



GENERAL PUBLIC SERVICE
SECTOR BARGAINING COUNCIL



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ARBITRATION AWARD

Panellist/s : DOLLY MAHASHA
Case No. : GPBC 467/2021
Award : 11 September 2022

In the ARBITRATION between:

D MAMPHISWANA

APPLICANT

AND

OFFICE OF THE PUBLIC SERVICE COMMISSION

RESPONDENT

Union/Applicant's representative : MR EDGAR LAMOLA
Applicant's email

Respondent's representative : ADV SUMAYYA TILLY

Respondent's email

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION:

1. This is an arbitration award in terms of Section 191 of the Labour Relations Act 66 of 1995 as amended ("the LRA), for an alleged unfair dispute dismissal between D Mamphiswa (hereinafter referred to as "the Applicant), and Office of the Public Service Commission (hereinafter referred to as "the Respondent").¹
2. The Proceedings were held for several days, the last day being on the 19 August 2022. The applicant was represented by Mr Edgar Lamola, whilst the Respondent was represented by ADV Sumayya Tilly, instructed by State Attorneys Johannesburg.
3. Parties were directed to submit their closing written arguments by the close of business, 02 September 2022. Both parties complied as directed.
4. The proceeding was conducted in English and recorded on Zoom.

ISSUE TO BE DECIDED:

5. I am required to decide whether the applicant's dismissal was substantively unfair, and if so, the appropriate relief.

BACKGROUND TO THE ISSUE.

6. The Applicant was employed by the Respondent as the Director-General ('DG'), and was charged with six (6) allegations of misconduct and found guilty of all charges. He was dismissed for charges 4, 5, and 6 and the charges read as follows:

6.1. Charge Four (4): Nepotism

"In that you committed an act of misconduct of nepotism in your capacity as the Director General by participating as the chairperson in the selection committee for the shortlisting and recommending the appointment of Ms Mogwe who is the mother of your child in a post of Chief Director: Professional Ethics".

¹ Section 191 of the Labour Relations Act 66 of 1995 as amended ("the LRA)

6.2. Charge Five (5): Misrepresentation/ Dishonesty

“in that you committed an act of dishonesty or misrepresentation as the Director-General in that as the chairperson of the selection committee for the shortlisting and interviews for the post of Chief Director: Professional Ethics, you breached regulation 13 (b), (d) and (f) of the ethical conduct contained in the Public Service Regulations which states that (1) an employee shall not engage in any transaction or action that is in conflict or infringes on the execution of his or her official duties; (2) recuse himself or herself from any action or decision making process which may result in an improper personal, and this shall be immediately properly declared by the employee and (3) refrain from favoring relatives and friends in work-related activities and not abuse his or her authority or influence another employee, nor be influenced to abuse his her authority.

6.3. Charge six (6): Bringing the name of the OPSC in disrepute by breaching Chapter 2 of the Public Service Regulation”.

“it is alleged that you committed an act of misconduct as the Director-General in that as the chairperson of the selection committee for the shortlisting and interviews for the post of Chief Director : Professional Ethics, you breached regulation 13 (b), (d) and (f) of the ethical conduct contained in the Public Service Regulations which states that (1) an employee shall not engage in any transaction or action that is in conflict or infringes on the execution of his or her official duties; (2) recuse himself or herself from any action or decision making process which may result in an improper personal, and this shall immediately properly declared by the employee and (3) refrain from favouring relatives and friends in work-related activities and not abuse his or her authority or influence another employee, nor be influenced to abuse his or her authority.

SURVEY OF EVIDENCE AND ARGUMENTS:

7. For brevity, I do not intend to record verbatim the evidence led, submission made and or the arguments raised on record. Only the prominent points raised by each party in their evidence that have a bearing on the issue in dispute to be decided, are recorded hereunder. I did however consider all the evidence that was presented.

