



IN THE GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL

Held in VIRTUALLY

Commissioner: P M NGAKO

Case No.: GPBC793/2021

Date of Award: 2 December 2022

In the Dispute between:

GWEBINDIBUDLA FELIX QONDE

(Union/Applicant)

And

MINISTER OF HIGHER EDUCATION, SCIENCE, AND INNOVATION

(1st Respondent)

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

(2nd Respondent)

Applicant's representative: EDWARD NATHAN SONNEBURG

Respondent's representative: STATE ATTORNEY

ARBITRATION AWARD



PARTICULARS OF PROCEEDINGS AND REPRESENTATION

- [1]. This matter was set down before me on the 1st of August 2022 for further continuation virtually. Appearing before me was applicant who was represented by Advocate Peer instructed by ENS Africa. The 1st respondent was represented by Advocate Sibuyi SC instructed by the Office of the State Attorney. The 2nd Respondent was represented by Advocate Prehemid instructed by the Office of the State Attorney. The Second Respondent submitted since no relief may be granted against him. the President abides by the decision of the Commissioner. After I rendered a ruling granting the applicant condonation, I then invited the parties to submit supplementary arguments and indicated that I have not addressed the preliminary issue who is the employer and whether the applicant exhausted internal process before referring his dispute to the GPSSBC

THE ISSUE IN DISPUTE

- [2.1] I am required according to the pre-arb minutes to determine whether the applicant was subjected to an unfair labour practice relating to demotion

PRECISE RELIEF CLAIMED

- [3.1] The applicant seeks formal apology which must be placed on notice boards in the Department and compensation equivalent to 12 months' salary.
- [3.2] The first respondent seeks that the matter be dismissed.
- [3.3] No relief is sought against the Second Respondent

PRELIMINARY ISSUES

Who is the employer of the applicant:

- [4.1] The first respondent contends that the employer to the applicant is the President that in terms of Section 12(1) of the PSA provides that:

"Notwithstanding any to the contrary contained in the Act, but subject to this section and section 2 (2B) and 32 (2) (b) (i), the appointment and other career incidents of the heads of department and government component shall be dealt in the of-



- (a) *a head of a national department or national government component, by the President; and*
- (b) *a head of the Office of the Premier, provincial department or provincial government component, by the Premiere."*

[4.2] It is the contention of the 1st respondent that in terms of section 42A (3) (a) of the PSA the executive authority referred to in section 12 (1) may, in case of the President, delegate to the Deputy President or a Minister any power conferred on the President by section 12. In *Masetlha v the President of the Republic of South Africa* at paragraph 68 to 72. The Court affirmed the President's powers to appoint and dismiss the head of the national department. Furthermore, the court held that "... *the term "career incidents" is not defined but is wide enough to include other matters relating to the career of the head of the department including terms and conditions of employment. In effect, therefore the section empowers the President to determine the terms and conditions of the employment applicable to the head of the department.*

[4.3] In *Apleni v the President of the Republic of South Africa* like in the present case. The contract of employment was signed by the Minister of Home Affairs and the appointment letter indicated that the cabinet approved the extension of the contract of employment. The Minister of Home Affairs placed the applicant on suspension. The applicant contended that the powers to place him on precautionary suspension were reserved for the President in terms of Section 12 of the PSA and had not been delegated to the Minister. In principle the applicant argued that "Minister was not the employer but the President. The Court found that the Second respondent, the Minister of Home Affairs lacked authority to suspend the applicant because she did not have a proper and lawful delegation from the president. In essence, that the President was the employee.

