



# ARBITRATION AWARD

**Panelist:** LUNGISANI AMOS SITHOLE

**Case No.:** GPBC 2000/2022

**Date of the Award:** 21 JANUARY 2025

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**PSA obo T Tshinyani**

Applicant

And

**Department of Human Settlements**

Respondent

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## DETAILS OF HEARING AND REPRESENTATION

- [1] On 26 July 2024, the Council set down this matter for arbitration for 04 and 05 November 2024 at 09:00 at Department of Human Settlements. The dispute is about the interpretation and application of Collective Agreement related to Occupational Specific Dispensation (OSD) – GPSSBC Resolution 3 of 2009.
- [2] Mr. Joshua Lepelle, PSA's Labour Relations Officer, represented Mr. Thilivhali Tshinyani ("the applicant") and Mr. Thabo Silawu, represented Department of Human Settlements ("the respondent"). The parties requested to submit their written arguments after 22 November 2024 due to work commitments and writing exams. I have considered the parties' written arguments when writing this arbitration award.

[3] The proceedings were digitally recorded and hand written notes were taken.

## **ISSUES TO BE DECIDED**

[4] In the minute of Pre-Arb Meeting, the parties set out the issues in dispute as follows:

- 4.1. GIS Professional posts are OSD posts and that the respondent had complied with relevant collective agreement to implement the OSD for GIS professionals amongst others in 2010.
- 4.2. The applicant occupies a Post that was translated from a Non-OSD to an OSD post by the respondent in line with the collective GPSSBC Resolution 3 of 2009.
- 4.3. The respondent confirmed that they implemented OSD to affected qualified for GIS professionals and related fields using DPSA circular 5 of 2009.
- 4.4. Whether the applicant's post of DD Spatial and Non-Spatial information is an OSD post.
- 4.5. That the applicant should be placed on the relevant OSD scale effective from his date of appointment.
- 4.6. The applicant does not qualify to be appointed on OSD: GIS.
- 4.7. The post occupied by the applicant is a non-OSD post.
- 4.8. The post occupied by the applicant does not require the applicant to be registered with professional institutions.
- 4.9. The applicant is not registered with professional institutions.
- 4.9. The applicant did not qualify for translation in the previous department due to non-registration.

## **BACKGROUND FACTS TO THE RULING**

[5] On 14 December 2022, the applicant referred an unfair labour practice dispute to the Council and on 17 July 2023 the Council advised him that he had filed his dispute out of time, and further advised him to file an application for condonation. The applicant's condonation application was granted. At conciliation, held on 31 January 2023 before Commissioner Burton, the dispute remained unresolved and a Certificate of Outcome was issued.

[6] The applicant sought the respondent to move him back to OSD and placed the applicant against the relevant OSD scale effective from his date of appointment and to pay all benefits due as a result.

## **SURVEY OF THE PARTIES'EVIDENCE AND ARGUMENTS**

**Applicant's evidence:**

- [7] The applicant testified under oath that he is employed by the respondent and occupies the post of Deputy Director: Spatial and Non-Spatial Information which is a GIS post. According to GPSSBC Resolution 3 of 2009 ("the Resolution") any GIS post has been designated as an OSD post and the respondent acted in contravention of the Resolution when it made the post he is occupying Non- OSD post. His predecessor occupied OSD- post and in this regard post and in this regard the applicant referred to page 36 of Bundle "A".
- [8] The respondent could not deviate from the Resolution which was conclude at the Council. The respondent's HR failed to advise the respondent accordingly. The fact that the respondent advertised the post as non-OSD and this does not change the fact that, the post he is occupying is an OSD post. This is so because the functions of the post did not change when it was advertised.
- [9] The applicant addressed Memorandum to the respondent asking them to translate GIS posts to OSD posts (A:19-21). The respondent's response to his Memorandum (A:22-23). This is what the respondent said in paragraph 2 of their response:

'As HR we have looked into the matters raised in your Memorandum and offer the following as a response:

- I. The Department of Human Settlements has implemented PSCBC Resolution 1 of 2007 for all affected officials covered by the Occupation Specific Dispensation for Engineers and Related Professionals and Occupations (which included among others: Town and Regional Planners; Construction Project Managers, GIS Professionals; etc.)
- II. This implementation was done in consistent with the provisions as stated in DPSA Circular 5 of 2009. Furthermore, the DPSA was also involved in the process and verified the translations accordingly.
- III. Affected officials in the Department were translated to appropriate levels as provided for in the OSD for Engineers and Related Professionals and Occupations.