THE RESPONDENT'S CASE

The Respondent called two witnesses who testified as follows:

Ms MICHELE DEANNE SNYMAN

8. She is employed at the National Department of Human Settlements as a Deputy Director: Project Resourcing.
9. She was one of the investigators appointed to investigate allegations of misconduct against the Applicant. She explained the methodology in the investigation, including the obtaining and perusal of various documents, exhibits and conducting of various interviews, including an interview with both the Applicant and Ms Mogwe and the listening to the recording of the interviews for the disputed posts.
10. Investigation revealed that the Applicant, who was the DG of the PSC, was involved in the recruitment and selection process that appointed Mogwe to the disputed post. Applicant changed the initial panel and he was unevenly engaging with candidates for the post during the interview process, with more engagement given to Mogwe and being far more interactive with her during the interview, as compared to other shortlisted candidates; that, with reference to the summary of scores, that he scored Mogwe the highest as compared to the other shortlisted candidates; that he, as part of the panel, recommended her appointment to the post and he supported her appointment to the post in a submission recommending such appointment.
11. She stated that the Applicant influenced other panel members during the process and recommended her for appointment by signing the scoresheet. Applicant had signed a declaration form and declared that he does not have a vested interest in any of the candidate interviewed for the disputed post.
12. She further stated that the Home Affairs documents clearly states as a fact that the Applicant is the father to Ms. Mogwe's child.

- 13.** She stated that there was non-compliance with the OPSC prescripts which states that the process must be fair and unbiased. She stated that Mr Malatsi should have chaired the panel and not the Applicant. According to her, the other candidates were stronger than Ms Mogwe during the interviews.
- 14.** She stated that the Applicant knew he was the father of the child as he was told by Ms Mogwe and they had a sexual relationship.
- 15.** She also testified that following the interview for the disputed post the Applicant had signed a confirmation of outcome of interview documents in which he declared that he was in full agreement with the decision of the panel to nominate Mogwe as the most suitable candidate for the disputed post.
- 16.** She indicated that the Applicant and Mogwe had a sexual encounter in 2012 outside the workplace; that in June 2019 Mogwe alleged the Applicant as the father of her child; that the disputed post was advertised in September 2019 with interviews in October 2019 and the recommendation that Mogwe be appointed in November 2019 all point to the fact that at the relevant time of the recruitment and selection processes being conducted, with the involvement of Applicant in all aspects of the process, under circumstances where he was told that he was the father of Mogwe's child in June 2019, should have been sufficient for him to have recused himself from the recruitment and selection process. Furthermore, his completion of the Declaration Form, under the same circumstances where he had a previous sexual encounter with Ms Mogwe shows misrepresentation and dishonest conduct.
- 17.** She stated that the proper action for him would have been to recuse himself from the process, which would have been in compliance with Public Service prescripts. She indicated that the Home Affairs documents confirm as a fact that the Applicant is the father of Ms Mogwe's child.
- 18.** She also testified that the Policy required that shortlisted candidates be given an equal and fair opportunity to present their candidature and that from listening to the recordings of the interviews as well as interviewing various panel members and shortlisted candidates, the investigation established that not all candidates were given the same and fair opportunity to present their candidature. A bias was created by the Applicant against external candidates as he commented that they were

overselling themselves and that it would go quicker with the internal candidates. This was a violation of the provisions of the Policy.

19. Ms Mogwe was asked more questions than other candidates and given a better opportunity to present her candidature to the panel, as compared to the other candidates.
20. She also testified that question 8 of the interview questions which was whether Mogwe was aware of anything in the past that could lead to embarrassment in the Public Service should her candidature prove to be successful. She demonstrated that this question was not properly put to Mogwe nor was it properly responded to by Mogwe, demonstrating that she was not prompted by the correct question to disclose the issues which in fact subsequently did cause embarrassment to the Public Service, which was her relationship the Applicant and the fact that she had a child with him. By comparison this question was put clearly to the other shortlisted candidates.
21. She also testified that the Applicant had engaged in an action or transaction that was in conflict with the execution of his official duties when he participated in the recruitment and selection processes whilst having had the sexual relationship and encounter with Mogwe and having been told that he was the father of the child and in having attended the Department of Home Affairs with Mogwe. This was a contravention of Regulation 13(b) under Charge 6.
22. She testified to the media reports surrounding the Applicant's conduct. One of the media reports reflected as a heading that the "PSC Boss hires Mistress as Ethics Official", which article had referred to the relationship between Mogwe and the Applicant to the disputed post of Chief Director: Professional Ethics. She testified that the Applicant's conduct must be viewed in light of the nature and functions of the PSC as set out in section 195 and 196 of the Constitution, as well as the seniority of Applicant being the Head of Department for the PSC and the Accounting Officer of same. She stated that his conduct, including his sexual encounter and relationship was in the media and did enter the public arena thus bringing the OPSC into disrepute and undermined the role of the PSC regarding its own future investigations regarding compliance with departments and prescripts.

23. She testified that Applicant's conduct had brought the name of the OPSC into disrepute as well as the reputation and credibility of the Minister of Public Service and Administration and the President, who delegated his authority to discipline the Applicant to the Minister.

Mr JOHANNES MODAU

24. He testified that he was employed by the Respondent as a Director: National Anti-Corruption Hotline which was inter alia responsible for handling of professional ethics, integrity and anti-corruption.

25. He testified from an ethics perspective the Applicant's conduct, against the post that he held as the DG was viewed by the OPSC in a highly unprofessional manner because it violated and infringed the policies of recruitment and selection.

26. He testified that the PSC had taken this matter very seriously because the Chairperson of the PSC had to institute an external investigation to see if there was substance to the allegations.

27. He testified that the gravity of the misconduct upon which the Applicant was found guilty resulted in the trust relationship between him and the OPSC being broken down and having made the continued relationship intolerable.

28. He also testified that the Applicant had refused to acknowledge his wrongdoing or show remorse to the PSC and this would have been expected from him from an ethics perspective. He testified that the post that the Applicant held was a senior one and of such value that he was supposed to be beyond reproach and lead by example. This was not done.

29. He also testified that during 2016 the Applicant addressed Parliament on a study conducted by the PSC in 2015 on irregular appointments in the Public Service. During the address the Applicant had remarked that a failure by an official to comply with the recruitment and selection processes was a major concern in Departments. Applicant had stressed the importance that officials be held accountable when they

failed to comply with the principles and prescripts and that disciplinary action must be taken against them.

30. He also testified that a sexual relationship or encounter must be declared in the spirit of law and that all were expected to declare such encounter. He pointed out that the other shortlisted candidates that participated in the process should not be disadvantaged. The fact that the Applicant had a sexual relationship or encounter demonstrated a vested interest in Mogwe and in terms of Regulation 13.

31. He testified that whether or the Applicant was the father of the child, the fact of the matter was that the Applicant had a relationship with Mogwe, and this should have been declared.

32. The fact that he went to the Department of Home Affairs demonstrated that he had a relationship with her and also showed a proven family relationship. Even if it was found that he was not the father, this was immaterial. The fact was that there was a once-off sexual encounter between them which should have been declared and for which he should have recused himself from the process.

33. The once-off sexual encounter also constituted a vested interest for which he was supposed to make declaration. His failure to do so was a misrepresentation to the panel.

APPLICANT'S CASE:

DOVHANI MAMPHISWANA

34. He confirmed that he is aware of the 6 charges against him and understand the charges as preferred against him in the charge sheet; he confirmed that he still maintains his plea of NOT guilty on the charges.

35. He confirmed to have signed declaration form during the interviews indicating that he had no vested interest in any candidate.

