



ARBITRATION AWARD

Panelist/s: Chris Mbileni
Case No.: PSHS340-10/11
Date of Award: 12-Apr-2011

In the ARBITRATION between:

In the ARBITRATION between:

PSA obo Visser, Liezl

Applicant Party

and

Department of Correctional Services: Western Cape

Respondent Party

Applicant's representative: Ms A. Mosaic

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1. **Details of hearing and representation:**

- 1.1 The arbitration was set down in terms of s24(2), [24(5)] of the Labour Relations Act 66, of 1995 (the LRA) as amended. The hearing was held on the 9th March 2011 in one of the rooms at the hall of the Allendale Management Area in Paarl, Western Cape.
- 1.2 Ms Mosetic, an official of the PSA appeared for the applicant, Ms Liezl Visser and Ms Malan, the Regional Coordinator for Legal Services represented the respondent at the arbitration proceedings. No pre-arbitration conference was held, however, the representatives presented their opening statements.
- 1.3 Ms Mosetic called two witnesses, Ms Liezl Visser and Ms Anita Müller to testify and they were asked to take an oath prior to them testifying whereas Ms Malan for the respondent selected not to call witnesses or to give evidence at all by the respondent. The proceedings were mechanically recorded and those audio tapes including the handwritten notes were handed to the Council for safekeeping.

2. Issue in dispute:

- 2.1 The issue in dispute is whether or not the Collective Agreement contemplated in Resolution 1 of 2009 was correctly interpreted or applied.

3. Opening Statements:

3.1 Applicant's opening statement:

- 3.1.1 Ms Mosetic submitted that the applicant, Ms Visser had been employed by the Department of Correctional Services since 1st October 1994. Ms Visser is currently holding the rank of a Social Worker at Grade II based at Havequa Correctional Centre and she had been there since the 1st June 2006.
- 3.1.2 Ms further submitted that the applicant lodged a grievance regarding her grading and it was agreed that the Department of Correctional Services (DCS) would carry out job evaluation on her post. The process was started but not finalised due to the upcoming OSD that would address her concern.
- 3.1.3 Ms Mosetic argued that Ms Visser's experience was not recognised and therefore incorrectly translated to the new OSD levels. The relief the applicant would expect is to be translated in terms of the OSD to a Supervisor Social Workers Grade 1.

3.2 Respondent's opening statement:

- 3.2.1 Ms Malan submitted in her opening statement that there was re-grading of social workers in 2005. All Social Workers were graded according to the levels where they were. At the time the OSD was implemented, the applicant was not a supervisor and there was job evaluation taking place but not finalised due to the upcoming OSD.
- 3.2.2 Ms Malan further submitted that the applicant was on R138 792.00 per annum and in terms of the OSD, she was translated to R142 947.00 per annum. She had 17 years of experience and she was placed on Grade II on the 4th Notch, which was a correct placement.
- 3.2.3 Ms Malan further submitted that at level 8, one is not regarded as supervisor in terms of the OSD; it is only Level 9 that one is regarded as supervisor. Ms Malan argued that the

dispute arose before the introduction of the OSD and the alleged dispute relates to the interpretation or application of a collective agreement.

4. Summary of evidence and arguments:

4.1 Applicant's case and argument:

4.1.1 The applicant's *first witness*, Ms Liezl Visser had testified that she was registered as a Social Worker in January 1992 [19 years of social work experience] and she had been renewing and paying for her membership to the Council every year since then in order to practise as a Social Worker.

4.2 The applicant, Ms Visser further testified that the Memo on page 30 of Bundle A indicated that she was one of two trained supervisors in the Overberg Management Area to become a supervisor at Caledon Comcor. Due to reshuffling, she was transferred from a supervisory post at Buffeljagrivier Correctional Centre where she supervised two social workers compared to a one person social work post at Swellendam Comcor Office.

4.3 Ms Visser further testified that in June 2006, she was appointed Section Head Social Work Services and Social Work Supervisor at Hawequa Correctional Centre by A. Müller, the Manager Social Work Services [see page 31 of **Bundle A**]. Ms Visser further testified that there are three Social Worker Supervisors in her Management Area and they perform the same functions as she does. Each supervisor has one supervisee, the same as she has.