- IV. Subsequent to the translations, management took a decision that the Department would no longer fill these posts as OSD when they became vacant. This decision was reiterated to HR during the recruitment process for the position that you occupy.
- V. Accordingly the position of Deputy Director: Spatial & Non-Spatial was advertised and filled as a Non-OSD position when it became vacant.
- VI. To date, the Department has not revised the decision not to fill these positions as OSD.'

The applicant stated that it is apparent from the respondent's response that, there is no dispute that his position is an OSD position.

- [10] The applicant further referred to clause 17 of the Resolution which deals with interpretation and application. Clause 17 reads as follows (B:9):

' 17.1. In the event of any conflict between the provisions of this agreement and any other agreement of the Council pertaining to the substance of this agreement, the provisions of this agreement shall take precedence.

17.2. No amendments to this Agreement shall be of force or effect unless reduced to writing and agreed upon by the parties to the Council as a Resolution of the Council.'

- [11] It was the applicant's evidence that the respondent's decision to translate his post to a Non-OSD post was inconsistent with the Resolution. It is the functions of the post which determines whether a post is an OSD or Non-OSD. He occupies the position GIS and therefore it should be remunerated at an OSD salary level.

- [12] The applicant further referred to the minutes of the meeting dated `22 September 2022 which he attended (A: 48-53). Paragraph 4 of the minutes of the meeting read as follows (A:51):

\* Mr Mbewane said the OSD as it relates to Engineer and related Professions in the department was implemented in consistence with DPSA circular 5 of 2009.

- With regards to Mr Modika's post, HR will check their records and if he was omitted by mistake, it was an error that require to be rectified.
- Mr Mbewana said the position that Mr Tshinyani occupied now, previously it was part of the

posts that was translated from non-OSD to OSD. When the previous incumbent vacated the post, the management decided that it should be advertised as Non-OSD.

- Mr Ramalepe indicated that he will contact the secretariat of EMT to request the minutes where the decision was taken to advertise and fill the Deputy Director: Spatial & Non-Spatial post as Non-OSD.'

[13] Paragraph 4 the minutes of the meeting deals with way forward as follows (A:52):

'It was agreed that HR will give Directorate: Spatial & Non-Spatial and Union the following documents:

1. EMT minutes indicating decision taken.
2. Letter to DPSA requesting to convert OSD posts to Non-OSD.
3. Response from DPSA regarding converting OSD posts to Non-OSD.
4. Email from Chief Director: Human resource instructing to advertise the post as Non-OSD'

[14] The applicant further referred to page 37 of Bundle A which contains an email indicating that the recruitment of the post occupied by the applicant would not be linked to any OSD dispensation. The applicant stated that the respondent did not have the mandate to advertise the post as Non-OSD. This is so because the respondent's prerogative could not supersede a decision taken at the Council to categorize GIS posts as OSD posts.

[15] The applicant further referred to the correspondence of the respondent's Director-General dated 16 March 2018 which he addressed to the Acting Director-General of DPSA (A:27-28). The said correspondence reads as follows:

- '1. The Department has implemented the Occupational Specific Dispensations (OSDs) for legally qualified personnel as well as for Engineers, related professions and occupations since the inception of these OSDs, with forty-four (44) approved OSD posts.
2. Due to the recent sector legislative and judicial proclamations and precedents, the Department is in the process of reviewing its Organisational Structure, during which assurance is made that:
  - 2.1 Competency requirements for each of the unit are clearly outlined, with skills gaps.
  - 2.2 Special consideration is given to scarce and critical skills.

