and functions were changed. According to Respondent Applicants continued performing the same functions that they performed as Assistant Managers prior to their appointment as District Heads. [It ought to be pointed out that Applicants were appointed as District Heads pursuant to a restructuring exercise by Respondent in 2007 and that even when they were appointed as District Heads their generic job designation as Assistant Managers/Directors did not change]. According to Respondent's Statement of Case a “Job evaluation was done in 2008 and the evaluation results came at salary level 9. The erstwhile MEC deviated from the recommendations of the Job Evaluation Committee to remunerate the Claimants at salary level 9 and the MEC preferred to remunerate them at salary level 10, which is still within the salary range of Assistant Managers”. According to Respondent's Statement of Case there was no need to re-evaluate the position of District Head because it was evaluated in 2008 and “there was no material change in the positions and salary

level.” According to Respondent at all times prior to the matching and placing arising from the last restructuring exercise, Applicants were Assistant Managers at salary level 10 and this position pertains even after the matching and placing. Respondent contends that placing Applicants as Deputy Managers: District Operations on 12 would result in a promotion of Applicants and that this would be in violation of the Policy. The Matching and Placement Guide and Procedure Manual came into effect on 01st April 2014. Respondent referred to the terms of the Policy set out in paragraph 20 hereof. According to Respondent’s Statement of Defence placing Applicants in the position of Deputy Manager: District Operations at salary level 11-12 would have resulted in the unfair promotion of Applicants and would have violated the Policy principle that matching and placement of staff must not be used to promote or demote employees. Applicants were not demoted as they are still remunerated at salary level 10 and are still employed as Assistant Managers as they always were. The two employees [Khumalo and Hlaluka] were declared redundant or in excess at Provincial level. The District Head posts align with the new Assistant Manager: Sport Promotion and Development posts salary level 9-10 but does not align with the new higher post of Deputy Manager: District Operations salary level 12. Applicants can apply to be appointed to any 1 (one) of the 9 (nine) vacant Deputy Manager: District Operations posts when they are advertised. The remaining 2 (two) (of these) posts were filled through matching and placing because Respondent had an obligation to give preference to existing employees to avoid them [Khumalo and Hlaluka] becoming redundant. The restructuring did not upgrade any posts. The “award as couched by Claimants is not competent because it has no basis upon which it is derived”. Respondent goes through the past career path and conduct (history) of Applicants claiming that they have now “recycled the same matter and disguised it as a demotion.” Applicants’ referral of this dispute is frivolous and vexatious and has caused Respondent immense prejudice. This Application ought to therefore be dismissed with costs, to include costs of Counsel.

15. Naidoo, who is employed in the Office of the Premier as a Deputy Director in the Provincial Organisation Directorate testified that this directorate deals with “monitoring and evaluation and compliance regarding Organisation Structures and Job Evaluation.” He testified that the office of the Premier is the “custodian” of the Provincial Job Evaluation Policy. He testified that in terms of the Provincial Jobs Evaluation Policy, Departments (Provincial) were allowed to evaluate all jobs up to salary Level 12. He testified as to the process that was followed when employees were not satisfied with the result of a job evaluation. He was referred to a meeting of the Provincial Jobs Evaluation Screening Committee (PJESC), held on 07th to 08th November

2013, of which he was the chairperson. According to him the post of District Head: District Sport Co- Ordination, (ie the post that Applicants were appointed to in 2007) was screened for the evaluation process. Naidoo testified that this post came before the PJESC (as part of the evaluation process) “as a result of the CCMA Settlement Agreement” (referred to above) The post was however not evaluated by the PJESC given that the job of a District Head: District Sport Co-Ordination (District Head) had not changed in content by more than 20 percent in relation to the incumbents previous position as Assistant Managers. He testified that “in order for a post to be re-evaluated the Provincial Norm is that there has to be a 20 percent content change between the old job description and the new job description being presented for evaluation.” He testified that at “that point in time” the Department of Sport and Recreation had advised that there was no change in the content of the job description of District Heads.

