



IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C 27/15

In the matter between:

MALEBYE URIA TABANE

Applicant

and

I DE VLIEGER-SEYNHAEVE N.O

First Respondent

**THE PUBLIC SERVICE CO-ORDINATING
BARGAINING COUNCIL**

Second Respondent

**DEPARTMENT OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT**

Third Respondent

Heard: 17 May 2017

Delivered: 28 September 2017

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction:

- [1] The Applicant seeks an order reviewing and setting aside the arbitration award dated 12 December 2014 issued under case number PSCB21-14/15 by the First Respondent (Commissioner), acting under the auspices of the Second Respondent, (PSCBC). In the award, the Commissioner found that

the Third Respondent (Department) had not acted in breach of the provisions of the PSCBC Resolution 3 of 2009 (The Resolution) as alleged by the Applicant . The dispute was referred to the PSCBC in terms of the provisions of section 24 of the Labour Relations Act 66 of 1995.

Background:

- [2] The factual background to this dispute is to a large extent common cause. The Applicant is currently employed by the Department, having commenced his employment on 1 April 1993, as a Security Officer Grade 1 on salary scale level 3. He had received a salary level progression from salary level 3 to level 4 on 1 May 1994 upon attaining the status of a Security Officer Grade 2. On 1 July 1996, he progressed to salary level 4 after his status changed from Security Officer Grade 2 to Grade 3.
- [3] On 1 August 1997, the Applicant progressed from Security Officer Grade 3 to Senior Security Officer, and as a result, received a further salary progression to salary level 5. On 1 August 2000, he received another salary progression to salary level 6, and at the time of the dispute, he was graded as a Senior Security Officer Grade 3.
- [4] The Applicant lodged an internal grievance with the Department alleging that he has was precluded from benefiting from provisions of Clause 3.6.2.12 of the Resolution, which provide that;
- 3.6.2.12 *Accelerated Grade Progression will be as follows:*
- 3.6.2.12.1 *An employee who has performed above satisfactory for 12 years cumulatively in a specific salary level, shall grade (salary level) progress from salary level 4 to 5 or from salary level 5 to 6 or from salary level 6 to 7 or from salary level 7 to 8. Only 30% of the employees per year may be awarded grade progression in this regard.*
- 3.6.2.12.2 *Recognition for accelerated grade progression commences with effect from 1 April 2010.*
- [5] The nub of the Applicant's grievance was that he has been at salary level 6 for over 12 years, had performed satisfactorily for 12 years cumulatively since

2000, and he therefore was eligible for grade progression from salary level 6 to level 7 as per the above provisions.

- [6] The Department had investigated the grievance internally, and compiled a report dated 23 November 2010, in which it was concluded that the process of excluding the Applicant from salary progression was fair. This was due to the reason that his post was graded on level 3, and he could therefore not grade progress to another level, as he was regarded 'out of adjustment'. Furthermore, he was informed that he was 3 levels higher than he was supposed to be.

The Arbitration proceedings:

- [7] Aggrieved by the outcome of the internal grievance processes, the Applicant referred a dispute to the PSCBC. Conciliation proceedings held on 2 May 2014 failed to resolve the dispute, and it was then referred for arbitration. The central issue as recorded by the Commissioner during the arbitration proceedings was whether the Department was in breach of the provisions of the Resolution.
- [8] No oral evidence was led before the Commissioner. The parties had agreed that the factual background to the dispute was largely common cause, and that the principal issue for determination pertained to the interpretation and application of the Resolution. They had accordingly exchanged written arguments, which were presented to the Commissioner together with documents which they contended were in support of their respective cases.
- [9] The Applicant does not dispute the grading of his post. His principal contention was that in accordance with the provisions of clause 3.6.2.12 of the Resolution, he was eligible for grade progression to salary level 7 on 1 August 2012. His interpretation of the Resolution was that it covered employees who had occupied the same salary level for a period of 15 years, and that it further provided for a salary progression for employees who have been in the public service for a period of 12 years, and who had performed above expectation for the cumulative period of 12 years.

