



THE REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Of interest to other judges

Case no: JR 557/08

In the matter between:

THE REGIONAL COMMISSIONER CORRECTIONAL  
SERVICES, FREE STATE AND NORTHERN CAPE

Applicant

and

WOLFAARDT

First Respondent

WATKINS C H

Second Respondent

Du PLESIIS B C

Third Respondent

LUBBE W P F

Fourth Respondent

GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL

Fifth Respondent

M C VAN AARDE N. O

Sixth Respondent

Heard: 26 July 2012

Delivered: 06 February 2013

**Summary: Review interpretation and application of Resolution 7 and 8 of 2000 the PSCBC. Application of the affirmative action in the placement of employees in terms of the restructuring as provided for in Resolution 7.**

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## JUDGMENT

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**MOLAHLEHI J**

### Introduction

- [1] This is an application to review and set aside the arbitration award made by the sixth respondent (the arbitrator) under case number PSGA 203-04/05. In terms of the arbitration award, the arbitrator interpreted the provisions of Resolutions 7 and 8 of the Public Service Bargaining Council (the PSCBC) in favour of the first to the fourth respondents (the respondents) and ordered that they be promoted to positions higher than those they occupied prior to the matching and placement process.
- [2] The late filing of the heads of arguments was at the beginning of the hearing condoned.
- [3] The first to the fourth respondents in this matter are employees of the applicant, the Correctional Services Department: Free State and North Cape (the department).

### Background facts

- [4] The brief history of this matter is that the PSCBC introduced, during 2002, the transformation programme for the entire public service through Resolutions 7 and 8 of 2002.
- [5] In terms of Resolution 7, in order to chief the transformation objectives each department including the applicants were required to redeploy, retrain alternatively employ excess employees in the public service. In this respect, each department, including the applicant, were required to identify the profiles of each employee and to match them with the requirements of the corresponding positions for the purpose of placement.

- [6] The other requirement was that the department had to incorporate into its transformation, affirmative action policy and plans, which it had to implement in order to address the issue of underrepresentation of certain groups in the department.
- [7] The individual respondents were dissatisfied with the manner in which the applicant interpreted and implemented the provisions of the resolutions with regard to their positions, in particular in relation to the matching and placement. It was for this reason that they referred a dispute to the fifth respondent (the bargaining council), the outcome of which is the subject of this review application.

#### The case of Mr Wolfaardt

- [8] At the time, the dispute was declared Mr Wolfaardt occupied the position of Correctional Officer level 1, which position he occupied consequent to the earlier restructuring process. That post, according to him in the statement of case, was upgraded to Senior Correctional Officer.
- [9] Mr Wolfaardt contends that the upgrading of his post was done in terms of category 2 of the matching and placement criteria document and therefore, he was entitled to be promoted because he was the incumbent in the position. It is common cause that he was not promoted.
- [10] Mr Wolfaardt, further, contends that, despite the appointment of the outsider, he continued after the appointment to perform the same duties as he did before i.e his duties and job description remained the same. His other contention is that in addition he had a satisfactory level of performance of his duties.
- [11] In what appears to be a prayer in the statement of case, Mr Wolfaardt, states the following:

'It is respectfully requested that the Commissioner make an Order in terms whereof Mr Wolfaardt be promoted to the Level of SCO and from the 1<sup>st</sup> of April 2003, together with all the benefits, increments, salary adjustments and

other remuneration which would have accrued to him since the aforementioned date.'

[12] The applicant did not file his statement of case as was directed by the arbitrator in the ruling dated November 2007. However, it contends in its heads of argument that Mr Wolfaardt did not qualify for a promotion for a number of reasons. The reasons are briefly stated as follows:

- 1.1 He did not qualify because of the equity plans being white male.
- 1.2 No job evaluation was done in terms of the Public Service Regulations Part V paragraph C5
- 1.3 He did not qualify because of the requirements of relevant policies, including the provisions of resolution 7.

[13] During the hearing before this court, it was argued that there is nowhere the arbitrator indicated that the resolution has been incorrectly interpreted.