4.4 Ms Visser further testified that she lodged a grievance regarding re-grading of her post from level 8 to level 9 [see page 13 of Bundle A: **fax from Mr. TS Magagula, Regional Job Evaluation Analyst**]. Ms Visser went to the meeting called by Mr. Magagula on 8th February 2008 with Ms Linkie Ngobeni. The job evaluation interview was conducted but the process of job evaluation was not finalised [see pages 19 to 22 of **Bundle A: Job Evaluation**] but Ms Ngobeni said the upcoming OSD would rectify any deficiency.

4.5 Ms Visser further testified that pages 27 to 29 of Bundle A, are a summary of her position at that stage [as at 13 October 2008]. In addition, she was promoted to Chief Social Worker (1997); Supervisor of Mrs. A. du Toit and Ms F. Theunis [they were both newly appointed social workers (1998)]; functioned as manager/production worker at Swellendam ComCor and also acted as Head ComCor [August 2002 to June 2006].

4.6 In conclusion, Ms Visser testified that pages 23 to 26 of Bundle A show her Performance Plan and in particular, page 26 is the key activities [see paragraphs 8.1 to 8.6]. Pages 24 and 25 show her supervisory duties that she performed.

4.7 During cross-examination by Ms Malan, Ms Visser confirmed that translation will be subject to the following conditions: page 8 of Bundle B, paragraphs: 3.2.1.1 (employees must meet the appointment requirements); 3.2.1.2 (the employee must be performing the functions of the job) and 3.2.1.3 (employees will translate to appropriate posts and salary grades in accordance with the posts that they occupy at the time of translation).

4.8 Ms Visser further confirmed that when the OSD kicked in, she was translated in terms of her salary scale, which was R138 792 p.a. to R142 947 p.a. She further confirmed that she had 19 years of service but the required level of experience was 10 years.

- 4.9 Ms Visser testified under cross-examination that her supervisory experience had not been considered in terms of the OSD. She further testified that she was incorrectly placed because the post was vacant and she was regarded as a Production Worker in 2006. She further gave evidence that she was transferred and to be job evaluated.
- 4.10 Ms Visser further confirmed that the Department of Correctional Services could not evaluate her post now. She further confirmed that her job was re-graded in 2005 – 2006 and it was then disregarded but later transferred to Hawequa Management Centre.
- 4.11 The applicant's *second witness* Ms Anita Müller testified that she is a Social Worker: Manager in the Allandale Management Area and a direct and professional supervisor to Ms Visser. Ms Müller further testified that the applicant had been working under her supervision since 2006 at Hawequa Correctional Centre.
- 4.12 Ms Müller further testified that she has three supervisors in the Allandale Management Area, however, at Hawequa Correctional Centre the post of still needs one but despite Ms Visser performing the duties of supervisor, the OSD did not recognise her as she is on level 8 and had thereby created disequilibrium on the organogram.
- 4.13 Ms Müller further testified that although the applicant went for the job evaluation interview and despite Ms Linkie Ngobeni indicating that she forwarded the job evaluation brief to Head Office, she did not get the results. Ms Müller stated that Ms Visser did everything regarding supervisory functions of two entry-level social workers since 2006. Ms Visser remained where she was before in spite of the fact that the job evaluation was stopped as it would be rectified by the implementation of the OSD.
- 4.14 Ms Müller further testified that she was not aware of the Memo on page 6, paragraph 4 of Bundle A which states that due to the implementation of the OSD for Social Workers, Job Evaluation can not be done.
- 4.15 During cross-examination by Ms Malan, the witness Ms Müller confirmed that during the re-grading of Ms Visser, she was Production Worker. Ms Müller further confirmed that nobody knew what the outcome of the job evaluation would be. She further confirmed that she promoted Ms Visser to a post that did not exist. Ms Müller admitted that in terms of the OSD Ms Visser was translated but she felt it was unacceptable, she should have been translated in excess of R196 000 per annum.
- 4.16 In concluding her cross-examination, Ms Müller testified that due to the OSD the applicant will have to apply for an advertised post.