[4.4] That Section 12 (3) (a) *the President may transfer the head of the National department or national government component before the expiry of his or her term, or extended term, to perform functions in a similar or any capacity in a national department or national government component in a post equal, higher, or lower grading or additional to the establishment, as the President considers appropriate".* The first respondent further submit that all the above authorities point to the fact that, in as far as the terms and conditions of the head of the department are concerned, the buck stops with the President, being the head of the cabinet and the Government. Over an above that clause, Clause 2.8 of Chapter 7 of the SMS Handbook defines an employer as:

"employer means-



- I) *In respect of all members (excluding heads of department in their capacities as employee), the head of the department or any member of his/her department designated to perform the specific act; and*
- II) *In respect of heads of department, the relevant executing authority”.*

[4.5] It is therefore the contention of the first respondent that since the contract between the Government and the Applicant, it is clear that the relevant Executive Authority is the President as the leader. Section 83 (a) of the Constitution describes the President as the Head of the State and Head of the national executive. Section 91 of the Constitution also plainly identify the President as the head of the Cabinet. In terms of section 85 (1) of the Constitution the executive of the Republic is vested in the President. As result it is the first respondent submission that it is explicit that the employment relationship is between the Government or the President and the Applicant. the Minister is merely in the position of the applicant's immediate supervisor on behalf of the Government or the President

APPLICANT'S SUBMISSION

[5.1] The applicant submitted that that The Minister has taken a point in limine regarding who applicant's employer is i.e. The Minister says it is the President. This is incorrect. The applicant is employed by the Government of the Republic of South Africa “the Government”). This is evident from the applicant's contract of employment and extension contract where it states as follows:

“EMPLOYMENT CONTRACT AS PRESCRIBED IN TERMS OF SECTION 12 OF THE PUBLIC SERVICE ACT ENTERED INTO BY AND BETWEEN

The Government of the Republic of South Africa, herein represented by Dr Bonginkosi Emmanuel Nzimande in his capacity as the Minister of Higher Education and Training (herein referred to as “the employer”)

And

Mr Gwebinkundla Felix Qonde... in the capacity of Director-General for the Department of Higher Education and Training (herein after referred to as the “Employee”

[5.2] It is the contention of the applicant that it is evident from his contract of employment, the employer is the Government represented by the Minister. The Government naturally would have representative from time



to time, in this case it is contractually stipulated that the Minister is the representative of the Government in respect of whom the applicant contracted with. It has been recently settled by the Labour Court that the employer is not the President or his delegate. The provisions of the Public Service Act 103 of 1994 ("PSA") relied upon by the Minister, pertain to powers to take decisions on career incidents, i.e., appoint, suspend and discipline. It does not make the President the employer

[5.3] In Department of Public Works and another v Vukela and others Case No J488/2022, dated 18 July 2022 para 34 to 35 the Labour Court per Justice van Niekerk has recently held:

"... Employer is not defined in the LRA; it is obverse of the definition of the employee. That definition refers to a 'person excluding an independent contractor, who works for another person or for the State, and who receives, or is entitled to receive any remuneration'. It follows that if a person works for the department of state (as does the first respondent), the State is the employer at least for purposes of the LRA. In the present instance, this conclusion is sustained by the terms of the respondent's contract of employment-his undisputed evidence was that the employer there recorded is the 'Government of the Republic of South Africa'

... While it is correct that clause 2.8 of chapter 7 of the SMS Handbook defines the term 'employer' for the purposes of the codes and procedures set out in the handbook to mean, in respect of heads of department, the relevant executing authority, that provision is limited to the and procedures established in terms of the Handbook and is not intended to extend to identifying or modifying the identity of the employer party for purposes of the LRA , and in particular, the referral of unfair labour practice disputes."

[5.4] It is further the contention of the applicant that the matter he has referred to is on point as also the applicant in this matter was also a Director- General. The SMS Handbook are not intended to mean employer for purposes of the LRA. As result it is the contention of the applicant that the submission by the Minister relying on the said provisions of the SMS Handbook does not assist the Minister as the Court in Vukela has settled this question. That the statutory powers of the PSA (section 12 and elsewhere) accordingly do not render the President the employer. It vests the power to take decisions on Qonde's career incidents in the hands of the President or his delegate. The two citations referred to in the Minister closing submissions, namely Masetlha and Apleni deal with a completely separate issue. There they deal with the power to dismiss and the authority to suspend respectively. If one reads the judgements, neither of them say that the President is the employer of a Director- General. They deal with the powers to dismiss and suspend which is completely a separate issue