[14] The essence of the arbitrator's finding is that the resolutions were incorrectly interpreted and applied by the applicant. The other essential finding of the arbitrator is that promotion was automatic on restructuring and upgrading of any position.

[15] The specific factors relating to the decision not to appoint Mr Wolfaardt, and the query that he raised in that regard appears briefly from the record as follows:

'After the upgrading of the post, and the matching and placement was done, Mr Wolfaardt lodged a complaint indicating his dissatisfaction and requested that the issue be placed before the Departmental Task Team for consideration.'

[16] On 11 April 2003, Mr Wolfaardt received a letter from the Commissioner of the Provincial Management Task Team advising him as follows:

'The implementation of the framework agreement on the restructuring and transformation of the public service bears reference.

The Management team has intensively studied the details of your personnel file, and accordingly placed you in the position of SH Centre Management at Goedemoed Med B in the Free State and Northern Cape Region.'

[17] Another letter was addressed to Mr Wolfaardt by the Convener: Provincial Management Team during June 2000, wherein Mr Wolfaardt was advised as follows:

- '1 Your memorandum in the above-mentioned regard has reference.
- 2 Kindly be informed that after careful consideration of the matter, the Management Team has reaffirmed their initial decision concerning your placement. It is not possible to place officials in upgraded positions in terms of the current phase of Matching and Placement-process.
- 3 If you are not satisfied with the response of the Management Team you may make written representation to the Provincial Monitoring Committee stating the grounds for your non-acceptance of the placement by the Management Team.'

[18] On 30 August 2004, the Regional Commissioner: Free State and Northern Cape addressed a letter to Mr Wolfaardt advising him that his representation was considered and it was not sustained.

[19] In support of his contention that he qualified for promotion, Mr Wolfaardt relied on two performance moderating report wherein it was indicated that for 2002/2003, his grand total in terms of performance assessment was 80.42% and for 2004/2005 was 84.71%.

#### The case of Mr Watkins

[20] The record reveals that during April 2003, Mr Watkins received a letter informing him that he was placed as HR Administrator at Goedemoed Prison. He responded in a memorandum which he addressed to the area manager, wherein he accepted the placement. He further indicated that according to the new establishment, the post of DH Personnel and Maintenance was upgraded to an ASD. He further contended that, having served in the position of DH

Personnel Maintenance since 1993 and having received good performance score allocation in terms of the criteria of matching and placement he was convinced that he met the requirements for upgrading in terms of resolution 7 and 8 of the PSCBC.

[21] In response, the Management Task Team affirm their earlier decision which they recorded in a letter dated 29 April 2003 and stated that:

- '1 Your memorandum in the above-mentioned regard has reference.
- 2 Kindly be informed that after careful consideration of the matter, the Management Team has reaffirmed their initial decision concerning your placement. It is not possible to place officials in upgraded positions in terms of the current phase of Matching and Placement-process.
- 3 If you are not satisfied with the response of the Management Team you may make written representation to the Provincial Monitoring Committee stating the grounds for your non-acceptance of the placement by the Management Team.'

[22] Mr Watkins, respondent to the above letter on 28 May 2003 and *inter alia* stated the following:

- '3 According to the feedback it is indicated that the Management Team reaffirmed their initial decision and they cannot place a person in an upgraded post, I took note thereof.
- 4 The following aspects is my concern and need to be notified of a satisfactory explanation.
  - (i) The contents of HR Management's Job description is based on Persal and Personal Administration. My service experience is actually only related to the aforementioned. Was it considered as stated in my PPF?
  - (ii) According to the criteria for the Matching and Placement, Category 5 was applied to my placement. Could my placing be considered in a new post as it should have been advertised.

- (iii) According to my understanding of the DCS's Category 2, should there be applied in my position in conjunction with the implication of Public Service regulation Part V.5 to C.7.
- (iv) The current Head Corporate service has been placed in the post of HR Management, was according to records I have been utilised in the position of Resource Management since 1993...
- (v) According to Management Team they cannot place an Official in a higher position during the current phase. Is it not the task to evaluate a person's experience in order to place him/her in a suitable position to comply with the Commissioner's statement as quoted in the Intranet.' What is happening and will be happening in our Department is unprecedented. It follows as an opportunity to ensure that each and every staff member is properly placed an optimiser utilise to assist the delivery of the better Correctional Service." This means placing staff members in positions where they can make a difference in line with their interest, skills, qualifications and experience. That is what the main and sole objective of this process is...'