- [10] The Applicant rejected the Department's position that clause 4.1.3 of Circular 29 of 2011¹ prevented it from grade progressing him, and contended that this circular differentiated between employees with 15 years of service and those with 12 years of service (as provided for in clause 4.2²). His further interpretation of the Resolution and clause 7 of Circular 2 of 2009 was that the latter mirrored what was set out in Circular 29 of 2011, and dealt with accelerated grade progression without prescribing that the post should be graded and/or evaluated at a certain level, and further that it did not make any reference to employees who are remunerated 'out of adjustment'.
- [11] The Department agreed with the contention that the provisions of the Resolution provided for grade progression for employees on specific salary levels and that its purpose was to give recognition to public servants who have been in the service for a period of 12 years and more. The Department however held the view that the Resolution was only applicable to employees who fell under specific criteria, and that the progression of an employee was dependent on his or her years of services. Thus an employee could be elevated to the next salary level without this affecting the level of the designation he was occupying. Differently put, where the designation was not graded at a higher salary level, the employee was not advancing to a higher designation, but rather to a higher salary. The employee's designation in title remained the same, but he or she would however receive a higher salary for essentially performing the same duties.
- [12] The Department further contended that promotions were abolished in the public service since 1999, and currently there were two ways that an employee could be elevated to a higher designation. The first was by applying

¹ Which reads:

'Employees with 15 years service who are occupying posts that are job evaluated at a lower salary level than on what they are remunerated (out of adjustment), e.g. an employee who is occupying a post graded at level 4 and remunerated at salary level 6, cannot progress to salary level 7. In this instance, the affected employee must be identified for the purpose of exploring the possibilities of job enrichment/expansion' (sic)

² Which reads:

Where employees with 12 years service on the same salary level meet the criteria of 12 cumulative 'above satisfactory' performance ratings, the implementation of the Resolution is straightforward. 'Cumulative' should not be confused with 'consecutive'. If an employee, for example, has 14 years service on same salary level, at least for any 12 of those years, she/he must have received "above satisfactory" performance ratings' (sic)

and being appointed to a higher designation after a recruitment and selection process, or if the post the incumbent occupied, received a higher job level grading after a job evaluation exercise. In the second instance, the employee would then be absorbed into the higher graded post in terms of the applicable regulatory measures.

- [13] Moreover, according to the Department, the Resolution was explicit in that it stipulated that employees, who are incumbents in designations that are graded on a lower salary level but for some reasons are remunerated at a higher salary than what the post they occupy, are not eligible to be progressed to a higher salary level as they 'are out of adjustment'. Reliance in this regard was placed on clause 7.6.1 of Circular 2 of 2009, which provided that the grade determined with job evaluation formed the basis from which employees could receive a grade progression. Regarding the Applicant therefore, he had occupied a designation graded on salary level 3, but was remunerated at salary level 6, and was consequently not entitled to be elevated to salary level 7.

The Award:

- [14] Upon a consideration of the matter, the Commissioner in issuing the award found that the Department was not in breach of the provisions of the Resolution on the basis that;
- a) It was common cause that the Applicant was graded at level three (3), and that he was remunerated at salary level 6. The grading of a designation was determined by a job evaluation exercise, which was therefore the basis from which employees could receive a grade progression. The salary progression was capped to the next salary level above the salary level attached to the designation in contention;
 - b) Clause 4.1.3 of Circular 29 of 2011 stipulated that employees who are incumbents in designations which are evaluated at a lower salary level than on what they are remunerated on ('out of adjustment) do not qualify to be elevated to the next salary level;

- c) The Applicant's contention that clause 4.2 of circular 29 of 2011 did not contain a similar limitation clause as clause 4.1 ought to be rejected, as such a 'state of affairs would cause confusion and unfairness, in that, an employee who is "out of adjustment"' would be allowed to progress to a salary level four (4) times than his current level after 12 years, but an employee who had 15 years' service record would not be entitled to the same;
- d) The starting point for every progression was determined by the grade level, and the Resolution therefore made it clear that progression was allowed for one salary level higher and not any further up. Whilst it was accepted that the Applicant was remunerated at salary level 6 but that his designation was grade at salary level 3, he was on those grounds not entitled to be elevated any further.

The legal framework:

[15] 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 all³. The principles applicable to the interpretation of collective agreements are trite as restated in *Western Cape Department of Health v Van Wyk and Others*⁴. The legal position is that;

- a) When interpreting a collective agreement, the arbitrator is enjoined to bear in mind that a collective agreement is not like an ordinary contract, and he/she is therefore required to consider the aim, purpose and all the terms of the collective agreement;
- b) The primary objects of the LRA are better served by an approach which is practical to the interpretation of such agreements, namely to promote the effective, fair and speedy resolution of labour disputes. In

³ See *PSA obo Liebenberg v Department of Defence and Others* (2013) 34 ILJ 1769 (LC) at para [2]

⁴ (2014) 35 ILJ 3078 (LAC) at para 22. See also *North East Cape Forests v SAAPAWU and Others* [1997] 6 BLLR 711 (LAC); *Food and Allied Workers Union v Commission for Conciliation, Mediation and Arbitration and Others* (2007) 28 ILJ 382 (LC) at para 35.

addition, it is expected of the arbitrator to adopt an interpretation and application that is fair to the parties.