6.1 ANALYSIS: it is the contention of the First Respondent that the applicant was employed by the Government therefore the President and that the employment relationship is between the Government or the President and the applicant. the Minister is merely in the position of the manager or the Applicant's immediate supervisor on behalf of the Republic of South Africa. The First Respondent is relying on section 12 of the PSA which provides as follows:

"Notwithstanding anything to the contrary contained in this Act, but subject to this section and sections 2 (2B) and 32 (2) (b) (i), the appointment and other career incidents of the heads of the department and government component shall be dealt with, in the case of –

- (a) a head of national department or national government component, by the President; and*
- (b) a head of the Office of the Premier, provincial department or provincial government, by the Premier."*

6.2 The first respondent in support of its submission referred me to *Masetlha v The President of the Republic of South Africa* 2008 (1) SA 566 (CC) at paragraph 68 to 72 in which he argues the court affirmed the President's powers to appoint and dismiss the head of the national department. The first respondent referred me also the para 147 of the PSA which provides as follows:

"... the term "career incidents is not defined but is wide enough to include other matters relating to the career of the head of the department including terms and conditions of employment in effect, therefore the section empowers the President to determine the terms and conditions of employment applicable to the head of the department"

6.3 The first respondent also referred me to *Apleni v the President of the Republic of South Africa* 2018 (1) All SA 728 and argues like the in the present case the contract of employment was signed by the Minister of Home Affairs and the appointment letter indicated the cabinet approved the extension of his contract of employment. The applicant contended that the powers to place him on precautionary suspension were reserved for the President in terms of sections 12 of the PSA and had not been delegated

6.4. I agree with the view by the applicant that the two citations referred to by the first respondent in his closing arguments deal with completely a separate issue. They deal with the power to dismiss and the authority to suspend and neither of them say the President is the employer of the Director general. I agree with the view by the applicant that this issue has been resolved by the Labour Court in *Department of Public Works and another v Vukela and others* Case No J488/2022, 18 July 2022 para 34-35 which provides as follows:



“the starting point is section 186 (2) of the LRA, which defines an unfair labour practice as ‘any act or omission that arises between an employer and an employee...’ The referral to conciliation must therefore cite the employer. ‘Employer’ is not defined by the LRA, it is the obverse of the definition of the ‘employee’. That definition refers to a person, excluding an independent contractor who works for another person or for the State and who receives, or entitled to receive, any remuneration’. It follows that if a person works for a department of State (as does the first respondent) the State is the employer, at least for purposes of the LRA. In the present instance, this conclusion is sustained by the terms of the first respondent’s contract of employment-his undisputed evidence was that the employer there recorded is the Government of the Republic of South Africa”.

Para 35

... While it is correct that clause 2.8 of chapter 7 of the SMS handbook defines the term ‘employer’ for purposes of the codes and procedures set out in the handbook to mean, in respect of heads of departments, the relevant executing authority, that provision is limited to the codes and procedures established in terms of the Handbook and is not intended to extend to identifying or modifying the identity of the employer party for purposes of the LRA, and in particular, the referral of unfair labour practice disputes.”

- 6.4 Taking into consideration the above Labour Court decision into consideration, the President for the purposes of the Labour Relations Act and referral of unfair labour practice is not the employer for the applicant as Head of Department. The applicant by citing the first respondent is because he represents the State as a Minister in the Department of Higher Education, Science, and Innovation.

Whether the approach taken by the Applicant, the Director General, in claiming the relief against the Minister but not the President is correct and sustainable in law?

- 7.1 It is the submission of the first respondent the careful reading of section 186(2)(a) of the Labour Relations makes it plain that the labour practice ought to arise between the employer and employee; that the conduct (whether act or omission) ought to be unfair; and lastly the specific conduct ought to occur during the currency of employment. In the case of MEC for Transport: Kwazulu-Natal v Jele [2004] 12 BLLR 1238 (LAC; (DA6/03) [2004] ZALAC 13 (9 July 2004). The Labour Appeal Court made it very clear that there cannot be a dispute relating to unfair labour practices unless there is an employment



relationship between the parties concerned. An applicant in the unfair labour practice dispute must be in the employ of the employer. It is contention of the First Respondent that the Minister has no power to demote is incidental to the President's power to appoint. Demotion is career incident. The Minister is in the position of the manager or the applicant's immediate supervisor on behalf of the Government or the President. In the light of the above legislation and authorities, the First Respondent is the employer of the applicant. in the premises it is submitted by the First Respondent that the applicant's claim against the First Respondent, the Minister cannot be sustained. On these grounds alone and his application be dismissed with costs.