[23] On 15 September 2003, the applicant addressed a letter to Mr Watkins confirming his initial placement. As concerning his performance assessment, Mr Watkins was informed that for 2003/2004 his rate was 74.65%.

#### The case of Mr Du Plessis

[24] Mr Du Plessis was, prior to the restructuring, employed as the secretary of the Parole Board. The post was upgraded to the senior correctional officer and thereafter advertised. He was unsuccessful in the interviews.

#### The case of Mr Lubbe

[25] At the time of the restructuring, Mr Lubbe was employed as a work-study official. He was retained in that position after the restructuring

### The applicant's case- grounds for review

[26] The applicant raised a number of grounds of review against the arbitration award. In this respect, the applicant contended that:

- '(a) That the commissioner committed misconduct in relation to the duties of the commissioner.
- (b) That he committed gross irregularity in the conduct of the arbitration;
- (c) That the commissioner exceeded his powers.'

[27] In substantiating the above grounds of review, the applicant complains that the arbitrator committed misconduct in relation to his duty in that he failed to apply his mind to the evidence before him, resulting in the incorrect interpretation of the resolutions.

[28] The arbitration award is also criticised for unreasonableness and that is based on the allegation that the arbitrator failed to consider all the evidence presented for the purposes of the interpretation of the resolution.

[29] The arbitrator is further criticised for having ordered the promotion of the individual respondents without determining the salary levels to which the promotion had to be effected and thus making it impossible to effect the implementation of the award.

### The respondents' case, in defence of the arbitration award

[30] The respondents, arguing in defence of the arbitration award, contended that it could not have been in the spirit of the collective agreement to "manufacture" positions for designated groups to the disadvantage of the incumbents who were already in those posts and performing the same function. According to the respondents, the approach of "manufacturing" posts for members of the designated groups is irrational and overlooks the constitutional imperatives based on the requirements of maintaining public service efficiency. In support of their argument, the respondents relied on the

following cases; *Eskom v Hiemstra NO and Others*,<sup>1</sup> *Coetzer and Others v Minister of Safety and Security and Another*<sup>2</sup> and *Public Servants Association of SA and Others v Minister Justice and Others*.<sup>3</sup>

[31] In the *Eskom* matter, the arbitrator was faced with having to deal with whether the employer's decision of failing to appoint the employee in the post of vending controller constituted an unfair labour practice in terms of item 2(1)(a) or item 2(1)(b) of schedule 7 to the LRA 1995. The arbitrator found that the employer had indeed committed an unfair labour practice and ordered that the employee should be retained in her post.

[32] The employer being dissatisfied with that outcome launched a review in terms of section 33(1) of the Arbitration Act 42 of 1965. The employer contended that the arbitrator failed to consider the question whether the discrimination between a black employee and a white employee was prima facie unfair.

[33] The court in the *Eskom* matter, in upholding the decision of the arbitrator, reasoned that:

[32] [A]s a general rule, an employer commits an unfair labour practice if that employer decides not to promote an employee on the grounds of his or her race, gender or for some other arbitrary reason.' (At 572G.)

An employer who stoops to racial discrimination in the course of conducting relations with his or her employees will unfairly affect the employment opportunities, including the aspirations, of the employees so victimized and the relationship between the employer and the employees will be detrimentally affected by the intrusion of racial criteria into the relationship.' (At 572G-H.)

[34] In *Coetzee* matter, the applicants, white males who were inspectors in the explosives unit of the SA Police Service were ignored in the promotional posts because they did not belong to the designated groups despite their

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<sup>1</sup> (1999) 20 ILJ 2362 (LC).

<sup>2</sup> (2003) 24 ILJ 163 (LC).

