

# ARBITRATION AWARD

Panellist/s: P M NGAKO  
Case No.: GPBC1565/2016  
Date of Award: 3 JULY 2017

In the ARBITRATION between:

NEHAWU OBO M W KEKANA

(Union / Applicant)

and

DEPARTMENT OF EDUCATION

(Respondent)

Union/Applicant's representative: TEISHI MOKOENA

Union/Applicant's address: \_\_\_\_\_

Telephone: 011 836 9150

Telefax: 011 834 4856

Respondent's representative: MOTSHIRI HLAPOLOSA

Respondent's address: \_\_\_\_\_

Telephone: 011 666 9154

Telefax: 086 666 9116

## **DETAILS OF HEARING AND REPRESENTATION**

- [1] This matter came before me on the 8<sup>th</sup> of March 2017 and the 21<sup>st</sup> of June 2017. Appearing before me was the applicant who was duly represented by Teishi Mokoena, a Trade Union Representative from NEHAWU. The respondent was represented by Motsiri Hlapolosa an employee in the employment of the respondent. This matter was decided on written heads of arguments from both parties as per agreement from both parties. A single bundle was submitted which parties relied on.

## **ISSUE TO BE DECIDED**

- [2] I am required to determine in terms of Section 186(2) (b) of the Labour Relations Act whether the respondent committed an unfair labour practice when it imposed a sanction of final written warning and three months suspension without pay

## **BACKGROUND TO THE ISSUE**

- [3.1] Applicant is employed by the respondent at Gordon Primary School
- [3.2] Applicant attended a disciplinary hearing on the 10<sup>th</sup> of December 2015
- [3.3] Consequent to the disciplinary hearing a sanction of final written warning and three months suspension without pay was imposed on the applicant
- [3.4] Applicant noted an appeal and her appeal was dismissed
- [3.5] Applicant was charged and found guilty on the following allegations:

### **ALLEGATION 1**

It is alleged that while on duty, you conducted yourself in an improper, disgraceful or unacceptable manner in that you divulged confidential information about the shortlisting process of a Deputy Principals post to Mr. Khoza an HOD in the school at which you are employed and a candidate to the said post.

### **ALLEGATION 2**

It is alleged that you invited Ms. Mpho Moloi to Pan Mall and asked her to write a letter giving false information about what transpired in the shortlisting process and that you went with Mr. Khoza to Ms. Moloi's house to request her to testify in arbitration and offered her your attention and your love.

### ALLEGATION 3

It is alleged that you called Ms. Pholosi and Mr Vickerman, asked them to write letters giving false information about what transpired in the interviews of a Deputy Principals post and offered them R 1 500.00.

## SURVEY OF EVIDENCE AND ARGUMENT

### APPLICANT'S SUBMISSION

4. It is the submission of the applicant that she was found guilty on one allegation out of three allegations that were levelled against her. The applicant submitted that when she left the proceeding, she was not waiving her right to be heard, but the chairperson was biased and failed or refused to allow her right to have her witness given an opportunity to come and testify because she was refused postponement which is the reason she and her representative left the proceedings. The applicant further submitted that the principle of natural justice which has been laid by the courts as a minimum protection of individuals against the arbitrary procedure that may be adopted and that to postpone a matter is to give an opportunity for one to be judged fairly in his or her presence and that one can have all the evidence as well as witnesses defend their case, and that both parties must be given equal opportunities to be heard, the chairperson should have granted the postponement to grant her fair opportunity to present her case.
5. The applicant in support of its case referred me to **Mabitsela vs SAPS (2004, 4 BALR 969)**, **Sappi, Forests (Pty) LTD v CCMA & Others (2008) 17 LC.11.83**; report in **[2009] 3 BLLR 254 (LC)**; Judge Pillay; and **County Fair v CCMA & others [1998] BLLR 577** and **SAB LTD (Beer Division v Woofrey & others [1999] 5 BLLR 525 (LC)**. It is therefore the submission of the applicant that the

sanction was too harsh and punitive for the allegations levelled against her. And prays that that the harsh sanction of 90 days suspension without pay be set aside

### **RESPONDENT'S SUBMISSION**

6. The respondent submitted that it has complied with the audi alteram partem rule which requires of the employer to allow the employee to explain his conduct before a decision is taken. Referred to Gerber v Algorax (Pty) Ltd (1990) 20 ILJ 2994 (CCMA) and Anglo American Farms t/a Boschendal Restaurant v Komjwayo (1992) 13 ILJ 573 (LAC). It is therefore the submission of the respondent based on the above that they followed due process in disciplining the applicant.
7. The respondent further submitted that in respect to a claim of refusing the applicant postponement, the respondent contends there is no basis for the claim in that the applicant applied for a postponement on the basis that their key witness was not available due prior commitments. The chairperson in her ruling said since the onus is on the respondent to start, it should its witnesses once it has completed its case and the applicant has finished leading her evidence, it will be fair to postpone the disciplinary hearing. It is therefore the contention of the respondent based on this ruling there was no justifiable reason to leave the proceeding. The respondent also submitted that it is not true that applicant was found guilty on one charge; the chairperson found her guilty on all three charges levelled against her.
8. The respondent submitted that opposing the granting of prayer lesser than three months suspension without salary and final written warning because the applicant as was found guilty on dishonesty allegations

## **ANALYSIS OF EVIDENCE AND ARGUMENT**

9. It is common cause that the applicant and her representative left disciplinary proceedings after the chairperson of the disciplinary hearing refused an application for postponement of the disciplinary hearing because the applicant's witness was not available due to prior commitments. It is the contention of the applicant that they were entitled to postponement as their key witness was not present due to prior commitments. The chairperson in her ruling found as the onus is not on the applicant, the respondent will lead its case after it has concluded then applicant will be offered an opportunity to give her version, then the matter can be postponed to accommodate the applicant's witness who was not present due to prior commitments. The decision of the chairperson was reasonable and fair because there was no reason to postpone the proceeding without the employer leading its evidence as the reason for the postponement was to accommodate the witness who was not present due to prior commitments; As result the conduct of the applicant and her representative when they left the proceedings amounted to the applicant waiving her right to be heard.
  
10. The applicant in her submission states she has been found guilty on one out of three allegations, this is disputed by the respondent and the finding and sanction of the chairperson at page 12 of the bundle clearly states the applicant was found guilty on all three allegations levelled against her. I agree with the respondent that the applicant has relied on cases that are not relevant to the dispute before me, the dispute before me relates to suspension as sanction and not as precautionary suspension pending the outcome of an investigation. The applicant is not challenging the finding but the sanction imposed as harsh, the initiator in this matter prayed for dismissal; the only reason that the chairperson did not impose the sanction of dismissal on the applicant at page 13 of the bundle states "I have also considered that the trust relationship is not irretrievably broken down for she was still serving at school and there were no other complaints since the charges were preferred against her".

11. Evidence was led during disciplinary hearing that other employees who were found guilty on the same or similar offences were dismissed by the respondent. As a result I consider the applicant fortunate that she is still an employee after committing allegations that amounts to dishonesty which in most instances will attract a sanction of dismissal. As a result it is my view that there is no justifiable reasons to interfere with the finding and the sanction imposed on the applicant by the respondent.

### **AWARD**

12. The finding and the sanction of 3 months suspension without pay and final written warning imposed on the applicant is hereby upheld;
13. There is no order as to costs.

A handwritten signature in black ink, appearing to be 'P M NGAKO', written in a cursive, stylized manner.

Panellist/s: **P M NGAKO**  
Sector: