



GENERAL PUBLIC SERVICE
SECTOR BARGAINING COUNCIL



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ARBITRATION AWARD

Panelist: KATLHOLO WABILE
Case No.: GPBC14/2021
Date of Award: 31 MARCH 2022

In the ARBITRATION between:

SAMUEL VUKELA

(Union / Applicant)

and

DEPARTMENT OF PUBLIC WORKS AND INFRASTRUCTURE

(Respondent)

Union/Applicant's representative: ADV. R. ITZKIN

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Respondent's representative: ADV. A. REDDING SC

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ARBITRATION AWARD

1. DETAILS OF HEARING AND REPRESENTATION

- 1.1 This matter has taken almost a year to complete. The matter was initially set down in a physical setting on 20 May 2021 at the GPSSBC offices situated at 260 Basden Avenue, Centurion. I postponed the matter on that occasion and issued a ruling with reasons. The matter was set down again on 30 June and 1 July 2021. On or around 24 June 2021, the respondent served and filed an application essentially seeking two declaratory orders, alternatively, a postponement of the matter. The first of said orders was that the Minister in the Presidency be declared to be a party with a substantial interest in the subject matter, alternatively, the Minister stood to be prejudicially affected by the outcome. The second was that the GPSSBC lacked the jurisdiction to arbitrate in the absence of the dispute being referred against the Minister in the Presidency and conciliation taking place with such party. The alternative relief sought carried the qualifier that the matter be postponed pending the Minister in the Presidency being joined in the proceedings and, after thus being joined, also provided with reasonable notice of the arbitration proceedings. The Applicant opposed this application.
- 1.2 The matter could, nevertheless, not proceed on 30 June and 1 July 2021 because I was booked by the GPSSBC to finalise a part-heard matter in the same period and that took priority. Fortunately, the matter was promptly rescheduled for 7 and 8 July 2021 and parties continued to serve and file papers in the preliminary application up to and including the morning of the first set down date, viz, 7 July 2021. On this occasion, the matter proceeded virtually on the Zoom platform whereupon the parties argued the preliminary application. I handed down a ruling *ex tempore*. That ruling is incorporated in this award. Suffice to state, at this point, that as a consequence of one of the preliminary points, I postponed the matter and issued a directive as to the future conduct of the proceedings. The matter was again set down virtually on the Zoom platform on 19 and 20 August 2021. Parties exchanged bundles up to the penultimate date of this set down. On this occasion, the Respondents (now in the plural) asserted that the 2nd Respondent, viz, the Minister in the Presidency, was not ready to arbitrate due to the appointment of a new Minister in the Presidency following a Cabinet reshuffle by the President of the Republic. Parties agreed that the Applicant would make representations to the new Minister regarding why the Applicant viewed his suspension as unjustified and, based on these, the new Minister would come to a decision in that regard. Given that the parties were seemingly committed to canvassing an internal solution, I granted the Respondents' request for postponement but reserved costs of Council. This was the third postponement of the matter.
- 1.3 The matter was next set down virtually on 8 and 9 December 2021. It would appear that on or around 22 November 2021, the GPSSBC received a request for postponement from the Office of the Presidency and the General Secretary of Council then decided to grant the request. This was the fourth postponement in the matter. It would further seem that, behind the scenes, parties agreed, and the GPSSBC consented, to virtual set down of the matter on 13 and 14 December 2021. At long last, the arbitration continued into the merits but was part-heard. Due to disparate diaries, parties agreed to re-convene on non-consecutive days, these being 21, 23 and 25 February 2022, and the GPSSBC duly set the matter down virtually on said dates. By 23 February 2022, the proceedings were completed but parties requested, and I consented, to closing arguments being submitted in writing by 18 March 2022. Parties complied with this deadline and I am indebted to them for the clarity of their arguments. Where applicable, I recorded the proceedings in the physical settings on my digital voice recorder and all virtual proceedings were recorded on the Zoom program in my laptop and thereafter

downloaded onto the GPSSBC external hard drive through the assistance of Mr Tinyiko Mashele, of the IT Department.

- 1.4 Save for the initial sitting when the applicant was represented by Advocate L. Nyangiwe of the Johannesburg Bar, he was thereafter represented by Advocate Y. Peer, also of the Johannesburg Bar, up to the set down in August 2021. However, from December 2021 until completion of the proceedings in February 2022, the Applicant's lead Counsel was Advocate R. Itzkin of the Johannesburg Bar, appearing with Advocate Peer. The instructing attorneys remained throughout Edward S. Classen & Kaka Attorneys (ESC & Kaka). Except for the first set down date when the 1st Respondent was represented by Mr A. Makuwa of the instructing attorneys, the 1st Respondent was next represented by Advocate P. Maharaj-Pillay, of the Johannesburg Bar and, thereafter, the 1st and 2nd Respondents were, together, represented by Advocate A. Redding SC, also of the Johannesburg Bar, appearing with Advocate Maharaj-Pillay. The instructing attorneys remained consistently Cheadle Thompson & Haysom Inc (CTH).

2.ISSUE TO BE DECIDED

- 2.1 Whether or not the Respondents committed an unfair labour practice related to suspension against the Applicant (the initial decision to suspend had been taken only by 1st Respondent).

3.BACKGROUND TO THE MATTER

- 3.1 The Applicant has been employed as a Director-General (DG) at the 1st Respondent since 7 December 2017. Accordingly, he is a member of the Senior Management Service (SMS) to whom the Public Service's comprehensive prescript, the SMS Handbook, applies and, particularly for present purposes, Chapter 7 thereof, dealing with the disciplinary regime for Senior Managers. He is, in my understanding, the most Senior Manager at the 1st Respondent, perhaps equivalent to the CEO in the private sector. His fixed term contract of employment will expire in December 2022. The 1st Respondent is a government department that employs thousands of employees in the Public Service and assists government to execute its constitutional obligations to govern the State.
- 3.2 It would appear that, in the course of the employment relationship the 1st Respondent seemingly had reason to believe the Applicant had committed certain acts of misconduct. To this end, on or around 17 March 2020, the President of the Republic of South Africa approved a delegation to the Cabinet Minister responsible for the 1st Respondent in respect of disciplinary action to be taken against the Applicant.
- 3.3 On or around 28 July 2020, the current Minister of the 1st Respondent, Minister Patricia de Lille, placed the Applicant on suspension. It would appear that on or around 9 September 2020, the President withdrew Minister de Lille's delegations and, instead, issued further delegations to the Minister in the Presidency, the now deceased Minister Jackson Mthembu, ostensibly vesting him with power to pursue disciplinary action against the Applicant.
- 3.4 It would appear, on the Applicant's version, that on or around 19 September 2020, Minister Mthembu, then still very much with us, decided to extend the Applicant's suspension pending the finalisation of the impending disciplinary process. It appears that the Applicant would have none of this and, on or around October 2020, proceeded to refer a request to the GPSSBC to the effect that disciplinary action against him unfold in the form of an Inquiry by Arbitrator in terms of section 188A(11) of the Labour Relations Act 66 of 1995, as amended ("the LRA"). This is not a matter of concern to

me. Insofar as the matter at hand is concerned, on or around 17 December 2020, the Applicant referred a dispute to the GPSSBC for conciliation. The dispute remained unresolved at that stage and, a certificate to that effect having been issued on 1 February 2021, the Applicant requested, on or around 22 February 2021, that the GPSSBC set the matter down to be resolved through arbitration. The sequel to that has been the developments succinctly captured at the outset of this award.

- 3.5 The Applicant claims an unfair labour practice, which the Respondents refute. The Applicant posits two main challenges. The first is that the extension of his suspension after the prescribed sixty (60) days within which a disciplinary enquiry had to be convened had expired, was supposed to be effected by the chairperson of the disciplinary enquiry and not the 2nd Respondent. The suspension had, consequently lapsed, is what Applicant contends. I seem to understand the second challenge to be that the Applicant's suspension is no longer a holding exercise pending a disciplinary enquiry but is punitive in nature. So, give or take, there are two or three basic premises upon which the suspension is assailed. It would appear that, quite apart from the present matter, the parties have been engaged in other litigation that reaches as high as the courts. Stemming from such litigation, it would appear that an agreement was struck between the parties to postpone finalisation of afore briefly alluded to section 188A referral but, more significantly for present purposes, the agreement also apparently included a similar keeping in abeyance of the disciplinary action the Respondents are seemingly determined to initiate against the Applicant. The delayed disciplinary enquiry has loomed large in these suspension proceedings.

4. PRELIMINARY ISSUES AND RULINGS

Declaratory orders

- 4.1 As captured at the outset of this award, the 1st Respondent essentially raised two preliminary points. The application in respect of these points was brought by the Minister responsible for the 1st Respondent. The first of these preliminary points is two-fold and I present it in interrogative terms:

- (a) Is the Minister in the Presidency a party with a substantial interest in the subject matter of the dispute? Alternatively;***
(b) Does the Minister in the Presidency stand to be prejudicially affected by the outcome of the dispute?

- 4.2 The second of said preliminary points I also questioningly posit essentially as follows:

Does the GPSSBC lack jurisdiction unless and until the dispute was referred against the Minister in the Presidency and such party participated in conciliation of the dispute?

- 4.3 I dealt comprehensively *viva voce* with these preliminary points at the time they were argued and the ruling is a matter of record. Accordingly, I herein only repeat the crux of the ruling.
- 4.4 In truth, the preliminary points, considered collectively, amounted to no more than an attack on the jurisdiction of the GPSSBC. It is apposite, before setting out how I dealt with the preliminary points, to touch on the principal opposition thereto, as I hereafter do.
- 4.5 The 1st Respondent's preliminary points had met with a challenge that the Minister responsible for the 1st Respondent did not have the authority to bring the preliminary application since she had been divested of the President's delegated authority to pursue the disciplinary action against the Applicant and that the preliminary application

stood to be dismissed on this basis alone. I held that, as the Executive Authority for the 1st Respondent, the Minister was clearly a party with substantial interest in the subject matter of the dispute and was, therefore, likely to be prejudicially affected by the outcome, obviously in the event it went against the 1st Respondent. Clearly, she had the standing to bring the application.

4.6 As to the preliminary points, I declared that the Minister in the Presidency, upon whom the delegation wrested from Minister de Lille had been conferred, was indeed a party with substantial interest in the subject matter of the dispute and stood to be prejudicially affected by the outcome, especially as the delegation imposed a statutory obligation on the Minister in the Presidency to dispense with the employment issues such as the present dispute. I, therefore, *mere motu* joined the Minister in the Presidency as I was empowered to do so in terms of Rule 27(3)(a) of the Rules for the Conduct of Proceedings Before the GPSSBC¹ ("Council's Rules").

4.7 As to the jurisdictional point, I declared that the GPSSBC was clearly not only competent to determine the dispute but had, in fact, already exercised conciliatory jurisdiction over the dispute. I held essentially that the fact that the Minister in the Presidency was unsighted in both the referral of the dispute, and conciliation thereof, was not a bar to the jurisdiction of the GPSSBC because the principal parties, viz, the Applicant as employee and the 1st Respondent as employer, were properly before the GPSSBC and joinder was, in any event, conceived, not to undo or redo what had already been done in the proceedings, but to afford a party with substantial interest who was otherwise initially unsighted, the opportunity to come into view.

4.8 Lastly, the preliminary point related to alternative relief is set out inquiringly as follows:

Should the matter be postponed pending joinder of the Minister in the Presidency and consequent thereto, should the joined party be afforded reasonable notice of the arbitration proceedings?

4.9 Briefly, deemed postponement to be appropriate. I postponed the matter, clearly, to enable processes of joinder to unfold. Reasonable notice of the arbitration proceedings to any party goes without saying.

5. SURVEY OF EVIDENCE AND ARGUMENT

5.1 The **Applicant** had the duty to begin. He testified under oath. This is not a verbatim account of his testimony but only the salient features thereof. He handed down a bundle of documents comprising one (1) lever arch file which, for convenience, I refer to as the "Vukela bundle".

¹ 27 How to join or substitute parties to proceedings

- (1) ...
- (2) A panelist may make an order joining any person as a party in the proceedings if the party to be joined has a substantial interest in the subject matter of the proceedings.
- (3) A commissioner may make an order in terms of sub-rule (2)
 - a) Of its own accord;
 - b) ...
 - c) ...
- (4) ...
- (5) ...
 - a) ...
 - b) ...
- (6) ...
- (7) ...
- (8) ...

- 5.2 He testified that he is the 1st Respondent's DG. His career in the Public Service commenced in 1986. He proceeded to sketch his career progression in the Public Service, including in the trade union, NEHAWU.
- 5.3 He referred to his letter of appointment as DG². This appointment was made on 7 December 2017. His tenure ends on 07 December 2022. He confirmed that he, and all managers at level 13 and above, fall within the SMS Handbook and was referred to chapter 7 thereof³.
- 5.4 He was then referred to a document⁴ he identified as a delegation by the President to the Minister responsible for the 1st Respondent concerning said Minister's authority to initiate disciplinary action against him. The delegation was on 17 March 2020. The Minister being delegated was Minister de Lille.
- 5.5 His attention was drawn to a document⁵ he identified as a letter of concern he addressed to the President concerning Minister de Lille's involvement in the disciplinary action against him. The letter is dated⁶ 12 July 2020.
- 5.6 In that letter, he was essentially drawing the President's attention to the unethical conduct of Minister de Lille who had sought the appointment of unsuitable service providers⁷ to 1st Respondent. This included the Minister's bias in failing to investigate a deputy DG (DDG), Mr Imtiaz Fazel, who was allegedly implicated in falsifying an investigation report⁸.
- 5.7 For the reasons set out above, he besought the President to review the delegations granted to Minister de Lille in terms of which she was to pursue disciplinary action against him⁹.
- 5.8 He was referred to a document¹⁰ dated 28 July 2020 which he identified as a letter communicating his suspension and authored by Minister de Lille. He confirmed that the letter raised the 1st Respondent's receipt of two reports which concerned allegations of irregularities within the 1st Respondent.
- 5.9 Paragraph 1, subparagraph 1.1 of the letter referred to the PWC report concerning the funerals of Ms Winnie Mandela and Ambassador Skweyiya and this was read into record. Subparagraph 1.2 referred to the Public Service Commission (PSC) report concerning appointments made in the 1st Respondent's SMS. The dates of these reports were 29 March 2019 and 8 February 2019, respectively. This was a year prior to his suspension.
- 5.10 There had been an internal investigation within the 1st Respondent before the release of said reports. He was suspended on 29 July 2020 and a disciplinary hearing chairperson, Advocate D. Berger SC, was appointed. The initiator appointed was CTH, 1st Respondent's attorneys in the present proceedings.

² Page 1 of the Vukela bundle

³ Page 94.2 supra

⁴ Page 5.1 supra

⁵ Page 40 supra

⁶ Page 42 supra

⁷ Page 41 supra at para 1.3.1

⁸ Page 41 supra at para 1.3.2

⁹ Page 40 supra at para 1.2

¹⁰ Page 4-5 supra

- 5.11 He was referred to a document¹¹, with an annexure, and identified it as a letter addressed to his attorneys regarding the President's delegation to the late Minister Mthembu, the annexure being said Minister's letter to him.
- 5.12 His attention was then drawn to another document¹² dated 9 September 2020 which he said was also a delegation. This one withdrew the delegation from the 1st Respondent's Minister and conferred it on the Minister in the Presidency.
- 5.13 His suspension was supposed to endure for 60 days. For it to extend beyond this timeline, the responsible Minister was supposed to make representations to the disciplinary enquiry chairperson who would take the decision to extend. Absence this, the suspension lapsed.
- 5.14 His attention was redrawn to the late Minister Mthembu's letter¹³ to him aforesaid. He confirmed that it was communicated to him that additional charges related to his countenancing of inordinate delay in a disciplinary matter, as well as his conduct in the procurement of service providers for the 40km Borderline Infrastructure Project between the Republic of South Africa and Zimbabwe at the Beitbridge Border Post (the Beitbridge project, for brevity). He was further referred to the reasons for his continued suspension¹⁴
- 5.15 The timing of the late Minister Mthembu's letter is that it was issued on 18 September 2020 whereas his suspension was to lapse on 26 or 27 September 2020. He was referred to a document¹⁵ (SMS Handbook) which set out the reasons upon which the employer may suspend an employee.
- 5.16 He was then taken through a comparison of the reasons for suspension as per the SMS Handbook and the reasons advanced by the late Minister Mthembu at the time the suspension was extended. The reasons cited by the latter were not encompassed in the SMS Handbook. The seriousness of the charges is not a stand-alone factor in the decision to suspend. Similarly with the issue of seniority, which was not peculiar to him.
- 5.17 His attention was drawn to a document¹⁶ he identified as a letter from his attorneys, ESC & Kaka, to the late Minister Mthembu, essentially a response to CTH's letter of 18 September 2020. His attorneys labelled his continued suspension unlawful¹⁷ therein. The attorneys also sought to put a stop to Minister de Lille's disparaging media comments¹⁸ regarding him.
- 5.18 In his attorneys' letter', he beseeched the late Minister Mthembu to review his decision regarding his continued suspension, including a suitable placement other than in his role. He had never interfered with the process of investigation and it was completed while he was at work. He had also not interfered with the disciplinary process pending against him.
- 5.19 He has suffered prejudice as a result of the suspension. He is perceived to have committed the alleged misconduct and a cloud hangs over his head. There has been public airing of his suspension and it has also come before Parliament.

¹¹ Page 6-10 supra

¹² Page 11 of the Vukela bundle

¹³ Page 9 supra at para 5.2

¹⁴ Page 9 supra at para 5.4

¹⁵ Page 94.8 supra at clause 2

¹⁶ Page 13 supra

¹⁷ Page 13 supra at para 8.2

¹⁸ Page 13 supra at para 8.5

- 5.20 He was referred to a document¹⁹ he identified as a statement by Minister de Lille regarding his precautionary suspension which went out to the media, including television. Yet another media statement²⁰ was pointed out to him. In this statement, Minister de Lille draws conclusions that funds have been misappropriated even before the allegations have been tested. Similarly with the allegations in the PSC report.
- 5.21 On 29 July 2020, Minister de Lille had pledged not to make any further media comments until the "process" had been concluded²¹. Yet, on 21 September 2020, she released a tweet implicating him in her commitment to root out corruption²². She had already concluded that he was corrupt. He commented on yet another statement²³. The damage to his reputation could be irreparable.
- 5.22 His attention was drawn to the late Minister Mthembu's response²⁴ to ESC & Kaka's letter of 23 September 2020. This is dated 24 September 2020. In this letter, the reasons for his continued suspension are reiterated²⁵.
- 5.23 He was then referred to a letter²⁶ which was ESC & Kaka's response to the late Minister Mthembu's letter of 24 September 2020. He sought therein to return to work²⁷. The late Minister had, instead, stated that his suspension was to endure until the finalisation of his disciplinary enquiry. This is why he did not report for duty when 60 days expired.
- 5.24 His attention was drawn to a letter²⁸ CTH addressed to his attorneys and dated 29 September 2020 which was a response to the latter's letter of 24 September 2020. In this letter, 1st Respondent confirmed that Advocate Berger SC would continue as chairperson of the disciplinary enquiry and his request to return to work would no longer be entertained.
- 5.25 He was referred to a document²⁹ he identified as a referral made on 1 October 2020 wherein he requested an Inquiry by Arbitrator in respect of his disciplinary charges. He had made disclosures to the President prior to his suspension. The referral was made due to a lack of response from the President.
- 5.26 The 1st Respondent disputed the jurisdiction of the GPSSBC in respect of said section 188A referral. The Council issued a ruling³⁰ dated 26 November 2020 in that regard. The commissioner ruled that the GPSSBC had jurisdiction. He was also referred to his referral³¹ of the suspension dispute to conciliation.
- 5.27 His attention was drawn to a document³² he identified as a notice of motion. This was to the Labour Court (LC). In Part B of said notice, the relief sought was the review and setting aside of the GPSSBC's jurisdictional ruling aforesaid. In Part A, 1st Respondent and 2nd Respondents sought a stay of the Inquiry by Arbitrator proceedings until the finalisation of said review.

¹⁹ Page 239 supra

²⁰ Page 243 supra

²¹ Page 35 of the Vukela bundle at para 47

²² Page 36 supra at para 48

²³ Page 37 supra at para 52

²⁴ Pages 68-72 supra

²⁵ Page 70 supra at paras 11-13

²⁶ Pages 73-79 supra

²⁷ Page 77 at para 16.3

²⁸ Page 80-81 supra

²⁹ Pages 81A-81B supra

³⁰ Pages 94.37-94.50 supra

³¹ Pages 82-88 supra

³² Pages 95-99 supra

- 5.28 He was referred to a document³³ he confirmed was an order of the LC. A letter³⁴ from CTH dated 5 January 2021 was brought to his attention wherein an enquiry was made whether he was amenable to postponement of the section 188A proceedings scheduled for 27 January 2021.
- 5.29 His attention was further drawn to a letter³⁵ dated 7 January 2021 where his attorneys, ESC & Kaka, sought confirmation that 1st Respondent did not harbour intentions of proceeding in internal disciplinary proceedings against him pending the review application. His attorneys were to seek a mandate from him concerning postponement of the section 188A proceedings.
- 5.30 Being referred to a letter³⁶ from CTH, he testified that his worry was that 1st Respondent would pursue the disciplinary enquiry against him while its review application was pending. He could, however, not understand 1st Respondent's stance³⁷ that the present proceedings (suspension) also be postponed pending the review application since the latter proceedings are distinguishable.
- 5.31 The 1st Respondent clearly sought through its stance above to perpetuate his suspension whereas he desired upliftment of the suspension and a return to the workplace since the suspension was without merit.
- 5.32 He was referred to a letter³⁸ from his attorneys to 1st Respondent's attorneys wherein the former conveyed agreement with a stay of both the section 188A and internal disciplinary proceedings pending 1st Respondent's review application but disagreed with a stay of these suspension proceedings pending same review as contemplated in the draft order³⁹.
- 5.33 His attention was drawn to an email from 1st Respondent's attorneys to his attorneys essentially confirming what the latter had agreed to on his behalf and the exclusion of these suspension proceedings from the ambit of the proposed court order.
- 5.34 After the suspension dispute remained unresolved at conciliation, he applied for arbitration which was then set down on 20 May 2021⁴⁰. He then testified on the various postponements of the matter.
- 5.35 If it were suggested that his return to work would result in an unworkable relationship with Minister de Lille, that would not constitute a ground for suspension. Even if such concerns were legitimate, he would do his best to foster a good relationship.
- 5.36 Given the various developments, including the 1st Respondent's review application, his contract could terminate in December 2022 whilst all these processes are pending and that would be tantamount to a dismissal. He was on paid suspension and thus not rendering any services which constitute improper use of the State's funds. He was invested in the Public Service and it required service from him.
- 5.37 He was referred to a letter⁴¹ dated 19 August 2021 from CTH to his attorneys wherein the former communicated the new Minister in the Presidency, Minister Mondli

³³ Pages 100-101 supra

³⁴ Page 159 supra

³⁵ Pages 156-157 of the Vukela bundle

³⁶ Page 157.2 supra at para 4

³⁷ Page 157.2 supra at para 5

³⁸ Pages 157.6-157.7 supra

³⁹ Pages 157.3-157.4 supra

⁴⁰ Page 93 supra

Gungubele's, request to him to make representations on why he should not remain suspended. He accepted this invitation as evinced by his response⁴². The date on it was a typing error. He then testified on particular paragraphs of the response.

- 5.38 He was generous in how he portrayed his continued suspension to Minister Gungubele. The reality was that this was one of the most serious injustices ever meted out. It was punishment. He reiterated the attack on his reputation and dignity posed by the suspension.
- 5.39 Upon a part of his submissions to Minister Gungubele being read to him, he testified that he was at the end of his career in the Public Service and was loath to depart as a suspended person. He looked to Minister Gungubele to restore his dignity⁴³.
- 5.40 He was referred to a document dated 8 October 2021 which he identified as Minister Gungubele's response⁴⁴ to his representations. His view, upon an assessment of the timing thereof, was that said Minister's response amounted to a defence of the continuation of his suspension.
- 5.41 As to the Minister's statement that his disciplinary enquiry should proceed, he believed that if the Minister had been sincere, he would have stated that the section 188A process should proceed since it was already before the GPSSBC.
- 5.42 Also, the Minister's averment that his presence at work might intimidate junior employees who will be required to testify against him was an issue that has never previously been raised. This affirms that the Minister's letter was meant to justify his suspension.
- 5.43 Similarly, his alleged breach of the Public Finance Management Act (PFMA) and the fear that this could be repeated were he to return to work was an attempt to find reasons that would be consonant with the SMS Handbook. This was previously never raised. The spotlight would be on him and he could thus ensure there was no repeat.
- 5.44 He also did not accept the Minister's proposal that a disciplinary hearing to be chaired by any one of three members of the Johannesburg Society of Advocates (excluding Berger SC) proposed by the Minister and chosen by him should be convened. This rejection is encapsulated in his response⁴⁵ dated 3 November 2021.
- 5.45 Finally, he testified again that the relief he sought was upliftment of his suspension
- 5.46 The Applicant was cross-examined on his evidence in chief and I refer to such evidence in the analysis section of this award but only to the extent necessary to deal with the substantive merits.
- 5.47 The **Respondent** opted to close its case without leading any oral evidence.
- 5.48 I shall refer to the arguments of the parties in the analysis section of this award but also only to the extent necessary to deal with the substantive merits.

⁴¹ Page 161 supra

⁴² Pages 166-178 supra

⁴³ Page 176 of the Vukela bundle at para 50

⁴⁴ Pages 264-269 supra

⁴⁵ Page 273 supra at para 4

6. ANALYSIS OF EVIDENCE AND ARGUMENT

- 6.1 The Applicant referred an alleged unfair labour practice dispute related to suspension. The GPSSBC has the jurisdiction to arbitrate this dispute as such is derived from section 191(5)(a)(iv) of the LRA⁴⁶.
- 6.2 Perhaps I must point out at the outset that I have considered all the evidence led and the arguments presented. For brevity, I focus only on the evidence and arguments that assist in the resolution of the disputed issues. I must also point out that, in the survey of evidence above, where I consistently referred to "1st Respondent's attorneys", I did so without any key delineation as to whether, in any given instance, these attorneys were acting for the one or the other of the Respondents. Suffice to state these attorneys seemed to carry a mandate for both and I do not think it serves any purpose to split hairs.
- 6.3 The concept of the unfair labour practice is not defined in the LRA. Section 186(2) of the LRA⁴⁷, merely states that unfair labour practice means any unfair act or omission that arises between an employer and an employee involving a number of acts or omissions set out in (a) to (d) of that subsection.
- 6.4 The right to fair labour practices is enshrined in section 23 of the Constitution⁴⁸ of the Republic of South Africa. The Constitutional Court, in its own wisdom, has in a previous decision considered it unwise to seek to give a precise definition of the concept of unfair labour practice (see *NEHAWU v University of Cape Town*⁴⁹). The Court nevertheless gave the clear guideline that the concept is given content by the legislature but must be left to gather meaning through decisions of the specialist labour courts and tribunals established in terms of the LRA. This was easier said than done. The road travelled has been treacherous and, without really belabouring the point, I daresay the Labour Courts have, over the years, not been wholly consistent in their approach, be the issue benefits or, as *in casu*, suspensions. Be that as it may, in the fullness of time, these specialist Labour Courts, the Supreme Court of Appeal where it has sampled labour law, and the Constitutional Court, have developed these concepts to a very satisfactory degree (see *Apollo Tyres South Africa (Pty) Ltd v CCMA and Others*⁵⁰; *Denel (Pty) Ltd v D.P.G Voster*⁵¹; *MEC for Education: North West*

⁴⁶ (5) If a council or a commissioner has certified that the dispute remains unresolved, or if 30 days or any further period as agreed between the parties have expired since the council of the Commission received the referral and the dispute remains unresolved-
(a) the council of the Commission must arbitrate the dispute at the request of the employee if-

(i)...

(ii)...

(iii)...

(iv) the dispute concerns an unfair labour practice.

⁴⁷ 186 Meaning of dismissal and unfair labour practice

(1) ...

(2) Unfair labour practice means any unfair act or omission that arises between an employer and an employee involving-

(a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to promotion) or training of an employee or relating to the provision of benefits to an employee

(b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee

(c) a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and

(d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act 26 of 2000), on account of the employee having made a protected disclosure defined in that Act

⁴⁸ 23 (1) Everyone has the right to fair labour practices

⁴⁹ (2003) BCLR 154 (CC)

⁵⁰ (2013) 34 ILJ 1120 (LAC)

⁵¹ 2004 (4) SA 481 (SCA)

Provincial Government v Errol Randal Gradwell⁵² and Long v SA Breweries (Pty) Ltd and Others⁵³. I return to this point towards the end of this award.

- 6.5 Before I deal with the merits of the dispute, it is appropriate to preface same with an observation I have made which I might say passes for a value judgment.
- 6.6 Prolonged suspensions in the Public Service have long been bemoaned by all and sundry as an aberration. Some decisions of the Courts have attempted to discourage this tendency but it appears to me to have the survivability of a superpower. So much for that.
- 6.7 This is a hearing that promised much but delivered very little. In fact, the hearing is significant more for what happened on the periphery than in the hearing itself. Again, I return to this later. For now, I take a brief look at the facts of this case.
- 6.8 The facts are straight forward albeit with some twists and turns. The Applicant was placed on precautionary suspension. The disciplinary hearing was not completed within 60 days as required by prescript and is, in fact, still not completed at the time of writing this award. During the course of the 60-day period and beyond, the Applicant raised various objections to the disciplinary process. This culminated in what I may suggest was a deluge of litigation in various forums between the parties. Of course, one of those forums is these arbitration proceedings.
- 6.9 As straight forward as the facts are (qualified by twists and turns of wider litigation), the issues in dispute are even more crisp. The Applicant could not have set them out more succinctly than he did at the outset of his cross-examination by Advocate Redding SC. Applicant decries the following issues:
- (a) The suspension has been too long; it is beyond 60 days.**
- (b) The Minister in the Presidency (2nd Respondent) extended the suspension beyond 60 days when he was not empowered to do so.**
- (c) The reasons advanced by the Minister in the Presidency for extending the suspension are not in accordance with the relevant prescript, viz, the SMS Handbook.**
- 6.10 In brief, the net effect of (a) to (c) above is a challenge that the SMS Handbook has been breached in the course of the extension of his suspension and that circumstance falls to be regarded as an unfair labour practice in the form of an unfair suspension. Applicant seeks an upliftment of the suspension and a return to work as redress.
- 6.11 The Applicant does not challenge the suspension *ab initio*. He conceded as much under cross examination albeit he rather ambivalently asserted that he had concerns with the suspension in the first 60 days but was willing to, as he put it, "stomach" such concerns. Odd.
- 6.12 Be that as it may, I am of the view that the Applicant stands or falls by the three challenges he posed to his suspension as depicted in paragraph 6.8 above. The Applicant led comprehensive evidence in support of his contention. It bears noting at this point that there is no contrary version by either the 1st or 2nd Respondent, Advocate Redding SC having opted to close without leading any witnesses from either. This is almost akin to absolution from the instance, a rare occurrence in our labour law. Whether that was prudent or reckless, we stand to see shortly.

⁵² (2012) 8 BLLR 747 (LAC)

⁵³ (2019) 40 ILJ 965 (CC)

- 6.13 The hearing manifested a clash of two approaches. There was a plain suspension dispute approach by the Applicant which was consistent with his dogged determination, in which he succeeded, to keep this dispute out of the Court order that has seen the section 188A proceedings and internal disciplinary hearing kept in abeyance, or stayed.
- 6.14 On the other hand, the 1st and 2nd Respondents approached the matter as if it were a hybrid dispute encompassing a complaint of unfair suspension and an accusation that there was an inordinate delay in the convening of the disciplinary hearing or enquiry. From Advocate Redding SC's line of cross-examination, I perceive the somewhat fleeting influence of *Stokwe v Member of the Executive Council : Department of Education, Eastern Cape and Others*⁵⁴.
- 6.15 In my view, the 1st and 2nd Respondents have one fundamental problem with their approach. I find that the complaint of the Applicant in these proceedings is not that the disciplinary hearing has been inordinately delayed. His core complaint is that the suspension has been too long. Applicant has, quite clearly, completely eschewed *Stokwe* and, in my view, any references he made to the delayed disciplinary hearing in these proceedings were, insofar as it related to his evidence in chief, merely contextual, and amounted to no more than the duty of a witness to respond to his or her inquisitor.
- 6.16 In any event, a suspension dispute has long ago in our law been accepted as a dispute in its own right to be determined on its own merits and, in my view, it did not require the agreement of the parties in a Court Order to distinguish this dispute from the other disputes in which they are mired. I turn to consider the Applicant's first challenge.

The suspension is too long; it is beyond 60 days

- 6.17 The elephant in the room in this dispute, in my estimation, is a statement, which on the face of it, is fairly innocuous, and it is important to set it out as I hereafter do. The statement is embodied in the precautionary letter of suspension which set in motion the train of events that were ventilated in these proceedings. It reads thus:

"Accordingly, and in light of all the above, I hereby place you on precautionary suspension with full pay from your position as Director-General, with effect from 29 July 2020, pending the finalisation of the disciplinary process instituted against you." (the underlining is my own emphasis).

- 6.18 It seems to me that, in determining the fairness or otherwise of Applicant's suspension, this statement must be assessed against three crucial factors, viz:

(a) The prescript governing suspension.

(b) The reasons for the suspension.

(c) Jurisprudence on the subject.

- 6.19 I must point out that the above three considerations will permeate this analysis in dealing with the disputed issues. Of course, the reasons for the suspension also stands as part of the Applicant's triangular challenge or challenges to his suspension.

⁵⁴ (2019) 40 ILJ 773 (CC)

- 6.20 In the private sector, more often than not, the prescript governing suspension, and more broadly, discipline, is a unilateral imposition of the employer. Not so in the public sector and, in particular, the Public Service.

The prescript

- 6.21 It appears to be common cause that the applicable prescript is the SMS Handbook. That instrument, which applies to members of the Senior Management Service such as the Applicant is, was the bulwark of the Applicant's defense to the contention that his suspension continues to be fair.
- 6.22 The provision governing suspension of SMS members is found in Chapter 7 of the Handbook and, specifically, clause 2.7(2)(a) to (c). I set it out below:

(2) Precautionary suspension or transfer

(a) The employer may suspend or transfer a member on full pay if –

- ***the member is alleged to have committed a serious offence; and***
- ***the employer believes that the presence of a member at the workplace might jeopardise any investigation into the alleged misconduct, or endanger the well being or safety of any person or state property.***

(b) A suspension or transfer of this kind is a precautionary measure that does not constitute a judgment, and must be on full pay.

(c) If a member is suspended or transferred as a precautionary measure, the employer must hold a hearing disciplinary hearing within 60 days. The chair of the hearing must then decide on any further postponement. *(underlining is my own emphasis)*

- 6.23 It appears to me that, irrespective of the approach adopted, nothing in the above prescript lends itself to an interpretation that seeks to say an employee must remain on suspension 'until the finalisation of the disciplinary process'. Put differently, the underlined words in (c) above, viewed in juxtaposition to the suspension or transfer of an employee, do not convey the meaning, no less the impression, that an employee must remain on suspension until the disciplinary hearing is finalised. It seems to me that, if "finalisation" of the disciplinary hearing is read into the provision, the more natural construction would be more that the employee will remain on suspension until the hearing is finalised within 60 days. Otherwise, the plain meaning of the text, which I assert is the correct interpretive approach, is clearly that, once suspended or transferred, the employee's disciplinary hearing must commence within 60 days. If the hearing is not finalised within that period, it seems to me that the chairperson will determine further postponement and not further suspension. It may well be that, in making that determination, the chairperson influences the underlying suspension, one way or the other (I return to this later). Seen this way, the construction adopted by the Respondents that the Applicant must remain on suspension until the finalisation of the disciplinary hearing is unnatural. To the extent that the decree that Applicant should remain on suspension until the finalisation of his disciplinary hearing is not derived from any construction of clause 2.7(2)(c), then it is an invention of the Respondents or, worse, a mere imposition. The danger in this approach is obvious as appears below.
- 6.24 Presuming for a minute that the expiry of his contract of employment he testified to does not enter the equation, it seems to me that if the disciplinary hearing is never (touch wood) held, the Applicant will never be released from suspension. Working on the same presumption, it also appears to me that, if his hearing is ultimately finalised at

the second coming of the Messiah, only then will he be unsuspended, to no avail, given the portentous events prophesied to unfold at that time. Surely, such an untenable situation cannot be countenanced on any account. In fact, the Applicant succinctly testified to a fear of departing the 1st Respondent under a cloud of the prolonged suspension with public perceptions that he might be a man of corruption.

- 6.25 The Applicant has been on suspension since 29 July 2020. This is a period of about a year and some eight (8) months. Discounting the prescribed period of suspension, notwithstanding the Applicant's willingness to "stomach" it, the suspension has, at the time of writing this award, endured for around five hundred and fifty (550) days. I find that it has been a very long suspension. The Respondents have, in any event, not said it is a trifling period. By what authority has the suspension exceeded 60 days to such a staggering extent? The answer follows as I deal with Applicant's second challenge.

The Minister in the Presidency (2nd Respondent) extended the suspension beyond 60 days when he was not empowered to do so.

- 6.26 To ascertain the probability of Applicant's assertion in the above regard, it is necessary to appraise, with some care, the late Minister Mthembu's letter of 18 September 2020, which was communicated to Applicant's attorneys by attorneys for the 2nd Respondent on 19 September 2020. It is or should be common cause that the entry of the late Minister Mthembu into the fray at this time was a consequence of the Applicant's appeal to the President of the Republic to remove delegations in respect of disciplinary action against him from Minister de Lille, alternatively for the latter to recuse herself. This the President had done some ten (10) days earlier.

- 6.27 In said late Minister's letter, the following is reflected at paragraph 5.4:

'it would be appropriate, in order to ensure that the integrity of the disciplinary process is safeguarded, considering the seriousness of the charges levelled against you and the seniority of the position you hold, that you remain on precautionary suspension, pending the finalisation of the disciplinary process'.

- 6.28 It appears then that the above paragraph encapsulates the extension complained of by the Applicant. Having regard to the clear provisions of clause 2.7(2)(c) of the SMS Handbook, specifically, the requirement that the chairperson of the hearing "must" decide on any further postponement, it is fitting to consider, then, what the chairperson, and not the late Minister, did or did not do because, quite frankly, what the late Minister did or did not do could never be of any force or effect as it would be no more than a nullity. This is so because there is no role for him in the prescript as it stands.

- 6.29 The evidence attests to the fact that the chairperson, Advocate Berger SC, made concerted attempts to convene the disciplinary hearing within 60 days since the Applicant was suspended. Evidentially, the Applicant's attorneys appeared to retreat to some degree from their initial stance of non-availability over that period by seemingly agreeing to attendance on some, and not all, of the dates first proposed, and then set, by the chairperson.

- 6.30 Advocate Redding SC's line of questioning varied from the suggestion that the disciplinary hearing had ensued by virtue of Advocate Berger SC's appointment, to a somewhat watered down postulation that said chair was already "seized" with the matter, and to a direct assertion that the Applicant himself frustrated the convening of his disciplinary hearing.

- 6.31 As I stated earlier, this matter concerns, not an inordinate delay in convening a disciplinary hearing, but an inordinately prolonged suspension. However, it would be folly not to see the correlation of the delayed hearing to the lengthy suspension. And,

with that sort of view, the indecisiveness of Advocate Berger SC swims into sharp focus, as appears below.

- 6.32 I referred earlier to the chairperson's several attempts to convene the hearing. It is not necessary to go into all of them. However, a few of the following excerpts from his emails, with timelines in brackets, portray the dilemma he created.

"I need to get a sense of where the parties are in relation to the disciplinary enquiry ..."
(20 September 2020).

"in the circumstances, I postponed the meeting pending ..." (23 September 2020).

"I would like to meet with the parties tomorrow to explore what still needs to be done before we can start the hearing" (30 September 2020) (underlining in these excerpts is my own emphasis).

- 6.33 I do not know if this was the first time Advocate Berger SC presided over a disciplinary hearing in the Public Service or whether he just suffered a lapse in concentration which afflicts all of us at given points in time. In my view, it appears that he was so fixated with the disciplinary hearing that he was completely oblivious of his obligation, as appointed chairperson, to actually start the hearing, and then postpone it to enable all the clearly vexed preliminary issues to run their course over a period that would indisputably have amounted to extension of the Applicant's suspension within the contemplation of clause 2.7(2)(c) of the SMS Handbook.

- 6.34 It is plain to see that, by 30 September 2020, whilst the chair was still contemplating what needed to be done before the hearing could start, he was basically, like Emperor Nero is reputed to have done, still playing the violin when Rome (read that as Applicant's suspension) had already burnt down to ashes (read that as expiry of Applicant's suspension on 28 September 2020). The latter date is the date after which the Applicant, failing the finalisation of the disciplinary hearing was, in terms of clause 2.7(2)(c) of the SMS Handbook, supposed to have been allowed to return to the workplace as his suspension had expired. Of course, Advocate Redding SC disputes such an interpretation, as we will presently see. The focus now is on Advocate Berger SC.

- 6.35 It is shocking that, in all the time since he was appointed, it never dawned, or was seemingly lost, on Advocate Berger SC that the countdown to the expiry of the Applicant's suspension had already begun. Advocate Redding SC made a valiant attempt to lay the blame of Advocate Berger SC's clear *faux pas* at the door of the Applicant during cross-examination. In response, Applicant, quite correctly, testified that he could not suspend himself and could not dictate what the Respondents had to do.

- 6.36 Unless Advocate Berger SC was entirely convinced that the Applicant had valid reasons for not attending the disciplinary hearing (which would be at odds with Advocate Redding SC's line of questioning suggesting the contrary), it appears from a reading of the relevant clause in the SMS Handbook that he could, at the very least, have started the disciplinary hearing within the 60-day period of suspension, thus placing himself in a strong position to postpone it and, thereby, extend the Applicant's suspension. This much is clear from clause 2.7(3)(f) as appears below:

"If the member fails to attend the hearing and the chairperson concludes that the member did not have a valid reason, the hearing may continue in the member's absence".

6.37 As matters stand, because Advocate Berger SC gazed at his navel too long, the more assertive late Minister Mthembu stepped up to the plate and made the decision to extend the Applicant's suspension as appears from the contents of paragraph 6.26 of this award. Well as powerful as the late Minister might have been, it is plain to see that the one power he lacked was to make a decision such as he made in this regard.

The reasons for the suspension

6.38 Applicant contends basically that the reasons given by the late Minister Mthembu for extending his suspension are not competent reasons. These reasons are three-fold, viz;

- Safeguarding the integrity of the disciplinary process;
- The seriousness of the charges; and
- The seniority of the Applicant's position.

6.39 Conversely, and save for the seriousness of the charges/ offences, the other two reasons for suspension that appear from clause 2.7(2)(a) of the SMS Handbook are distinguishable from the reasons given by the late Minister Mthembu, as appears below:

- ❖ Jeopardy to the investigation of the alleged misconduct; and
- ❖ Endangering the well being or safety of any person or state property.

6.40 I tend to agree that the SMS Handbook makes no reference to the seniority of an SMS member, or the need to safeguard the integrity of the disciplinary process. However, I find it hard to accept that these would not be competent reasons for continuing an SMS member's suspension. These are self-evidently valid reasons and have, on various occasions, been accepted as such by the Courts. The Applicant advances no cogent argument why the late Minister Mthembu's reasons are not competent except for the fact that they are not embodied in clause 2.7(2)(a) of the SMS Handbook. With respect, this is not enough to render the reasons incompetent. This is, however, not the end of the matter as we shall see later in this award.

6.41 Then there is the matter of the reasons advanced by Minister Gungubele after he had received the Applicant's representations on why he ought not to remain on suspension. I referred in paragraph 6.7 of this award to the fact that this hearing is more significant for what happened on the periphery than in the hearing itself. I had Minister Gungubele's response to the Applicant's representations in mind. This arrangement had nothing to do with the dispute as referred. I also did not direct that the parties enter into such an arrangement. The parties themselves arranged this process in the context of the core issue I was considering at the time, viz, the Respondents' request for postponement. The arrangement, nevertheless, influenced the proceedings to a great degree and cannot be ignored. The Applicant regards said Minister's reasons for his continued suspension as nothing more than elaborate tailoring to suit them to clause 2.7(2)(a) of the SMS Handbook. I could be wrong but it seems to me that the implication is that the invitation to the Applicant to make representations to the then new Minister was nothing but a stratagem to gain a tactical advantage. Assuming I am correct, the Applicant only has himself to blame as appears below.

6.42 Nothing in the SMS Handbook obliges a member of the SMS to make representations on why he should not remain on suspension after such suspension has expired. I know that Advocate Itzkin posited at the time of the invitation that Applicant was sitting on the horns of a dilemma. Try as I did, and perhaps it is time to call on my

optometrist, I could just not see what the dilemma was. What I could foresee is precisely what transpired. As Advocate Redding SC put it, perhaps somewhat tongue in cheek I cannot say, Minister Gungubele was required to apply a fresh mind to the issue. Well, he did, and then some. However, the central question, whether tailor-making is involved or not, appears to me to be whether Applicant's presence at work would pose the risks contemplated in clause 2.7(2)(a) of the SMS handbook. I think not.

- 6.43 The fact is it is undisputed that the investigation into the Applicant's alleged misconduct was completed long before he was placed on precautionary suspension. Applicant's uncontested evidence is that he was in the workplace and there was nary a complaint of jeopardy to the investigations at the time they were carried out. I am not sure if the misconduct alleged in relation to the supplementary charges was encompassed in the two investigative reports (PWC and PSC) but it seems to me that the mere fact that the charges were added implies that they had been investigated already. So, I believe it can be accepted without equivocation that there was not, at the time the suspension letter was issued, and there is not now, an investigation capable of being jeopardized in progress at the 1st Respondent. The Applicant has, of course, quite rightly in my view, conceded the seriousness of the alleged misconduct. This, therefore, leaves only the danger to the well-being or safety of any person or state property, as contemplated in the prescript, to consider. I shall, of course, also touch very briefly on the other reasons outside this ambit as postulated by Minister Gungubele.
- 6.44 There is, of course, no version by either the 1st or 2nd Respondent before these proceedings. As such, Minister Gungubele's response to the Applicant's representations on why he should not remain suspended have not been tested under cross-examination. Insofar as the well-being of state property and funds is concerned, Minister Gungubele states in his response that Applicant's desired return to the workplace raises, in the light of both the PFMA relatedness of the allegations against him, and their repetitive nature, serious concerns regarding the possibility of further acts of similar misconduct arising, ostensibly with an adverse impact on such state property and funds. Tactical manoeuvre or not, Minister Gungubele's submission in this regard bears close scrutiny.
- 6.45 It is common cause or, in any event, should be common cause that, at the time Applicant was suspended, Minister de Lille did not raise any concerns regarding the well-being of any person or state property and, quite obviously, also for the state funds alluded to by Minister Gungubele. The primary focus of Minister de Lille at the time she suspended the Applicant was only the seriousness of the alleged misconduct. I would like to believe that Minister de Lille was fully conversant with the grounds for suspension specified in clause 2.7(2)(a) of the SMS Handbook or, if she was not, she certainly had access to the best advice on labour relations related matters within the 1st Respondent in the form of its labour relations department, as well as without the 1st Respondent, in the form of, perhaps the Office of the State Attorney. At any rate, once she took the decision to suspend, it was incumbent upon her to ensure that she was acting in line with the relevant prescript. Otherwise, she could easily have requested those knowledgeable in such matters within the 1st Respondent to draft the letter of suspension and simply hand it over to her for perusal and signature. However, what she did, is her concern, not mine.
- 6.46 What strikes me as more apparent, is that Minister de Lille seemed to have been convinced, probably after properly applying her mind, that the seriousness of the allegations alone, in the absence of other reasons, was a valid reason to suspend the Applicant. Or if she, perhaps, was of the view that other reasons existed, she might not have considered them to be valid. In my view, it seems clear that Minister de Lille

probably made her decision after a thorough consideration of the circumstances prevailing at the time. Those circumstances are telling.

- 6.47 Firstly, the Applicant was suspended almost a year and four months to the date of the release of the PWC and PSC investigative reports. His evidence that he was in the workplace in all that time and never interfered with the investigation is unchallenged. Secondly, it has certainly not been suggested in cross-examination that, during said period, he posed a risk to the safety of other persons or state property or funds. In my view, it makes no sense that the Applicant should, suddenly, pose the sort of risks alluded to were he to return to work nearly a year removed from the period where he was permitted to remain in the workplace after all the acts giving rise to the purported risks had come to the fore. As eloquently as Minister Gungubele might like to think that he has illuminated these risks or concerns in his response to the Applicant's representations, his claims are, with respect, and in the light of the full-functionality of the Applicant after the alleged misconduct was uncovered, both improbable and preposterous.
- 6.48 There is no version before these proceedings to contradict the Applicant's evidence that he practically continued in his role as DG after the release of said investigative reports. If there had been evidence, or even a proposition in cross-examination, placed before these arbitration proceedings, to the effect that after the alleged misconduct came to light, the 1st Respondent harboured so much fear for other persons, its property or funds, that even though it kept the Applicant in his position, it curtailed his powers to mitigate risks to such an extent that it became untenable and burdensome to sustain such an arrangement, then, and only then, in my view, would it make sense, so late in the day, to cry that Applicant's return to the workplace would pose dire risks to other persons or property or funds.
- 6.49 Of course, it appears from Minister Gungubele's response to the Applicant that he cites other reasons for his decision that the Applicant should remain on suspension. Firstly, he refers to the seriousness of the misconduct as Minister de Lille did. I can do no better than repeat the Applicant's evidence that this aspect is not a standalone ground as a reason for suspension. Much less for the Applicant to remain on suspension. The prescript clearly envisages that, in addition to such seriousness of the misconduct, the presence of the employee in the workplace should pose the risks canvassed at length in the preceding paragraphs.
- 6.50 And then there is Minister Gungubele's stated apprehension that, due to the power dynamic between the Applicant and his subordinates, the latter could be intimidated from testifying in relation to specific allegations preferred against the Applicant. It would seem from the Minister's response that some of the intimidation to junior employees could come, if not directly from the Applicant himself, then from subordinates who report directly to the Applicant. I take this to mean that these direct subordinates would exude intimidation of own accord or on instruction by the Applicant. I hope that the Honourable Minister is aware that he is basically insinuating that the Applicant potentially has accomplices after the fact of the alleged misconduct. I cannot accept such conjecture.
- 6.51 I think I must point out that the beginning of the wording of the second bullet point of clause 2.7(2)(a) of the SMS Handbook is fertile ground for abuse. It reads "the employer believes that the presence..." (underlining is my own emphasis). In my estimation, the belief contemplated in this provision is not like one of faith. It is also not a belief harboured by a king. While I agree with Advocate Redding SC's argument that this belief ought not to be harboured on objective grounds (it is, after all, a subjective belief) it is one that, nevertheless, must be reasonable in relation to the facts and the circumstances surrounding the contemplated suspension, or extension thereof. It is, in my view, not reasonable to keep an employee on a protracted suspension in the face

of the factual situation where the employee was present throughout the investigation of the alleged misconduct and, during that time, and in the lengthy aftermath of reports issued post-investigation, he never and has not, hampered the investigation or jeopardized other persons or state property or funds. With respect, Minister Gungubele, even if he faithfully believes Applicant cannot be allowed onto the workplace, does not possess the monarchical authority to pronounce "Off with him, the mere apparition of the man doth engender dread in my royal subjects and imperils the royal treasure!!!". It would be manifestly wrong if such an understanding of said provision were to be embraced.

6.52 Lastly on the reasons for the suspension, I return to what I canvassed in paragraph 6.40 of this award. In my view, just because the Applicant is a senior employee, or even the most senior employee, and just because there is a need to safeguard the integrity of the disciplinary process, it is not axiomatic that the Applicant must remain on suspension, despite these reasons being, on the face of it, competent reasons. In my view, the competency of these reasons must still be assessed with reasonable reference to the facts and the circumstances surrounding the suspension of the Applicant.

6.53 In my view, the Applicant cannot be anything but the most senior employee at the 1st Respondent. It is not by his own choice that he became a senior employee. He became one by virtue of the discretionary decision of the 1st Respondent. Applicant's seniority can, therefore, not be used against him willy-nilly. His seniority notwithstanding, the SMS Handbook applies to the Applicant just like it applies to every senior employee and this was certainly his evidence in these arbitration proceedings. And, despite the existence of the SMS Handbook, apparently cheek by jowl with PSCBC Resolution 1 of 2003, the view I take is that 1st Respondent does not have dual disciplinary dispensations in its workplaces. Discipline, in my estimation, is applied uniformly and applies equally to all employees, irrespective of rank. If I may couch the issue in legal parlance, the SMS Handbook is nothing but application of the same uniform discipline with the changes required by the context. Nothing more, nothing less. The context here is that the Applicant is disciplined as a senior employee. However, his suspension is still subject to the same standard of fairness as the suspension of a junior employee. If not, then we are back on Animal Farm.

6.54 Applicant denied in his testimony that he posed any of the threats contemplated in clause 2.7(2)(a) of the SMS Handbook, as well as those other threats conjured by Minister Gungubele in his response to the Applicant's representations on why he should not remain suspended. I find this testimony probable and I accept it.

6.55 Finally, I turn to:-

The jurisprudence on the subject

6.56 The Courts have long ago established the principle that parties to a collective agreement are not at liberty to deviate from its provisions save in exceptional circumstances. As stated earlier in this award, it is common cause that the applicable prescript is the SMS Handbook. That instrument has been endorsed in the much broader collective agreement governing discipline in the Public Service, viz, PSCBC Resolution 1 of 2003 (see *Mashiane v Department of Public Works*⁵⁵). What I am trying to say, and this is plain from *Mashiane*, is that the misconduct procedures contained in the SMS Handbook incorporates those provisions of Resolution 1 of 2003 which were considered appropriate and practicable in respect of members of the SMS.

⁵⁵ (J1773/12) [2012] ZALCJHB 69 (18 July 2012)

- 6.57 Even if the SMS Handbook may not be a collective agreement, and might not form part of PSCBC Resolution 1 of 2003, the following is crucial. In *Mashiane*, the Court held essentially that the provisions dealing with discipline are not referred to as guidelines in the SMS Handbook. The implication is that these provisions are peremptory. They must be given effect to. With that in mind, and with specific reference to the extension of a member of the SMS's suspension after the expiry of the 60-day period of suspension, the Court held quite clearly that this is the discretionary decision of the chairperson of the disciplinary enquiry. So, it seems to me that, even if it could be said that the late Minister Mthembu, in the first instance, and Minister Gungubele in the latter instance, had ticked all the boxes in compliance with clause 2.7(2)(a) of the SMS Handbook, the extension of Applicant's suspension would still stand to be regarded as not being in compliance with said provision for no reason other than that these Ministers were not the chairpersons of the disciplinary enquiry and, by implication, did not have the discretion to extend the suspension. I note, of course, that the court dealt there with the validity of the suspension. For my part, I find the extension of the suspension to have been a palpable unfair labour practice.
- 6.58 The Court in *Mashiane* did not arrive lightly at its findings and decision. The Court had sight of a number of important decisions it had made on the subject over time (see paragraph 17 of the judgment). A glimpse at paragraph 17 of the judgment shows that the Courts interpreted clause 2.7(2)(c) of the SMS Handbook to be an intervention to prevent the problem of protracted suspensions which demoralize and unfairly prejudice the suspended employee. The Applicant has borne the full brunt of what the Courts decried. In my estimation, the demoralization of the Applicant was exacerbated not only by the length of the suspension but also by the conduct of Minister de Lille.
- 6.59 Of course, it has been a matter of public consumption that Minister de Lille was a tremendous catalyst in the unravelling of the so-called Arms Deal Scandal the country became embroiled in some years ago. However, the public acclaim and accolades she received in consequence thereof have not, in my view, given her license to spew untested vitriolic comments in the mainstream media implicating the Applicant in corruption and malfeasance. Her comments could not only potentially cause irreversible damage to the reputation of the Applicant but is also a self-evident affront to the long-established presumption of innocence until guilt is proven. Seen in the context of the precautionary suspension, Minister de Lille's conduct has clearly pushed the suspension from the realm of the preventive or holding to one of the punitive. Her conduct is clearly deplorable and stands to be strongly censured by those who have authority over her.
- 6.60 Having regard to what the Court said in *NEHAWU* (see my promise at the end of paragraph 6.4), I am not sure if Minister de Lille's conduct does not constitute fertile ground to further develop the notion of the unfair labour practice. It does not seem to me that, where a labour practice such as suspension is in effect, the suspender can embark on a crusade of the kind Minister de Lille unleashed without it coming to be regarded as unfair conduct in its own right. However, I have no precedent setting powers and I leave that thought to the courts.
- 6.61 As indicated at the outset of this award, I received written arguments from the parties. I have considered these arguments carefully to determine if I may be persuaded one way or the other in respect of the findings I have made herein. Citing authorities on the interpretation of the 60-day period of suspension, Advocate Itzkin has argued, on behalf of the Applicant, that only the chairperson of the disciplinary hearing had the power to extend the Applicant's suspension beyond 60 days. A finding of unfairness should be made on this basis alone and Applicant's suspension uplifted. In this regard, his argument does not differ much from my findings herein, save in the instance where, he quite correctly, carries the Applicant's evidence that the mere fact that Applicant raised this aspect belatedly did not alter the legal position regarding its

interpretation. I agree. I am also persuaded that the Respondents cannot rely on Applicant's attack of the appointment of Advocate Berger SC, as well as Applicant's attack on the validity of the disciplinary proceedings themselves, to justify extension of the 60-day period of suspension by the late Minister Mthembu. Applicant's sustained attacks at no stage, in my view, stripped Advocate Berger SC of his authority to chair the disciplinary proceedings, or (stripped) the disciplinary proceedings of their validity.

6.62 Advocate Itzkin's arguments on the reasons for the continuation of Applicant's suspension do not differ in any material respect from my findings herein and I am not going to dwell on this aspect.

6.63 I am equally not going to spend an inordinate amount of time on Advocate Itzkin's arguments regarding the longevity of the suspension. The contention that the Applicant is to blame ostensibly by his dilatory conduct in referring this suspension dispute to the GPSSBC, as well as by his declination of an alternative disciplinary process, amount to no more than a clutching at straws. The Applicant provided a plausible explanation regarding the time it took for him to refer this dispute and, in my view, it is not exactly as if he delayed to the point where he was required to file an application for condonation. I also accept Applicant's evidence that the alternative disciplinary process suggested to him remained, in essence, the very same internal disciplinary process he eschewed. Ultimately, Advocate Itzkin argues for a costs order.

6.64 The GPSSBC's Case Management staff, in forwarding the parties' arguments to me, created the impression there were arguments for the 1st and 2nd Respondent's separately. This is not quite so. From reading between the tramlines, it is clear that the arguments authored by Advocate Redding SC are composite arguments in respect of the Respondents collectively.

6.65 Advocate Redding SC, consistent with his cross-examination, argues on behalf of the Respondents that, in these proceedings, not only are Applicant's grounds for challenging his suspension fundamentally different to those initially raised at various stages, but his contention that his suspension had lapsed or was extended by an incorrect functionary is also legally unsustainable and entirely irreconcilable with his conduct.