<sup>3</sup> (1997) 18 ILJ 241 (T).

specialised training. The applicants were excluded from the promotion on the basis of the affirmative action programme of the SAPS.

- [35] The forensic science laboratory, the business unit in which the bomb squad fell, did not have its own employment equity plan, which it was required to have in terms of the general SAPS employment equity plan. In the absence of an employment equity plan and an affirmative action plan for the forensic science laboratory, it had to be determined whether the general SAPS employment equity plan could be relied on by the SAPS to justify its discrimination against the applicants.
- [36] The Court found that in terms of the Constitution a balance need to be struck between affirmative action and other Constitutional imperatives including the need for the SAPS “to discharge its responsibility effectively’ in terms of section 205 (2) of the Constitution. The balance between the two imperatives, the Court held, has to be rational.
- [37] On the facts, the Court found that the decision of the SAPS Commissioner not to promote the employees was not justified for two reasons. The first reason, according to the Court, was that the SAPS did not have a specific affirmative action plan applicable to the explosives unit and secondly that in refusing to promote the employees the Commissioner overlooked the imperative of efficiency for the SAPS.
- [38] In the *Public Service Association* matter, the applicants challenged the appointment of candidates in the office of the state attorney which was done on the basis of the affirmative action programme. The applicants contended that the implementation of the affirmative action programme was discriminatory against them.
- [39] The Court found that the employer being the sponsor of the affirmative action programme had the duty to show that the discrimination introduced by the programmes was fair. Similarly, the Court found that it was imperative that the affirmative action programme was balanced with “fair and equitable principle” and promotes an efficient public service” in terms of section 212(2) of the 1993 Constitution. The Court further found that the affirmative action

measures introduced by the employer 'were haphazard, random and overhasty.'

[40] In *Solidarity obo Barnard*,<sup>4</sup> the Court per Pretorius AJ followed a similar approach to the above. In dealing with the issue of employment equity, the Court in that case summarised the principles that formed the basis for its decision as follows:

25.1 The provisions of the Employment Equity Act and an Employment Equity Plan must be applied in accordance with the principles of fairness and with due regard to the affected individual's constitutional right to equality. It is therefore not appropriate to apply, without more, the numerical goals set out in an Employment Equity Plan. That approach is too rigid. Due consideration must be given to the particular circumstances of individuals potentially adversely affected. In this regard the need for representivity must be weighed up against the affected individual's rights to equality and a fair decision made.

25.2 Obviously (and this was not an issue in the trial) individuals from non-designated groups (and perhaps from designated groups too) will be adversely affected by the implementation of employment equity plans. But both as a matter of substance and procedure implementation of employment equity plans should be effected with due regard not only to the individual's right to equality but also to the dignity of affected individuals. This is particularly so when it comes to the application and effective use of internal dispute resolution procedures and statutory conciliation procedures.

25.3 Accordingly, the extent to which the implementation of employment equity plans may discriminate or adversely affect individuals is limited by law. In this case at least the following considerations are relevant. First, the terms of the Employment Equity Act require the application of its provisions to be done in a manner that is both rational and fair. Second, due recognition must be given to the affected individual's rights to equality. Third, in the implementation of an employment

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<sup>4</sup> *Solidarity obo Barnard v SAPS* 2010 (10) BCLR 1094 (LC).

equity plan, due recognition must be given to the right of affected persons to dignity.

- 25.4 Where a post cannot be filled by an applicant from an under-represented category because a suitable candidate from that category cannot be found, promotion to that post should not ordinarily and in the absence of a clear and satisfactory explanation be denied to a suitable candidate from another group.
- 25.6 There must be a rational connection between the provisions of the Employment Equity Plan and the measures adopted to implement the provisions of that plan.
- 25.7 In appropriate circumstances at least, the efficient operation of the Public Service or what is termed “*service delivery*” is a relevant factor to be taken into account in the implementation of an employment equity plan. (footnotes left out).