3. It has since been established that:

3.1 OSDs of Legally Qualified Personnel do not add value to the Department, as it remains a constraint to attract and retain competent candidates, despite the required qualifications for Legal Services line posts. The Department is of the view that relevant posts be reviewed in terms of Job Evaluation based on revised qualifications, expertise and experience.

3.2 For OSD of Engineers, related professions and occupations (Town and Regional Planners, and Geo-Information Science (GIS):

3.2.1 The proposed Organizational Structure no longer requires OSD speciality at National level, since the actual implementation of functions reflected in the OSD determination takes place at Provincial level.

3.2.2 The relevant qualifications, expertise and speciality is required at National level in developing policies that are implemented for programmes and projects at a provincial level, in the built environment and Town and Regional Planning.

4. It is on the basis of the above considerations that, the advice is sought if the Department can convert its OSDs posts to non-OSD.'

[16] The applicant's further evidence was that the respondent appointed him to his current position on 01 August 2014 and the correspondence referred to in paragraph [17] above was not in existence when he was appointed to his current position.

[17] The applicant further referred to the correspondence of the D'PSA's Director-General dated 03 April 2020 addressed to the respondent's Director-Genera (A:24-25). The said correspondence reads as follows:

'Dear Colleague,

**REQUEST FOR ADVICE ON THE PROPOSED CONVERSION OF POSTS UNDER THE OCCUPATION SPECIFIC DOSPENSATION (OSD)**

1. Your letter dated 16 March 20218 regarding the above-mentioned subject matter refers. My apologies for the delayed response as the original request could not be found in my department.
2. In your letter, you requested advice on the following matters:
  - (a) The grading of posts covered by the Occupation Specific Dispensation (OSD) for legally Qualified Personnel with the job evaluation system; and
  - (b) The abolishment of posts covered by the OSD for Engineers and Related Professions and Occupations at national level and the creation of such OSD posts at provincial level, while remaining with a few OSD posts that will be responsible for policy development at national level.
3. My advice regarding the above mentioned matters is as follows:
  - (a) the grading of jobs that are covered by the OSD for Legally Qualified Personnel are centrally determined in terms of the relevant OSD and the Minister's determination and your department may not deviate in this regard. Therefore, the (re) grading of jobs by your department by means of prescribed job evaluation is nor permissible.
  - (b) Your letter is silent on whether the posts covered by the OSD for Engineers and Related professions and Occupations are filled or vacant. Nonetheless, your department may abolish posts covered by the relevant OSD at national level and remain with the OSD posts that will be responsible for policy development provided that such posts are provided for in the OSD dispensation.
  - (c) It is your department's intention to abolish posts at national level and create similar posts at provincial level. The incumbents of the posts that are no longer required at national level should be transferred to the provincial level in terms of section 14 of the Public Service Act, 1994 and regulation 32 of the Public Service Regulations, 2016.
4. I would like to urge you that where there are policy provisions that guide us in the course of our work such should be respected and complied with at all times.'

[18] In his previous employment at Department of Rural Development & Land Reform (DRDLR), the applicant and some of his previous colleagues filed an unfair labour dispute related to benefits against DRDLR), and the dispute was also about interpretation and application of Resolution 1 of 2007 (A: 55-62) related OSD. The arbitrating commissioner ruled in their favor.

[19] The applicant further referred to clause 13.2. of the Resolution (B:8) which deals with OSD requirements. The said clause reads as follows:

‘13.2. Measures to facilitate translation from existing dispensation to appropriate salary scales attached to the OSD based on the following principles:

‘13.2.1. No person will receive a salary (notch or package) that is less than what he/she received on 30 June 2009, i.e. prior to the implementation of the OSD.

13.2.2 Translation will be done in three phases, namely:

**(i) 1<sup>st</sup> Phase**

Minimum translation from the current post as at 30 June 2010, to the appropriate post and salary grade, as contained in Annexure A1.