- 36.** He confirmed that he knows Ms. Mogwe as a colleague since 2009 when she joined OPSC as a Deputy Director. He indicated that she was promoted to Director in the OPSC based in Free State but he was not part of that process. However, he was involved as a panel member and chairperson of the panel which led to the promotion of Ms. Mogwe to Chief Director: Professional Ethics in 2019.
- 37.** He confirmed that he is familiar with documents appearing as an application to Home Affairs for an unabridged birth certificate which he participated in to a certain degree; he confirmed that back in 2012 he had a once-off sexual encounter with Ms. Mogwe after hours outside and that such an encounter he had protected himself.
- 38.** He stated that in June 2019, he received a call from Ms Mogwe saying shocking that the incident of that night had led to a pregnancy and she believed that the child was his.
- 39.** He indicated that he did not believe that as he had used condom. He indicated that he asked her why she was bringing up the incident of 2012 as well as the child born 2013 only in 2019. He stated that she indicated that she decided to inform him as there was a need to travel outside the country with the child and she was informed by Home Affairs when enquiring about the requisite travelling document that child must have a passport, an unabridged birth certificate and consent from the child's father if the child is born out of wedlock.
- 40.** He indicated that they eventually agreed on the phone that they will have to conduct a paternity test to confirm the suspicions of Ms. Mogwe to confirm whether the Applicant was indeed the biological father to her child emanating from 2012 once-off incident.
- 41.** He indicated that she was responsible to make an appointment for the paternity tests, but such never happened until she engaged him again in August 2019 about intention to travel with the child.
- 42.** He brought up the issue of the pending paternity tests as agreed however she had indicated that there was an emergency to travel; he reluctantly agreed to the Home Affairs process on humanitarian grounds with the understanding that tests will still be conducted after the process to assist with unabridged birth certificate.

- 43.** He stated that she then informed him that she would visit Home Affairs Office in Centurion on 13th August 2019 and he reluctantly agreed to join her with the intention to discuss paternity further; he went to Home Affairs and found Ms. Mogwe in the queue completing forms.
- 44.** He engaged with her further on the paternity and after some discussion he went to his car to obtain a copy of his ID and gave it to Ms. Mogwe to fill the details on his behalf as he received an urgent call from the office.
- 45.** He then informed her that he was going back to the office and will return the next day (14th August 2019) to finalize the process. He indicated that he later received a phone call from Ms. Mogwe informing him where to obtain the forms the next day, he went back the next day however during the process after doing fingerprints.
- 46.** He stated that he then realized after signing on the affidavit that he was about to commission an oath which is binding on him in terms of law and he decided not to proceed with the process pending agreed paternity tests with Ms. Mogwe.
- 47.** He asked to retrieve the original forms from Home Affairs to stop the process but he was informed that he is not allowed to remove the forms so he left them at Home Affairs but left without completing the questionnaire/affidavit so the process can be halted.
- 48.** He stated that Ms. Mogwe called later on 14 August 2019 to find out how did the process go to finalize the application but he informed her that he could not go ahead and finalize the process as he was once again advised to conduct the tests before the Home Affairs process.
- 49.** He testified that neither him nor Ms. Mogwe knew for a fact during the interviews that he was the father to her child as he believed that he was not the father hence he requested for the paternity test to be conducted and there was only a strong suspicion on the part of Ms. Mogwe;

50. He testified that therefore there could not have been any vested interest and/or anything to disclose at the time of the interview; and he confirmed that if the paternity tests done in September 2020 had been done at the time of the interviews and came out negative as they are now, he stated that he still would NOT have disclosed anything.

Mr. ABRAHAM MOKGALUSI

51. He stated that he works under Mokgalusi Group, a company responsible for language transcriptions.

52. He stated that he is familiar with the two transcripts appearing of pages 347 to 436 and 440 to 521. He stated that the second transcript result from the customer who requested that the accuracy of the recordings be confirmed. He stated that as the case was allocated to Josias of his company, he had to verify the concerns of the customer as the initial transcript is generated by a software which at times does contain errors.

53. He then revisited the recordings on request and not instruction which he confirmed that pages 520 to 521 of Applicant bundle are the correct version in the 2nd transcript against page 435 of the 1st transcript. He stated that there was no need to issue a new certificate of veracity as only a portion of the transcript was being verified and not entire recordings; and he finally stated that if the second transcript is questioned by the Respondent, the recordings provided by the Respondent can be played on record for the Commissioner to verify that indeed the Applicant did ask Mogwe same questions as other candidates at the end of her interview.