- c) A collective agreement is a written memorandum which is meant to reflect the terms and conditions to which the parties have agreed at the time that they concluded the agreement.
- d) The courts and arbitrators must therefore strive to give effect to that intention, and when tasked with an interpretation of an agreement, must give to the words used by the parties their plain, ordinary and popular meaning if there is no ambiguity. This approach must take into account that it is not for the Courts or arbitrators to make a contract for the parties, other than the one they in fact made⁵;
- e) The “parole evidence” rule when interpreting collective agreements is generally not permissible when the words of the memorandum are clear.
- f) Collective agreements are generally concluded following upon protracted negotiations, and it is expected of the parties to those agreements to remain bound by their provisions. It therefore follows that such agreements cannot be amended unilaterally.

[16] Applying the above principles to the facts of this case, the starting point is that for this application to be successful, the Applicant must convince the Court that the award or the decision arrived at by the Commissioner is one that a reasonable decision maker would not have made in the light of what was presented to him. The enquiry is not whether the decision is correct or not, but whether the Commissioner properly applied her mind to the issues before her, considered all the material before, and adopted an approach that gave effect to the purpose of the provisions of the agreement.

The grounds of review:

[17] The Applicant seeks to have the award reviewed on the basis that the Commissioner incorrectly concluded that the grade determined which job

⁵ See *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA)

evaluation formed the basis from which employees could receive grade progression. He contended that this conclusion was not based on the provisions of the Resolution. The Applicant further contended that the Commissioner's conclusion that clause 4.1.3 of Circular 29 of 2011 was not applicable to advanced progression as it would cause confusion and unfairness, was incorrect, as this was tantamount to making a contract for the parties other than the one they envisaged or in fact made.

- [18] It was further submitted that the Commissioner's decision was wrong and not one that a reasonable decision maker could have reached as she failed to appreciate that where a circular conflicted with the Collective Agreement, the latter prevailed, as the employer did not have the prerogative to impose its understanding of the bargained agreement on the employee without a specific authority for such prerogative in the agreement⁶.

Evaluation:

- [19] The objectives of Resolution include giving effect to clause 5 of Resolution 1 of 2007 by introducing a revised salary structure for all occupational categories graded on salary levels 1-12 not covered by any Occupation Specific Dispensation (OSD), and to introduce a career pathing model and grade progression for identified salary levels⁷. In this regard, it is not in dispute that the Applicant is within the salary levels in question, and is also not covered by the OSD.
- [20] The essential elements of the Resolution to the extent that they are relevant for the determination of this application are to provide for a grade progression model, to be based on, *inter alia*, the principle of completed continuous years of services on a salary irrespective of the notches, and for employees who have performed above satisfactory over a period of 12 years.
- [21] With a view of ensuring the proper implementation of the provisions of the Resolution, the Director-General and Deputy Director-General (Corporate

⁶ In reference to *Western Cape Department of Health v MEC Van Wyk and others* (20140 11 BLLR 1122 (LAC) at para 20

⁷ Clause 1 of the Resolution

Services) of the DPSA had issued circular 2 of 2009 and circular 29 of 2011. The intervention of the Minister of the DPSA in the implementation of collective agreements concluded in the public service, is permissible within the context of section 5 of the Public Service Act (PSA)⁸. These provisions permit the Minister to issue directives to elucidate or supplement collective agreements, with the proviso that that any act performed by the Minister under the PSA may not be contrary to the provisions of any collective agreement concluded at a bargaining council for the public service as a whole or for a particular sector in the public service.

[22] A proper interpretation of clause 3.6.2.12 of the Resolution needs to take into account other provisions of the Resolution, more specifically the other parts of clause 3 which provide;

“3. PARTIES TO THE COUNCIL AGREE

Revised salary structure

⁸ Act No. 103 of 1994,
Section 5:

‘5. Implementation or limitation of actions affecting public service or its members

(4) Any act by any functionary in terms of this Act may not be contrary to the provisions of-

- a) any collective agreement contemplated in item 15 (i) of Schedule 7 to the Labour Relations Act; or
- b) any collective agreement concluded by a bargaining council established in terms of the said Act for the public service as a whole or for a particular sector in the public service.