**(ii) 2<sup>nd</sup> Phase**

Minimum translation from the current post as at 30 June 2010, to the appropriate post and salary grade, as contained in Annexure A2.

**(iii) 3<sup>rd</sup> Phase**

Re-calculation of relevant experience obtained by an employee who occupies a post on production level after obtaining the relevant qualification and complying with relevant requirement, as at 30 June 2011. The experience will be calculated and implemented with effect from 1 July 2011.

[20] He meets all the requirements of the OSD post which he is occupying, amongst others, which is registration with the relevant Council (A:71).



- [21] Under cross examination, the applicant testified that, he was an Assistant Director at salary level 10 when he applied for the position he is presently occupying. In his previous employment, he was translated to an OSD post after winning the dispute at the Council. It was put to the applicant that the arbitration award he referred to in his evidence in chief was not relevant to this matter. The applicant did not agree with this proposition.
- [22] The applicant reiterated his evidence that he joined the respondent on 01 August 2014. Currently, his position is Non-OSD. The advert did not indicate whether his post was an OSD or Non-OSD but the functions of the post indicate that it is an OSD post (A:38). The difference between an OSD and Non-OSD posts is that the OSD post is paid at a higher amount.
- [23] He was shortlisted, interviewed and appointed to his present position by the respondent. After his appointment, he was not happy that the post he had been appointed to had been categorized as Non-OSD post and raised his unhappiness with his supervisor. As from 2014, his superiors did not want to entertain his complaint.
- [24] At a later stage, there was a meeting between him, his union and the HR regarding his dissatisfaction that the respondent had classified his post as Non-OSD and wanted the respondent to revisit their decision and again made the post an OSD. Not realizing any progress, he filed the grievance and exhausted all internal procedures. GIS is part of professionals listed in Resolution 3 of 2009 which were recognised as an OSD post. At some stage, his current post was an OSD post and in contravention of the Resolution, the respondent made and at later stage categorized his current post as Non-OSD. It is correct that when he joined the respondent the post was no longer an OSD. He did not know the process which the respondent followed to translate the post from the OSD to a Non-OSD post. Therefore, he could not say whether the respondent followed the correct process when translating his post from OSD to Non-OSD.
- [25] The applicant testified that he not disputing that the DPSA was involved in the process of translating his post to a Non-OSD post. The applicant was referred to paragraph III of the respondent's response to his Memorandum which is alluded to in paragraph [11] above. He was specifically referred to paragraph III which stipulates that, all officials in the Department were translated to appropriate levels as provided for in the OSD for Engineers and Related Professionals and Occupations. The applicant did not agree with this proposition. The applicant argued that, the respondent had no authority to translate his post from OSD to Non-OSD.

[26] The applicant's further evidence was that he did not know whether the respondent approached the Council before they translated his post from OSD to Non-OSD. The applicant still maintained that he is occupying OSD post but he is not remunerated at the OSD level.

[27] The applicant was further referred to the letter of the respondent's Director-General dated 16 March 2018 headed '**REQUEST FOR ADVICE ON PROPOSED CONVERSION OF POSTS UNDER THE OCCUPATIONAL SPECIFIC DISPENSATIONS (OSDs) IN THE NATIONAL DEPARTMENT OF HUMAN SETTLEMENTS**' (A:27-28). He then read paragraph 3.2.1 reads as follows:

'The proposed Organizational Structure no longer requires OSD speciality at National level, since the actual implementation of functions reflected in the OSD determination takes place at Provincial level.'

The applicant's understanding of this paragraph was that the respondent no longer wanted the OSD post at National level but at Provincial level.

[28] The applicant was further referred to the letter of the DPSA's Director General dated 25 March 2021 addressed to the respondent's Director-General. The subject of the correspondence was '**REQUEST FOR ADVICE ON THE PROPOSED CONVERSION OF POSTS UNDER THE OCCUPATION SPECIFIC DISPENSATION (OSD)**'. Then, the applicant read paragraph 3 of the letter as follows:

'If it is your department's intention to abolish posts at national level and create similar posts at provincial level. The incumbents of the posts that are no longer required at national level should be transferred to the provincial level in terms of section 14 of the Public Service Act, 1994 and regulation 32 of the Public Service Regulations, 2016.'