Ms. BOITUMELO MOGWE

54. She confirmed that back in 2012 she had a once-off incident with the Applicant outside working hours; she conceived a child in 2012 who was born in 2013 and decided to raise her child without the involvement of the father as reflected in the initial birth registration forms of the child.

55. She indicated that as much as she suspected that the Applicant could be the father of her child resulting from the incident of 2012, she was also involved in a relationship at

the time of the incident which was toxic and abusive. She decided not to inform the Applicant nor person she was in a toxic relationship with about the child and opted to raise the child on her own; she indicated that ever since the child was born, there was a request for her to bring the child to Botswana to meet great-grand parents however during 2019 the need to travel to Botswana intensified as the grand-parent had taken ill.

56. She telephonically enquired from the Department of Home Affairs about the documents which were required when travelling out of the country with CD child. She was informed that in order to travel out of the country with her child, the child would be required to have a passport and an unabridged birth certificate which indicates the details of both parents if child born out of wed-lock as well as consent from the child's father.
57. She eventually decided to inform the Applicant about the possibility that he could be the father of her child with the intention for her to only get his assistance to obtain the birth certificate; there was an agreement to conduct as paternity test before application for certificate to confirm paternity.
58. She indicated that since at the time she was based in Free State Province and the Applicant in Gauteng, it was not easy to arrange for the paternity test to be conducted; however, she was informed early August 2019 that her grandparent was seriously ill and needed to travel to Botswana to introduce her child; She then approached the Applicant with a request to apply for the unabridged birth certificate and passport for the child to enable her to travel to Botswana with the child and that paternity test would be done thereafter.
59. She indicated that the Applicant was reluctant and was strongly opposed to applying for the unabridged birth certificate prior to the paternity tests being conducted; none the less she pleaded with him and informed the Applicant she would visit the Department of Home Affairs in Centurion on 13 August 2019 and implored him to avail himself in this regard; the Applicant reluctantly agreed to join her.
60. She arrived at the Department of Home Affairs, Centurion Office on 13 August 2019; upon her arrival she joined the que and informed the official that she was there to

apply for her child's passport and unabridged birth certificate; she was given the forms in this regard and she commenced with completing the forms.

- 61.** The Applicant arrived and found her completing the forms and then requested that they discuss the paternity issue first. After pleading with the Applicant and highlighting the urgency of the situation, he then went to his car and brought a copy of his ID and gave to her to fill the details on his behalf as the Applicant received an urgent call during the process, he then left whilst on the phone with the understanding that he would return the next day (14th August 2019).
- 62.** She then completed the forms, made the necessary payments for the passport and unabridged birth certificate and left the forms with one of the Home Affairs officials for the Applicant to come and finish the process the next day; she left for the Free State on the same day and called the Applicant later in the day to inform him where to obtain the forms.
- 63.** She called the Applicant the following day to find out how did the process go to finalize the application; however the Applicant informed her that he could not go ahead and finalize the process and insisted on the fact that the paternity test should be conducted prior to completing the application process, therefore he had abandoned the application process at Home Affairs.
- 64.** She left the matter at that on the 14th August 2019 with the understanding that the paternity test was required before anything else; She further testified that subsequent to the Applicant's decision to abandon the application process at Home Affairs she also began to have doubts that the Applicant was the father to her child, thus she resigned herself to the fact that her child was borne out of a toxic and abusive relationship; to her surprise the newspaper article was issued in January 2020 "confirming" she was the mother to the Applicant's child.
- 65.** She confirmed that nothing at the time of the interviews confirmed as a matter of fact that the Applicant is the father to her child or that there was a relationship between the Applicant and Ms. Mogwe as a result there was nothing to disclose on the part of the Applicant according to her.