(5)

(6) (a) Any provision of a collective agreement contemplated in subsection (4), concluded on or after the commencement of the Public Service Amendment Act, 2007, shall, in respect of conditions of service of employees appointed in terms of this Act, be deemed to be a determination made by the Minister in terms of section 3 (5).

(b) The Minister may, for the proper implementation of the collective agreement, elucidate or supplement such determination by means of a directive, provided that the directive is not in conflict with or does not derogate from the terms of the agreement.’

- 3.3 Progression to a higher notch within the scale attached to a salary level will be based on performance in terms of existing department performance management and development systems.

Grade Progression Model

3.5 The grade progression model is based on the following principles:

- 3.5.1 Posts are graded based on the outcome of Job Evaluation;
- 3.5.2 Recognition of performance; and
- 3.5.3 Completed continuous years of service on a salary level irrespective of the notch.

[23] In line with the above, I agree with the submissions made on behalf of the Department that clause 3.5 of the Resolution should be read conjunctively with clause 3.6, which set out the salary structure of the model. Accordingly, the fact that an employee has served 12 cumulative years in a grade is not a basis for an automatic grade progression, as any grade progression is based on a variety of factors, including job evaluation, recognition of performance and obviously the cumulative 12 years.

[24] The difficulty with cases presented before Commissioner by way of mere submission of written heads of argument and voluminous bundle of documents has received attention by the Labour Appeal Court in *Arends and Others v South African Local Government Bargaining Council and Others*⁹. Murphy AJA held that such a decision (i.e., to merely present written submissions) in that case was ill-advised¹⁰. The same sentiments ought to be

⁹ (2015) 36 ILJ 1200 (LAC)

¹⁰ At para 11. See also at para 15, where it was held that;

“The appellants are to some extent the authors of their own misfortune. They placed the matter before the arbitrator as if there was a simple, single issue capable of resolution with the barest minimum of factual matter. Their approach was neither prudent nor correct. When parties desire to proceed without oral evidence in the form of a special case, it is imperative that there should be a written statement of the facts agreed by the parties, akin to a pleading. Otherwise, the presiding officer may not be in a position to answer the legal question put to him. Alternatively, without such a statement, the question put is in danger of being abstract or academic. Courts of law and arbitration tribunals dealing with disputes of right exist for the settlement of concrete controversies and not to pronounce upon abstract questions or to give advice upon differing contentions about the meaning of an agreement. Where a question of legal interpretation is submitted to an arbitrator, the parties must set out

equally expressed in this case. The mere fact that a dispute pertains to the interpretation and/or application of a collective agreement does not imply that a determination in that regard will be confined solely to matters of interpretation or application. Such disputes must obviously be resolved within a factual context, and it is invariable that disputes of fact are bound to arise notwithstanding the parties' agreement that the background facts of the dispute are largely common cause. The facts of this case illustrate this difficulty.

- [25] In this case, and bearing in mind the provisions of clause 3 of the Resolution as pointed above, the questions that should be asked is how, in the absence of oral evidence was it expected of the Commissioner to determine whether the requirements of grade progression as stipulated within clause 3.5 were met in this case? Thus, how was the Commissioner to conclude that there was a proper job evaluation, and what its outcome was? On what basis if any, was the Commissioner to conclude that the Applicant's performance was recognised and that he had satisfactorily performed? Even more crucially, how was the Commissioner to know that the Applicant fell within the 30% threshold in 2012 for him to be awarded grade progression?
- [26] The Department in its submissions before the Court had sought to rely on the fact that no oral evidence was led at the arbitration proceedings, and thus there was no evidence that the Applicant had 'satisfactorily performed'. In my view however, these submissions are not in tandem with what was presented before the Commissioner as can be gleaned from the Department's own written submissions before the Commissioner¹¹. To therefore suddenly raise the concerns as stated above is clearly opportunistic, particularly since the Department had also agreed to the manner with which the case was presented before the Commissioner.

in the stated case a factual substratum which shows what has arisen and how it has arisen. The stated case must set out agreed facts, not assumptions. The purpose of the rule is to enable a case to be determined without the necessity of hearing the evidence. An oral stated case predicated upon poorly ventilated and potentially unshared assumptions as to the facts defeats the purpose of the requirements of a stated case and, as this case shows, will lead to problematic results." (Citations omitted)