[41] The issue of justifiability and rationality in the implementation of the affirmative action received attention on appeal in the *Solidarity obo Barnard*<sup>5</sup> matter. The Labour Appeal Court per Mlambo JP, held that an employment equity plan is a measure mandated by the Constitution. In this regard, the Learned JP had the following to say:

[34] An Employment Equity Plan is equally a measure, like the Employment Equity Act, as contemplated in section 9(2) of the Constitution. It is therefore a constitutionally mandated tool in a designated employer’s hands to ensure compliance with the injunction to ensure and achieve equitable employment practices and representativity.’

[42] In dealing with the issues of rationality and efficiency of the public service in relation to the affirmative action, the Learned JP held:

[44] I should also point out that the statement advanced by the Labour Court that there must be a rational connection between the equity plan and its objectives was not raised as an issue requiring determination.

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<sup>5</sup> *South African Police Service v Solidarity obo Mrs R M Barnard* Case no: JA24/2010.

That issue arises if there is a legal challenge to the plan which was not before this Court. A reading, however, of the appellant's Employment Equity Plan demonstrates that the plan was crafted with due consideration of rationality and reasonableness. It is a plan that was drafted with due regard to the appellant's workplace dynamics and identifies the gaps requiring attention as well as providing for a programme of action that is time bound regarding the closing of the gaps identified. The issue rather is whether there is a rational connection between the transformational goal of promoting the achievement of equality by ensuring equitable representation of designated groups in all occupational categories and levels in the appellant's workforce on the one hand and the means used to achieve that goal on the other hand.

- [46] The Labour Court's conclusion that the failure to appoint Barnard compromised service delivery is also misconstrued. The National Commissioner is the accounting officer of the appellant and is the only person who is answerable regarding service delivery matters. It is not open to a court to 'second guess' a decision that not filling a post will or will not compromise service delivery. In this case the National Commissioner, as the responsible accounting officer, decided not to fill the advertised post which he subsequently withdrew. In any event, I am of the view that the National Commissioner was the only person well-placed to determine if service delivery would be compromised by the failure to fill the post and his decision that this would not be so is unassailable. Frankly speaking that is his prerogative and should he be incorrect in so deciding and imperil service delivery as a result, he is answerable to his accounting authority, being the Minister and ultimately to Parliament. The National Commissioner is similarly answerable in that manner should he fail to achieve the targets set out in the Employment Equity Plan. Our role as courts is to determine if any conduct, alleged to be based on an Employment Equity Plan, for instance, is justifiable in terms of that plan such as we have here. It is not open to a court to dictate to the National Commissioner that he is compromising service delivery and should fill a post.'

### The arbitration award

[43] The arbitrator formulated the issue which he was to determine as follows:

‘The main issue in dispute relates to an Application in terms of the Labour Relations Act 66/1995, section 63(1) re interpretation and application of Resolution 7/2000 read with Resolution 8/2002 regarding the placement or redeployment of certain members/applicants to the dispute.’

[44] In his survey of evidence and arguments presented before him, the arbitrator summarises the background history of the dispute and quotes in full the document relating to the Matching and Placement Criteria document. The arbitrator then summarises facts in relation to the individual respondents and the category that would in terms of the matching and placement criteria document would have applied. It is on the basis of those findings that the arbitrator ordered the applicant to promote all of the respondents to positions higher than those they had been placed in.

[45] I proceed to deal briefly with the background of each individual applicant's case.

### Evaluation

[46] It is apparent that in seeking to facilitate the transformation of the public service at the time, the parties agreed on a broad frame work of how to go about it. The specific details and criterion for achieving the transformation goals were left in terms of resolution 7, to the various sectoral councils. The various sectoral councils were given the powers to agree on the specific details of the restructuring and transformation.

[47] In the present instance, in realising the objectives of resolution 7, the DCS developed the criteria for matching and placement for the restructuring process. The validity of the criteria as developed and set out in the frame work agreement, has not been challenged. In fact, the applicants rely on its provisions in supporting their claim.