16. Khumalo testified that she was placed as a Deputy Manager: District Operations at salary level 12 with effect from September 2015 “through the Department’s restructuring.” She testified that she “was then brought to the Ethekewini District.” According to her prior to being placed as a Deputy Manager: District Operations as foresaid she was a Deputy Manager: Community Sport at “Head Office” on salary level 12. She had been promoted to the position of Deputy Manager in May 2009. She had been a District Head at salary level 9 and thereafter salary level 10. According to her the position of a District Head was that of an Assistant Director at salary level 9 or 10. Whenever she acted in a higher post she was appointed by letter to do so. She could only act for a period of 3 (three) months at a time. As Deputy Manager: District Operations she supervised 2 (two) Assistant Managers. She testified that District Heads are Assistant Managers at salary level 10. She initially stated that there was no difference between District Managers and Deputy Managers: District Operations, then stated that she did not know the job descriptions of District Managers and when cross-examined stated that the job description of District Managers was not the same as hers (Deputy Manager: District Operations). When cross-examined she stated that the Key Responsibility Areas of District Managers were different from hers (Deputy Manager: District Operations). According to her if a Deputy Manager: District Operations was absent from her/his post one of the Assistant Managers would be appointed to act in the Deputy Manager’s position. They would have to be appointed to act in the Deputy Manager’s position. This procedure was, however, at times (“sometimes”) not followed. She testified that a district could function without a Deputy Manager: District Operations.

17. I am of the view that it is instructive to set out the relevant aspects of Applicants' written closing arguments. These are as follows:

“4.1 In their referral forms for Conciliation, the Applicants claimed an unfair labour practice relating to the demotion.

4.2 In terms of the outcome required, they stated that they should be retained in their positions as District Managers.

4.3 In their Statement of Claim at paragraph 23, it is stated that the Respondent, unilaterally demoted the Applicants and/or committed an unfair labour practise, by failing to apply its matching and placing policies and procedures fairly and properly or at all and/or conducted itself arbitrarily and unfairly in relation to the promotion and/or demotion of the Applicants, generally.

4.4 In the relief sought in their Statement of Claim, the Applicants requested that the Respondents match and place them to the correct post of Deputy Manager: District Operations within the new structure and they claimed compensation from 01 July 2015 at the correct salary range or grade Level 12.

4.6 the dispute of rights resonates as they were victims of an unfair labour practice being the Respondent's failure to follow its own matching and placing policy. Their claim to be matched and placed correctly, which is accompanied by a claim for the difference in salary, being what they are earning as compared to what they should be earning if the matching and placing was done correctly by the Respondent, does not change the character of their dispute.

4.9 Ms Hadebe's evidence was clear and coherent. There have been two restructures. The Respondent failed to evaluate the post of District Head under the first restructure and then failed to evaluate the post of Assistant manager under the second restructure.

4.10 The Respondents argument that the matter is *lis pendens* or *res judicata* due to the Labour Court's dismissal of the Application to make the Settlement Agreement from the CCMA an Order of Court, must fail. There is no reason why the facts of that matter cannot be heard in this new dispute for the purposes of showing that the Respondent never actually evaluated any post.

4.11 Ms Hadebe clearly stated that the Applicants as Assistant Managers performed the duties of Deputy Manager: District Operations. Her point was that the District Heads should have

been properly evaluated at level 11/12 under the first restructure and if so then when the post of Deputy Manager: District Operations was created under the second restructure, it would have been properly evaluated as equivalents and the Applicant should have been matched and placed correctly.

5. Conclusions

5.1 This case, unlike Mathibeli's has merit. Here, there is a logical connection between (i) the Respondent's unfair labour practice of not performing job evaluations, matching and placements and (ii) paying the Applicants a grade that was incorrect, while knowing they were in fact incorrectly graded and performing duties of posts that were vacant which they should have been matched and placed in many years ago, had the correct procedures been followed.

5.4 From the above, it is evident that the Respondent's refusal/failure to correctly evaluate the disputed posts, in the sense that the omission to do so directly impacts upon the mismatching and misplacement of the Applicants within the Respondent's newly created restructure, is an unfair labour practice.

5.5 The Respondent has demoted the Applicants and has acted arbitrarily and unfairly in this regard.

5.6 As previously mentioned in pleadings, it is necessary and entirely permissible for the Arbitrator to determine the extent to which the post-functions being carried out by Applicants, prior to their alleged demotion mirrored or were similar in nature to that which applied to the position of District Operations Manager. The Applicants are not seeking relief for the actual posts to be upgraded, rather they are seeking a factual finding which determines the extent to which an unfair demotion has occurred, in fact and in law.