¹¹ Pages 128 – 132 of the Record

- [27] To come back to the concerns being raised, there is nothing in the record that suggests that the requirements for grade progression as stipulated in clause 3.5 of the Resolution were met, nor is there anything in the award that suggests that the Commissioner had in earnest, considered whether those requirements as stipulated in clause 3.6.2.12.1 of the Resolution were met. There is further nothing in the award that suggests that the Commissioner had regard to or considered the requirements or principles for grade progression as further emphasised in clauses 3.3¹², 3.5, or 3.6 of the Resolution.
- [28] The Commissioner as is evident from the award, placed emphasis on the interpretation of the two circulars, which were in the main, merely ancillary to the Resolution if not interpretation tools devised by the DPSA. These circulars were to be considered only if there was ambiguity in the provisions of the Resolution relied upon if the need arose.
- [29] To the extent that it was submitted on behalf of the Applicant that these circulars were in conflict with the provisions of the Resolution, and further to the extent that the Commissioner had regard to them, it is important to highlight that clause 7. 6 of circular 2 of 2009 provides that the grade progression model is introduced based on the principle that posts are to be graded based on outcome of the job evaluation unless indicated otherwise, and that the grade determined with job evaluation formed the basis from which employees could be grade progressed. This provision cannot by all accounts be in conflict with the provisions of clause 3.5 of the Resolution, which also outlines the principles applicable to grade progression, including that of an outcome of job evaluation. As already indicated however, the Commissioner paid scant regard to these principles or requirements.
- [30] The manner with which the Commissioner however dealt with the provisions of these circulars is equally problematic, and I am convinced that her interpretation of clauses 4.1 and 4.2 of the circular 29 of 2011 evinces a failure to properly apply her mind to the issues before her. In essence, in

¹² Which provide that;

'Progression to a higher notch within the scale attached to a salary level will be based on performance in terms of existing departmental performance management and developmental systems'

shifting her focus to these circulars, and basing her decision on them, she not only interpreted them in an unfair and misguided manner, but she also failed to adopt an approach that gave effect to the purpose of the provisions of the Resolution.

- [31] Clause 4.1 of the circular pertains to employees with 15 years' service on a salary level, whilst clause 4.2 dealt with employees with 12 years' service on a salary level, and was specifically about accelerated grade progression. The dispute before the Commissioner pertained to an employee who had 12 years of continuous service, and clause 4.2 does not make any reference to employees remunerated out of adjustment as in 4.1.3 of the same circular. Thus, reliance by the Commissioner or the Department for that matter on the provisions of clause 4.1 of circular 29 of 2011 was misplaced, as it had no relevance to the Applicant's case. The Commissioner thus imputed an interpretation to clause 3.6.2.12.1 of the Resolution that was completely out of sync with the objectives of the Resolution and the principles of grade progression model as stipulated in clause 3.5.
- [32] Even if the Commissioner was inclined to be persuaded by the provisions of the circulars in coming to her conclusion, for the purposes of the interpretation of clause 3.6.2.12.1, and for what it is worth, clause 4.2.1 of circular 29 of 2011 was even more instructive, as it provided for grade progression in respect of employees with 12 years of service, with emphasis however being placed on 'above satisfactory' performance.
- [33] The conclusion to be reached in the light of the above is that the Commissioner, having correctly identified the issue for determination, went about the enquiry in that regard in a wrong manner, and thus arrived at an outcome which did not fall within the band of reasonableness. In the end, the Commissioner failed to adopt an interpretation of the provisions of the Resolution that was fair to the parties, especially in view of it being apparent that her decision was based more on the interpretation of the circulars rather than the provisions of the Resolution themselves.

[34] In the light of the above conclusions, ordinarily, the Court, and where it was prudent, would substitute the Commissioner's findings with its own. The circumstances of this case however militate against such an approach, more specifically in view of the concerns raised in regard to the manner with which this dispute was presented before the Commissioner. In the circumstances, the only way that this matter can be properly determined is to have it remitted to the PSCBC for a fresh hearing. I have also had regard to the issue of costs, and I am satisfied that the requirements of law and fairness dictate that each party must be burdened with its own costs.

Order:

[35] In the circumstances, the following order is made;

1. The arbitration award issued by the First Respondent under case number PSCB21-14/15 dated 12 December 2014 is reviewed and set aside.
2. The matter is remitted back to the Second Respondent to be heard *de novo* by a Commissioner other than the First Respondent.
3. There is no order as to costs

E Tlhotlhemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:

Attorneys

C.J May of Adams & May

For the Third Respondent:

Adv. S.C O'Brien with Adv. S Mbali

Instructed by:

The State Attorney, Cape Town

LABOUR COURT