- [48] It follows that in the interpretation and application, in the context of the facts in the present instance, Resolution 7, has for that purpose to be read with the provisions of the framework agreement and other related legal frame work.
- [49] In terms of the preamble to the framework agreement, the matching and placement was to arise, consequent to the newly developed structure of the DCS. It is further provided in the matching and placement that account is to be taken of the provisions of several legislative measures, which include both Labour Relations and the Public Service.
- [50] The preamble further provides that in applying the criteria as set out in the framework agreement, consideration is to be given to the employment equity plan. The frame work agreement provides for six categories. These categories provide for certain threshold, the meeting of which would lead certain results. The main category on which the applicant relies on their claim is category 2.
- [51] It is apparent in the reading of the first part of category 2 that the key requirement in the matching and placement process are:
- 1.4 the existing post has been upgraded
  - 1.5 the job content to have remained the same.
- [52] It is apparent, in my view that the drafters of the matching and placement document envisaged that the first part of category 2 would be read with the provisions of the Public Service Regulations Part V C.5 and C.6. Part V of the Public Service Regulations reads as follows:
- C.5 An executing authority may increase the salary of a post to a higher salary range in order to accord with the job weight, if-
    - (a) the job weight as measured by the job evaluation system indicates that the post was graded incorrectly; and
    - (b) the department's budget and the medium-term expenditure framework provide sufficient funds.

C.6 If an executing authority increases the salary of a post as provided under regulation V C.5, she or he may continue to employ the incumbent employee in the higher-graded post without advertising the post if the incumbent-

- (a) already performs the duties of the post;
- (b) has received a satisfactory rating in her or his most recent performance assessment; and
- (c) starts employment at the minimum notch of the higher salary range.'

[53] I now proceed to evaluate the cases of individual respondents.

Mr Wolfaardt

[54] In ordering the promotion of Mr Wolfaardt, the arbitrator reasoned that:

1.6 prior to entering after the restructuring the job content of Mr Wolfaardt's position was upgraded but his post remained the same.

1.7 Category 2 placement was applicable in the circumstances.

1.8 Mr Wolfaardt's performance was satisfactory.

[55] The arbitrator noted the contention of the applicant, as to the reason for not promoting Mr Wolfaardt, after upgrading the post. The contention which the arbitrator noted was that Mr Wolfaardt was not promoted because of the requirements of the equity plans of the applicant. The arbitrator further noted the contention raised by the applicant that the job evaluation for the position in question had not been done as required by the public service regulations.

[56] After noting the issues raised by the applicant, the arbitrator proceeded to reason why Mr Wolfaardt qualified for a promotion.

[57] It is apparent from the reading of the arbitration award that the arbitrator does not deal with the two critical issues raised by the applicant. The issue of the employment equity plan was critical in the interpretation and application of

resolution 7. It was relevant when consideration is given to clause 7.2 of the resolution, which is read as follows:

'In deciding which employees should be placed in defined posts that their profiles correspond with, a department must implement-

- (a) the relevant affirmative action policy for designated groups;
- (b) representativity targets; and
- (c) plans to redress under representivity and advance persons in designated groups. profiles, referred to in clause 6.2, correspond with the requirements of the defined posts bon an organisational structure of the department...'

[58] In my view, in failing to consider the issue of the employment equity, as was raised by the applicant, the arbitrator committed misconduct in his position as an arbitrator.

[59] The arbitrator also in not considering the issue of employment equity as raised by the applicant failed to apply his mind to critical and an important issue in the resolution of the dispute between the parties and thus committed a serious irregularity that denied the applicant a fair hearing.

[60] There is no indication in the pleadings that the applicant's equity plan was challenged for its validity or for any other reason. Thus had the arbitrator applied his mind to the issue of the employment equity, he ought to have found that the applicant, in not promoting Mr Wolfaardt, had interpreted and applied to the provisions of Resolution 7 correctly. The approach adopted by the applicant was in line, more particularly, with the provisions of clause 7.2 of the resolution.

#### Mr Watkins

[61] In the case of Mr Watkins, the arbitrator dismissed his claim that he was entitled to be promoted to the position of assistant director level 9. However, the arbitrator proceeded to order the applicant to do a formal job evaluation of Mr Watkins' job content.

[62] The terms of reference of the arbitrator was to consider the interpretation and application of resolutions 7 and 8 of the PSCBC and nothing more or less. There can be no doubt that in ordering the applicant to do the job evaluation, the arbitrator exceeded his powers. It is for this reason that I find that the arbitrator committed gross irregularity and accordingly, his arbitrator award stands to be reviewed.

Mr du Plessis

[63] The arbitrator found that the post occupied by Mr du Plessis, was during the restructuring process upgraded to senior correctional officer and that he (Mr du Plessis) continued to perform the same duties as those of the senior correctional officer.

[64] The applicant argued that, at the time of the restructuring, the position had not yet been subjected to a job evaluation. According to the applicant, the job evaluation was only done in 2004 and that was after the post was advertised during August 2004. The post was filled in 2005.

[65] It is apparent that the arbitrator was confronted with the disrepute of fact in as far as this matter was concerned. Mr du Plessis's contention was that at the time the post was upgraded the provisions of resolution 7 were still in place and therefore he was entitled to the benefits provided in that resolution. The applicant on the other hand argued that the post was only upgraded in 2004, way outside the life span of resolution 7. After the upgrading, the post was advertised and the successful candidate was appointed.

[66] Clause 3 of resolution 7 provides:

'This agreement comes into effect on the date of signing, and remains in force for twelve months. In the event that the terms of this Agreement have not been implemented in the period stipulated herein in the duration of the Agreement will be extended by a further three months.'

[67] The resolution was signed on 6 March 2002 and therefore it would have expired in March 2003 or if there was any extension by June 2003. This

means any restructuring that happened in 2004, could not have been in terms of resolution 7 because by then it would have been of no force and effect.

[68] The memorandum signed by the deputy director: job evaluation, dated 21 April 2004 indicates that the position of the secretary of the parole board was upgraded on 19 March 2004. There is no evidence that this was disputed by Mr du Plessis. On the facts, the arbitrator ought therefore to have found that the position was upgraded outside the provisions of rule 7 and therefore Mr du Plessis could not rely on the provisions of that resolution.

#### Mr Lubbe

[69] Prior to the restructuring process, Mr Lubbe occupied the position of work study officer. His claim was that he was entitled to be promoted because the post he occupied was upgraded to that of a senior correctional officer.

[70] The applicant on the other hand contended that the position of the senior correctional officer did not exist in March 2003, and that it appears that a handwritten insertion was made of the post in the diagram of the post establishment. It was further contended on behalf of the applicant that the handwritten insertion does not indicate the relevant job level.

[71] The arbitrator, without providing reasons, rejected the version of the applicant. In the absence of the reason for the rejection of the version of the applicant, the only reasonable conclusion to make is that there was no basis for the rejection of the applicant's version. There is also explanation for why Mr Lubbe's version was preferred above that of the applicant.

[72] The arbitrator was clearly faced with two conflicting versions as to the existence or non-existence of the senior correctional officer's position. It is common cause that the arbitrator considered the matter on the basis of motion proceedings. In that regard, had the arbitrator appreciated the issue that had arisen he would have realised that, in the absence of referring the matter to oral evidence the version he had to accept, in terms of the established principles of the law, was that of the applicant.

[73] The probabilities, also favours the version of the applicant in that Mr Lubbe did not provide evidence as to the circumstances which led to the handwritten insertion in the staff establishment document the original of which did not have such insertion. It has not in this regard been disputed that the copy of the original post establishment structure was made available to the arbitrator.

[74] In light of the above discussion, I am of the view that the applicant's application stands to succeed. I do not, however, believe that it would be equitable to allow the cost to follow the results.

Order

[75] In the premises, the following order is made:

1.9 The sixth respondent's arbitration award is reviewed and set aside.

1.10 The arbitration award is substituted with an order to the effect that the applicant correctly interpreted, applied the provisions of resolutions 7 and 8 PSCBC and acted also in a fair manner in dealing with the placement and deployment of the first to the fourth respondents.

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Molahlehi J

Judge of the Labour Court of South Africa

APPEARANCES:

FOR THE APPLICANT: Advocate Venter

Instructed by: The State Attorney

For the Respondent: Advocate S Grobler

Instructed by: C Dell Attorneys.