5.7 A finding must be made to this effect, awarding compensation to the Applicants for an unfair demotion.

ANALYSIS OF THE SUBMISSIONS AND EVIDENCE

18. The use by Applicants of the words 'sought' and 'purported' in Applicants' Statement of Claim would generally have rendered this dispute premature. The same can be said for

the claim in the referral form relating to this dispute where Applicants claim that they are “District Managers” and seek the relief that they be “retained in their positions as District Managers.” Fortunately for Applicants it was their case during these proceedings that pursuant to the restructuring exercise, in July 2015, they were matched and placed as Assistant Managers: Sport Promotion and Development or Assistant Managers: Recreation Promotion and Development.

19. Applicants complaint arises from their having been ‘matched and placed’ either as Assistant Managers; Sport Promotion and Development or Assistant Managers; Recreation Promotion and Development. As must be apparent this occurred pursuant to a second restructuring process which was finalised in 2015. As stated by Applicants “In short, the alleged unfair demotion (being an unfair labour practice cause of action) is simply premised upon the factual history relating to the post in question and focuses upon the consequence of the Respondent’s refusal / failure to correctly evaluate the position concerned, in the sense that the omission to do so directly impacts upon the mismatching and misplacement of the Applicants within the Respondent’s newly created restructure.”

20. In determining whether Applicants were demoted when matched and placed as aforementioned ,in 2015, I must of necessity have regard to the facts relating to the posts that Applicants occupied immediately prior to them being placed as Assistant Managers; Sport Promotion and Development or Assistant Managers: Recreation Promotion and Development in July 2015. It is necessary to point out that the matching and placing was affected in terms of the ‘Matching and Placement Guide and Procedure Manual’ (hereinafter referred to as ‘the Policy’) determined and issued by the MEC of Respondent on 24th March 2014. It is not in dispute that in terms of the Policy the following applies:

‘d) The matching and placement of staff must not-

- Disrupt the effective and efficient delivery of services;
- Be used as a punitive measure against employees; and
- Be used to promote or demote employees.

e) During the matching and placement process no additional remuneration must be paid in any form to any employee.’

21. The positions that Applicants held prior to the matching and placement, were designated as Assistant Managers: District Heads, i.e Assistant Directors. It is not in dispute that these posts were graded (job weight) at level 9 and salary level 9 and that pursuant to a 'deviation' by the then MEC (in 2008) it was graded at (job weight) level 10 as well as salary level 10. Applicants' case, at the risk of being repetitive, is that given the duties, functions and responsibilities attaching to the post of a District Head. had it been (job) evaluated it would have been re-graded to grade and salary level 12, i.e the grade and salary level attaching to a Deputy Director which would include the post of Deputy Manager: District Operations (on the new structure). They also allege that District Heads were de facto on grade and salary level 12. Thus, they state that had the post of District Head been correctly evaluated when the 'matching and placing' was affected in 2015 they would have been placed in the post of Deputy Manager: District Operations grade and salary level 12.

22. Contrary to Applicants' assertion however, the post of District Head was evaluated in 2008. Furthermore in refusing to make the Arbitration Award, stemming from the Settlement Agreement referred to above, an order of court, the ratio decidendi of the Court was that the post of District Head was evaluated by the PJEC in 2014 although it recognised that Applicant took issue with the process adopted by the PJESC as well as the PJEC. I am mindful of the evidence of Naidoo to the effect that the post was not evaluated in terms of the foresaid Settlement Agreement. In the case of Hadebe v Minister of Labour [2014] LAC Saffli Website the Court quoted the following from National Commissioner of the SA Police Service v Potterill N O and Others (2003) 24 ILJ 1984 (LC) with approval:

"[16] In my view regulation 24 requires one to draw a distinction between a decision to regrade a post and a decision to allow the incumbent employee in the regraded post to continue to occupy that post. Where the incumbent employee is permitted to continue to occupy the regraded post and is afforded the appropriate higher salary, the employee is, in my view 'promoted'. In my view such a situation falls within the first meaning given for the word 'promote' in The Concise Oxford Dictionary Dictionary (9 ed), namely:

'V.tr.1(often foll. by to) advance or raise (a person) to a higher office, rank, etc (was promoted to captain)' [my emphasis]

[17] A bulletin issued by the South African Police Service on 28th March 2002 which sought to explain the meaning and effect of regulation 24 stated:

‘There is, however no, no obligation on the National Commissioner to *upgrade the post and promote the incumbent*. Instead, he may,’ ”

[my emphasis]

In my view the author of this document was quite correct in distinguishing between the decision to ‘upgrade the post’ and the decision to ‘to promote the incumbent’.