5. Analysis of evidence and argument:

- 5.1 The applicant was invited to meet a job analyst for a job analysis interview on the 8th February 2008. The applicant led evidence that she attended the job evaluation interview; however, the process was put in abeyance pending the implementation of the OSD agreement which would 'correct' her post.

- 5.2 It has been held to be unfair to overlook evaluating an employee to determine whether he or she qualified for appointment to an upgraded post (see **Truter and SA Police Service (2005) 26 ILJ 821 (BCA)**). However, the PSA on behalf of the applicant had requested the dispute to be arbitrated in terms of s24(2), [24(5)] and not in terms of s186(2)(a) of the LRA, i.e. unfair conduct of the employer relating to promotion.
- 5.3 Ms Mosectic's argument was that during 2006, a re-grading of social workers was done to align them in DCS with Social Services and it was backdated to 2004. As a result of the lodgment of a grievance, a job evaluation interview was arranged but the outcome never materialised.
- 5.4 Ms Mosectic further argued that in terms of the OSD agreement, the applicant was translated to the production level, i.e. to R142 947 instead of R175 322 but she performed the duties of a supervisor since 2006 through to December 2010. The respondent failed to translate her to Social Work Supervisor Grade 1.
- 5.5 Ms Mosectic further argued that the respondent never translated the applicant to the correct grading as per the collective agreement and the respondent was in breach of the agreement. In conclusion, Ms Mosectic argued that the respondent failed to apply the collective agreement correctly and that the applicant should be translated to Social Worker Grade 1 retrospective to 1st April 2008.
- 5.6 Ms Malan's submission was that the applicant was appointed since 1st October 1994 and she is now employed at Hawenga Correctional Centre, which falls under the Allandale Management Area since 1st June 2006. Ms Malan argued that the applicant admitted the translation in terms of the OSD and her salary was translated from R138 792 to R142 947 with 17 years of experience.
- 5.7 Ms Malan further submitted that the applicant wants the interference with a decision executed in terms of the job evaluation process. She argued that the Council does not have jurisdiction to instruct the respondent to implement the job evaluation which is not allowed in terms of the collective agreement based on the collective agreement and the instruction of the DPSA. Ms Malan further argued that this dispute has nothing to do with s24 of the LRA
- 5.8 Ms Malan further submitted that the job evaluation interview was held on the 8th February 2008. The applicant and Ms Muller confirmed during cross-examination that there was no outcome on this process as the OSD had absorbed the job evaluation process [see pages 9 to 11 of Bundle A].
- 5.9 Ms Malan argued that the OSD for social workers was implemented as at 1st April 2008 and the executing authority would not have taken a decision at that time which could have given the applicant a higher salary scale. The salaries of the other supervisors were different as they were on salary level 9, whereas the applicant was on salary level 8 as at 1st April 2008.
- 5.10 Ms Malan further argued that the inconsistency lies outside the ambit of a dispute concerning the interpretation or application of the relevant collective agreement. The evidence with regard to the applicant's supervisory status is also irrelevant in terms of the OSD's application of Resolution 1 of 2009. It was only relevant at the time of the re-grading exercise and the job evaluation process, which was absorbed by the OSD.

The respondent is of the opinion that the application of the collective agreement be dismissed.

5.11 I am required to determine whether or not the OSD agreement in terms of Resolution 1 of 2009 was correctly interpreted or applied. Section 213 of the LRA defines a collective agreement as:

‘a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand:

- (a) one or more employers;
- (b) one or more registered employers’ organisations; or
- (c) one or more employers and one or employers’ organisations.’

5.12 A dispute over the *interpretation* of a collective agreement exists when the parties disagree over the meaning of a particular provision; a dispute over the *application* of a collective agreement arises when the parties disagree over whether the agreement applies to a particular set of facts or circumstances (**Grogan, *Collective Labour Law* at 132**).