6.66 His argument goes further to say that the Applicant's continued suspension is justifiable as there is a *prima facie* reason to believe Applicant committed serious misconduct. He attributes the delay in finalizing the disciplinary hearing to Applicant. Citing authority, Advocate Redding further argues that a holding suspension, such as *in casu*, is merely done for good administration. Once a *prima facie* reason has been established for a precautionary suspension, so his argument goes, only then can the justifiability of denying access to the workplace be interrogated. The employer does not have to substantiate its subjective belief in this regard on any objective grounds. All the SMS Handbook requires, is the subjective belief of the employer that the alleged misconduct is serious and the employee will prejudice the investigation.

6.67 Assaulting the Applicant's grounds directly, Advocate Redding SC argues that clause 2.7(2)(c), when the normal rules of statutory interpretation are applied thereto, makes no reference to the consequences of the expiration of the 60-day period on the validity of an employee's continued suspension. The *obiter* remark of a learned judge in the Labour Court was not authority for the proposition that suspension falls away after 60 days unless the chairperson of the disciplinary hearing extends that period. He preferred the dictum by the same Court in another matter where it was held there is no reason why the suspension falls away just because disciplinary proceedings are actually initiated before the 60 days are up. This challenge by the Applicant was an afterthought, he further argues.

- 6.68 Addressing Applicant's contention that there was non-compliance with the SMS Handbook, Advocate Redding SC reiterates the seriousness of the allegations and the allegedly repetitive nature thereof as sufficient to buttress the reasonable belief that any return by the Applicant to the workplace poses a risk. The Applicant also refused to reveal his plea to the allegations and this should count against him. He referred to authorities to support the argument that the Applicant, due to seniority as Head of Department, could jeopardize investigations. He also argued, similarly to when he cross-examined Applicant, that the latter was a visible threat to junior employees who might testify against him. There is no ulterior motive against the Applicant, he contends.
- 6.69 In my view, the difficulty with Advocate Redding SC's entire arguments, especially his reliance on the authorities he cites, is that they are wholly misplaced. If anything, said authorities support the Applicant's case more than the Respondents' case. For example, in *Phutiyagae v Tswaing Local Municipality*⁵⁶, the passage he refers to clearly deals with a suspension in the context of an extant investigation. There is no ongoing investigation *in casu*. Again, in *Manamela v Department of Co-Operative Governance, Human Settlements & Traditional Affairs Limpopo Province*⁵⁷, Advocate Redding SC also misses the rather stark point that the Court pronounced there in relation to suspension in circumstances where the disciplinary hearing had actually commenced. (Underlining is my emphasis). Of course it goes without saying that the expiry of the 60-day period while the disciplinary hearing is ongoing can by no means be interpreted to mean that the suspension has lapsed. In my view, the mere continuation of the disciplinary enquiry in those circumstances has the automatic effect that the chairperson had, by implication, extended the suspension until finalisation of the disciplinary hearing or, if there are any further postponements, until such time as the hearing is actually finalised. This is the true meaning of the terms "suspension until finalisation of the disciplinary proceedings". It does not, unfortunately, include the sort of navel-gazing by a chairperson to which I referred earlier in this award.
- 6.70 In the circumstances I am not persuaded, at all, by Advocate Redding SC's arguments. Even if clause 2.7(2)(c), narrowly interpreted, makes no reference to the consequences of the expiration of the 60-day period on the validity of an employee's continued suspension, it similarly does not say, where a disciplinary hearing has not commenced, an employee must remain on suspension after the expiry of the 60-day period. Of course, I promised to return to this aspect in paragraph 6.23 of this award. The reason for this return is two-fold. Firstly, it may seem, from my analysis in paragraph 6.23 that I am on all fours with Advocate Redding SC as it relates to his assertion that clause 2.7(2)(c) does not mean suspension lapses upon the expiry of 60 days. I find that it may appear that way but where we, crucially part ways, is where I clearly take the view that it is still the chairperson, by virtue of the further postponement, who extends the suspension of the employee. My view, and perhaps it is wrong, is that the chairperson's extension of the suspension as I put it, is almost subliminal rather than express. Secondly, Advocate Redding SC argues that, to the extent that it is contended on behalf of the Applicant that clause 2.7(2)(c) has been judicially interpreted as providing for the lapsing of the suspension after the 60-day period, such is without merit. As stated previously, he contends that such an interpretation was an obiter remark by a learned judge. The difficulty Advocate Redding SC finds himself in is that it is not only the isolated obiter remark of one learned judge he has to contend with in making his argument. It is, in fact, several judges of the Labour Court in various judgments. In my view, these Courts trump both his argument and my own interpretation in paragraphs 6.23 and this paragraph of the award. The Courts clearly state that the extension of the suspension is the discretionary decision of the chairperson of the disciplinary hearing. As stated earlier in this award, Advocate

⁵⁶ (2006) 27 ILJ 1921 (LC) at paras 27-28

⁵⁷ 2014 JDR 1448 (LC) at para 48

Redding SC relies rather erroneously on the decision of the Court in *Manamela* to support his argument.

- 6.71 In my view, the failure of the Respondents to lead any evidence in these proceedings has the effect that the arguments of Advocate Redding SC have no factual basis. Yes, the legal principles he postulates are certainly beyond reproach, but he is, unfortunately, left resembling a preacher who pontificates on certain scriptural truths without anecdotal references from such scriptures.
- 6.72 I have tried to consider whether, even if the Respondents could be said to have failed to comply with clause 2.7(2)(c) of the SMS Handbook, they could, at a bare minimum, be considered to have, nevertheless, followed a procedure that is fair in the circumstances. I have a keen eye but I fail to see any vestige of fairness in the overall conduct of the Respondents.
- 6.73 In the final analysis, and for all the foregoing reasons, I find that the Applicant has discharged the onus to prove that the Respondents committed an unfair labour practice in their conduct of extending his suspension beyond the 60-day period prescribed in clause 2.7(2)(c) of the SMS Handbook. There is absolutely no fair reason for the continuation of the Applicant's suspension. If anything, the continuation of the suspension is both arbitrary and egregious. It is appropriate, therefore, that the Respondents uplift the suspension of the Applicant, and permit him to return to work. It appears to me to be a reasonable timeframe for the Applicant to report to work at his normal workplace on Monday, 11 April 2022, at the time he normally assumes duties.

7. COSTS

- 7.1 Advocate Itzkin has, on behalf of the Applicant, argued for what he calls "costs of the arbitration including the costs occasions (sic) postponement in August 2021". I also reserved costs of Council in the wake of the Respondents' request for postponement of the proceedings in August 2021. In the light of the exemplary conduct of the parties in conducting their respective cases, I lean towards un-reserving and waiving said costs. As to the costs of the arbitration sought by Applicant, I also lean towards the view that the requirements of law and fairness do not impel me to such a costs order. In my estimation, the Respondents' appear sincere in their somewhat misguided belief that Advocate Berger SC's efforts to set up the disciplinary hearing suffice to explain why the disciplinary proceedings failed to ensue within the 60-day period of suspension. Even though I have since shown herein that Advocate Berger SC was inexplicably indecisive, I cut the Respondents' some slack insofar as costs are concerned, given their sincere but misguided belief. The Respondents also, wrongly of course, seem sincere in their belief that the Applicant was responsible for the prolongation of his own suspension. I am also reluctant to burden the ongoing relationship between the parties with a costs order. In any event, while not specifically ousting award of costs in appropriate circumstances, the Constitutional Court in *National Union of Mineworkers obo Masha and Others v Samancor Limited (Eastern Chromes Mines) and Others*⁵⁸, essentially upheld the general rule that losing parties in labour matters should not be ordered to pay the successful parties' costs. Given what I have said regarding the manner in which the parties conducted these proceedings, I defer to the apex Court.
- 7.2 I did seriously consider, even though Applicant never sought such relief, whether an order of some compensation would not be appropriate given the Applicant's evidence on the effect of the unfair suspension on him. Again, it seems to me that this would be a touch punitive to the Respondents and, at any rate, the extent of the harm Applicant

⁵⁸ 2021 910) BCLR 1191 (CC)

testified to approximate more a cry for damages than a *solatium*. I am clearly not empowered to dabble in so lofty a matter.

8.AWARD

- 8.1 The Respondents, Department of Public Works and Infrastructure and the Minister in the Presidency, committed an unfair labour practice against the Applicant, Samuel Vukela, by extending, and continuing to keep the Applicant, on suspension beyond the 60-day period prescribed in clause 2.7(2)(c) of the SMS Handbook.
- 8.2 I order the Respondents, Department of Public Works and Infrastructure and the Minister in the Presidency, to uplift the suspension of the Applicant, Samuel Vukela, with immediate effect.
- 8.3 I order Samuel Vukela, the Applicant, to report for work at his normal workplace at the 1st Respondent, Department of Public Works and Infrastructure, at the time he normally starts work, on 11 April 2022.
- 8.4 I make no order as to costs.



NAME: KATLHOLO WABILE

GPSSBC ARBITRATOR