The applicant's understanding of this paragraph is that if the respondent had the intention to abolish posts at national level, they had to transfer the incumbents of the posts to the provinces. The letter of the Director-General was signed 03 April 2020 and did not agree that when he joined the respondent the post he is currently occupying was no longer an OSD post.

[29] The applicant's further evidence was that he applied for a non-OSD post and was appointed to that post. Although, the post was classified as a non-OSD post it did not qualify the post to be classified OSD in terms of the Resolution. The fact that he is not remunerated at OSD level does not disqualify the post to be an OSD. The nature of the post is still OSD even though the respondent is not recognizing as such.

[30] It was put to the applicant that he is not an incumbent of the OSD post and therefore there is no need for the respondent to transfer him to the province. Therefore, paragraph 3 of the letter of DPISA's Director General referred to in paragraph [28] above is not applicable to him. The applicant's response was that he was not asking the respondent to transfer him to the province. All what he wants is for the post he is occupying to be translated from Non-OSD to OSD post in terms of Resolution 3 of 2009.

**Respondent's evidence:**

[31] The respondent did not call any witness in this matter.

**ANALYSIS OF THE PARTIES'EVIDENCE AND ARGUMENTS**

[32] It appears to me that the crux of the applicant's case is that, the respondent had no authority to translate the post he is occupying from the OSD to Non-OSD. The basis of the applicant's contention is that; the posts of GIS fall within OSD in terms of collective agreement – Resolution 3 of 2009. In light of this, the applicant argued that, the respondent could not translate the post in question to a Non-OSD post and if the respondent wanted to translate the post in question to a Non-OSD post it was bound to approach the Council.

[33] On the other hand, the respondent argued that the respondent had a prerogative to translate the post in question from the OSD to a Non-OSD post because of their operational needs. According to the respondent, the post at national level was no longer adding value to its operations.

[34] In light of what I have stated in paragraph [32] above, it follows that, the main issue in dispute is whether the respondent had an authority to translate the applicant's post from OSD to Non-OSD. It is common cause that the Resolution categorizes Geo-Information Science (GIS) as one of the professions/occupations which fall within the Resolution. In light of this, the applicant argued that, the respondent ought to have approached the Council if it wanted to translate the post in question from the OSD to Non-OSD. There was no evidence suggesting that the respondent had approached the Council regarding this matter.

[35] It is my considered view that, there is substance in the applicant's argument because, the Council (GPSSBC) has not amended its Resolution to exclude GIS professionals as professionals who fall within the OSD. It follows that the respondent did not have an authority to take a decision to translate

the post in question from OSD to Non-OSD. Simply put, the respondent acted in contravention of the Resolution when it advertised/translated the post in question from the OSD to Non-OSD.

[36] The next question for determination is whether the respondent should translate the applicant's post from Non-OSD to OSD remunerates the applicant at OSD level. It is also common cause that the post in question was an OSD post but after the incumbent of the post (the applicant's predecessor) had vacated it, the respondent advertised it as Non-OSD. Although, the respondent advertised as Non-OSD, the functions of the post did not change. On this basis, the applicant argued that he is performing the duties of the OSD post but is not remunerated at OSD level.

[37] Having found that, the respondent had no authority to translate the post in question from OSD to Non-OSD, I find that, the respondent must translate the applicant's post from Non-OSD to OSD, and remunerates the applicant at an OSD level from 01 August 2024.

#### **AWARD**

[38] The respondent had no authority to translate the applicant's post from the OSD to Non-OSD.

[39] The respondent is ordered to translate the applicant's post from Non-OSD to OSD on or before 1 March 2025.

[40] The respondent is further ordered to remunerate the applicant at OSD level from 1 August 2014.



**GPSSBC Panelist: LA Sithole**

Date: 20 January 2025