- 66.** She confirmed that if the paternity tests done in September 2020 had been done at the time of the interviews and came out negative as they are now, she still would not have disclosed anything but had the tests been done and be positive, she would have informed the panel that the Applicant is the father to her child as required by the Code of Conduct.
- 67.** She confirmed that there was no vested interest between her and the Applicant as they were only colleagues, they did not have a romantic relationship and that no child exists between them.
- 68.** She further testified that she applied for the advertised post of Chief Director: Professional Ethics as she possessed the requisite academic qualifications, experience and competence and underwent the requisite Competency Assessment which found that she was competent to be appointed as Chief Director.
- 69.** She confirmed that during the interview for the post of Chief Director: Professional Ethics, the Applicant as the Chairperson of the interview panel asked her all the questions as indicated in the scoresheet at page 43 of the Respondent bundle; and She also testified that the scores by the respective panel members was evidence that the Applicant had not favoured her in any way as the Applicant had scored lower in comparison to the other panel member albeit her overall score was the highest amongst all the candidates.

ANALYSIS OF EVIDENCE AND ARGUMENTS

- 70.** In terms of Section 192 of the LRA, Respondent bears the onus to prove the fairness of the dismissal.
- 71.** I do not intend to deal with the issue of transcriptions as I do not find it to be material in my findings.
- 72.** I now go back to the charges that led to the dismissal of the Applicant.
- 73.** Item 7 of Schedule 8 of the LRA provides guidance on what will constitute a dismissal for misconduct at the workplace, which is existence of the rules, knowledge of the rules, contravention of the rules and the appropriateness of the sanction.

74. It is common cause that there are various Public Service Prescripts dealing with conflict of interest and ethical conduct of employees in the Public service.
75. The mandate of the Public Service Commission is to investigate amongst others “the ethical conduct for public servants”. As an Accounting Officer of the organization Applicant is supposed to be in a better position to understand or would have been reasonably expected to be aware of such rules given that it forms part of the core mandate of the organization he was leading.
76. It is trite in our law that a contract of employment regarded is founded on the principles of utmost good faith, and a premium is placed on honesty because conduct involving immorality by employees’ damages trust relationship on which this contract is founded on.
77. According to John Grogan², conflict of interest arises when employees place themselves in a position where their personal interests are, or maybe, at odds with the interest of the employer. Good faith requires that the employees inform their employers as and when such situation arises. In **Nedcor Bank Ltd v Frank**³, the Labour Appeal Court held that dishonesty entails lack of integrity or straightforwardness, and, in particular, a willingness to steal, cheat, lie or act fraudulently.
78. Both the Applicant and Mogwe did not dispute the fact that they have an intimate knowledge of each other including the fact that they were sexually involved to a point where there was a child who later became a subject of a paternity dispute.
79. The issue of whether Applicant and Mogwe engaged in protective sex and he is not the father of Mogwe’ child is immaterial. Applicant was not charged for fathering a child with Mogwe, but was charged for nepotism, dishonesty and bringing the name of the organization into disrepute by failing to declare his intimate knowledge of Mogwe at interviews to a point where he even wrote on the declaration of interest that he is not conflicted in the interviews even though he knew he had sex with her to a point where there was an issue of the paternity of the child.
80. Mr Modau’s unchallenged evidence that in 2016, Applicant addressed Parliament where he spoke very strongly about non-compliance in the public service reminds me

² Dismissal, 2nd edition, P228

³ (2002) 23 ILJ 1234 (LAC)

of the adage “do as I say not as I do”, which makes it clear that for Applicant these rules are only serious when they are transgressed by others and not by him.

81. Startling is his continued insistence that having sexual relations with someone to a point where paternity test would have to be taken did not amount to conflict of interest to a point where one would be required to disclose at interviews.

82. For a person in a position of Director General of the Public Service Commission who supposed to lead by example, he is a risk to the organization and the public service at large. He has failed the litmus test and he is the author of his own misfortune.

83. Having considered all the facts, I am satisfied that dismissal was an appropriate sanction.

AWARD

84. The dismissal of the Applicant Mr D Maphiswana was substantively fair.



MAHASHA D.
GPSSBC PANELIST