23. In this dispute there was never a decision to upgrade the post of a District Head. Applicants were always (prior to the matching and placing) designated as Assistant Directors on grade 10 salary level 10. Their job designation, job grade and salary level were determined by the MEC of Respondent as he/she was obligated to do in terms of the Public Service Act of 1994 and Public Service Regulations of 2001, i.e by law. Having regard to the case of Hadebe wherein it is recognised that the decision to upgrade a post belongs to the National Commissioner (read MEC) I would be usurping the function of the MEC were I to find that Applicants ought to have been graded at (job) level 12 and salary level 12. I would also be acting in violation of the Policy determined by the MEC were I to find that Applicants ought to have been matched and placed as Deputy Directors: District Operations given that same prohibits an employee of Respondent from being promoted or from receiving additional remuneration (when being matched and placed). In view of the provisions of the Public Service Act and Regulations and having regard to Applicants’ grade and salary level (i.e 10) prior to them being matched and placed it cannot be said that they were demoted. Even if Applicants’ posts as District Heads were incorrectly or improperly evaluated in 2008 or when Respondent acted in terms of the Settlement Agreement referred to above, I would be speculating if I were to find that had they been “correctly evaluated” Applicants would have been upgraded to a grade and salary level 12 post. It therefore cannot be said that they were demoted when they were matched and placed as Assistant Managers: Sport Promotion and Development or Assistant Managers: Recreation Promotion and Development. Furthermore, as an aside, no incumbent to a post that has been upgraded has the right to be promoted to the upgraded post.

24. I do not doubt that their matching and placing did reduce certain functions and duties of Applicants. Having found as foregoing, however, it would be illogical to go on to find

that Applicants were demoted simply because they no longer performed these duties and functions. That must be so given that the consequences of restructuring can range from employees being matched and placed or having to apply for posts in certain circumstances or being relocated and even being dismissed for operational requirements, as a last resort. Moreover the Policy (to which reference was made) makes provides for a situation such as the position that Applicants find themselves in. It states that “Every attempt shall, as a matter of principle, be made to first match and place all existing employees into the new structure. If no placement in terms of the agreed to criteria can be made, the employer will advertise the post and fill the post with the most suitable candidate.” It also goes on to state that “Employees shall be matched and placed in positions according to the degree to which their current job duties are the same or similar to the job duties of a new post in terms of the recruitment process.” It must be borne in mind that the posts that Applicants were placed in were new posts. Sub-clause 5.2. of the Policy reads as follows:

- a) In placing employees in new structures, employees shall be placed on a close-match basis *as far as possible*. In close- matching a post, the job content of the “new” post must be compared with the existing job content. Employees having the *closest* match in respect of the job content shall be given preference. (my emphasis)
- b) Where the close match cannot be done one hundred percent, the match shall be done on the *most matched job content*. (my emphasis)
- c)
- d) The close match is done on job content and not job designation. Post designation may however be used as an indicator.

It bears repeating that this Policy is a determination by the MEC. The foregoing makes it clear that the structuring process envisages changes to the job content of posts that employees are matched and placed in. Employees may be placed in posts with added or reduced job content compared to their previous positions. As long as their grade and salary level are not downgraded employees cannot cry foul. I therefore find that notwithstanding the reduction in their duties, functions and responsibilities Applicants were not demoted. All of the foregoing must be read in the light of the provisions of the Policy that (legally) employees must not be promoted, demoted and /or receive additional remuneration when matched and placed. Were it not for these prohibitions, in terms of the Policy, the outcome of this dispute may very well have been different.

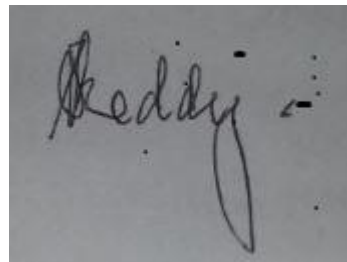
25. It is apposite to state that incorrectly matching and placing an employee in the context of restructuring is, in and of itself, not an unfair labour practice in terms of the Unfair Labour Practice scheme of the Labour Relations Act of 1995 as Amended.

26. This referral was neither frivolous nor vexatious. I therefore do not believe that an order of costs is appropriate.

AWARD

26. The dispute referred by Applicants herein is hereby dismissed.

27. There is no order in relation to costs.

A handwritten signature in dark ink, appearing to read 'Reddy', is centered within a rectangular frame.

Commissioner: Sugan Reddy

30th November 2020