5.13 The primary purpose in interpreting collective agreements must therefore be to ascertain what the parties had intended and, to this end the common law canons of contractual interpretation may offer guidance [see **UWCASA v University of the Western Cape [2002] 5 BLLR 487 (LC)**; **NUMSA v Volkswagen of South Africa (Pty) Ltd [2002] 1 BLLR 1 P**]; Contra **IMATU v Cape Town Municipality (1999) 20 ILJ 960 (CCMA)**]. Thus:

- (a) where the wording of the agreement is clear and unambiguous, the parties may not rely on evidence beyond what is embodied in the document to demonstrate their intention at the time it was concluded [see **Johnston v Leal 1980 (3) SA 927 (A)**].
- (b) the words in the agreement must be given their ordinary grammatical meaning and must be interpreted in the context of the agreement as a whole [see **Sassoon Confirming and Acceptance Co (Pty) Ltd v Barclays National Bank Ltd 1974 (1) SA 641 (A)**].
- (c) where words are unclear and ambiguous, regard may be had to the circumstances surrounding the agreement such as previous negotiations between the parties, correspondence between them and the manner in which they acted on the document [see **Coopers and Lybrand & Others v Bryant 1995 (3) SA 671 (A)** at 768.

5.14 In **FAWU v CCMA & others (2007) 28 ILJ 382 (LC)** at [35], the judge said:

“What is accordingly very clear is that, where a court, or a commissioner of the CCMA for that matter, is tasked to interpret a written contract, or as in the present case, a collective agreement, it must give to the words used by the parties their plain, ordinary and popular meaning and if there is no ambiguity in the

words of the contract, they must be given their plain, ordinary and popular meaning.”

- 5.15** In our case, the correct interpretation of the OSD agreement, and the manner in which it should be applied, is that job evaluation would be subsumed by the OSD process [see **page 33 para 2(c)(i)**] which states in part: The grading of posts with the job evaluation system in the social service professions and occupations, based on the job descriptions as contained in the OSD, was done centrally and the grades of the relevant jobs were determined centrally. This will ensure consistent application between departments/provinces.
- 5.16** It had been established during cross-examination that the applicant had been translated from R138 792 to R142 947 in terms of the OSD agreement. The applicant had argued that the respondent had erred in 2006 when agreeing to perform a job evaluation exercise for the post of the applicant.
- 5.17** In **Durusa/University of Durban Westville & others [2001] 7 BALR 753 (CCMA)**, it was pointed out that a legitimate expectation yields a right, not to be promoted, but to be considered for promotion. The fact that Ms Müller testified that those who were translated to social work supervisor post were all supervising one person only, which was the same case with Ms Visser.
- 5.18** The Allandale Management Area has three (3) supervisors: Allandale Correctional Centre (Ms SV Burgess); Paardeberg Correctional Centre (Ms AM Smit); Paarl Community Corrections (Ms L van Wyk) and at Hawequa Correctional Centre, the post does not exist.
- 5.19** The current organogram shows that the post of Social Work Supervisor does not exist at Hawequa Correctional Centre. If it does not exist, it may not be budgeted for and therefore it could be a risk to fill it. Ms Visser was asked to read the last paragraph (para. 5) on page 6 of Bundle A, which states: It was suggested that if there is a need for a level 8 or supervisor post it should be created on the structure and the normal appointment procedures should be followed. Ms Müller, as the Manager: Social Work Services is at liberty to write a Submission.
- 5.20** The evidence that was led shows that the applicant had been translated based on the duties she was performing at the time when Resolution 1 of 2009 for social work professionals was implemented retrospective to 1st April 2008. In my view, the translation was in line with the requirements of the OSD agreement.
- 5.21** In all the evidence that was tendered by the applicant, I did not find a single dispute regarding the interpretation or application of the OSD agreement, upon which the referral was made [see definition of the interpretation or application of collective agreement: **paragraph 5.12 above**].
- 5.22** In the premises, the probabilities weigh heavily towards the fact that the Council does not have jurisdiction to instruct the employer to translate or promote the applicant to salary level 9 via the OSD agreement.

6. Award:

- 6.1** I, accordingly find that the applicant failed to discharge its onus to prove that the respondent misinterpreted or applied the OSD agreement incorrectly.

6.2 I therefore rule that the application is consequently dismissed.

Signed and dated at Johannesburg on this the 18th day of March 2011.

Panellist: 
Chris Sizili MBELENI.