7.2 Applicant's submission: it is the submission by the applicant that the relief is essentially sought against the Government or State. One would not see, within the confines of employment disputes within the State, a citation of the Government of the Republic of South Africa. Rather is the relevant representative of that government or state that is cited. In the case of the applicant contract of employment, he is appointed as DG. His cause of action is that he has been in substance demoted from his position. The contract tells us that the employer is represented by the Minister. The Minister is duly cited, and relief is accordingly sought against him. It is of course, not personal relief sought against the Minister, but against him in his representative capacity. Accordingly, the relief sought is competent, against the employer representative being the Minister, who represented the State in its capacity as the employer when contracting with the applicant. the office that exercises powers in respect of career incident, the President, is also cited. There is no merit to the point in limine, and it is submitted that it be dismissed with costs.

7.3 ANALYSIS: I have ruled above that the employer to the applicant is the State in terms of the Vukela Judgement. As result the contention by the First respondent that the applicant cannot seek relief against him cannot be correct. The First respondent is the one who is representing the State as the Minister and I agree with the applicant the relief against the First respondent is not against him in his personal capacity, but as the representative of the employer being the State also the First respondent represented the employer in the contract it entered against the applicant and as result the approach taken by the applicant in claiming relief against the First respondent but not the President is correct and sustainable in law as the President is not the employer

8.1 Internal dispute Resolution Mechanisms: The applicant submitted that the Minister does not raise point in limine, regarding the exhaustion of internal dispute resolution mechanisms in his Closing arguments (as



he did with the question of whether the President is Qonde's employer). At best he raised it in his cross examination of the applicant referred to from paragraph 165, page 32 of the Minister Closing Submissions, accordingly one can assume this is not an issue, and nothing further needs to be said of it. However, the Commissioner seems to have raised it in his condonation ruling where the commissioner refers to the prospects of success in so far as Qonde "exhausted internal processes before referring his dispute to the bargaining Council.

- 8.2 The applicant submits that out of abundance of caution, this is addressed assuming that I believe it is an issue. Section 35 of the PSA provides that an employee may lodge a grievance with the relevant executive authority under the prescribed circumstances, on the prescribed manner. Further the same section provides that an employee may only refer a dispute to the relevant bargaining council, if he or she has lodged a grievance; and the department does not resolve the grievance to his or her satisfaction. The SMS Handbook reiterates this. On the other hand, the LRA provides for the referral of disputes within 90 days from the occurrence of the act or omission occurring. The applicant submits that the LRA does not provide that, as a precondition for a referral of unfair labour practice, one must first refer the matter to internal grievance proceedings. Accordingly, the condition imposed by the PSA and SMS Handbook do not accord with the provisions of the LRA.
- 8.3 The applicant further submitted that if one has regard to section 210 of the LRA, it provides that where there is a conflict between the provisions of the LRA and any other law, the provisions of the LRA will prevail. In the matter of Department of Military Veterans V Moche and others Case No: JR 1450/17 at para 18. The Labour Court held that the exhaustion of internal grievances does not suspend the 90-day period. If an employee was late in his referral because of pursuing internal grievances, the employee will have to apply for condonation. On the interpretation of the LRA, one therefore cannot expect an employee to exhaust internal grievances prior to the referral of unfair labour practice disputes. The employee is entitled in terms of the LRA, to refer the unfair labour practice as soon as it happens, but within 90 days. Any provision that first expects the employee to exhaust internal grievance processes would be at odds with the provisions of the LRA
- 8.4 The applicant also submits that even if the referral of internal disputes was a requirement (which is disputed). The applicant has submitted two grievances to the president both of which culminated in meetings, that did not yield any result. After having exhausted the process, he then referred the matter to the Bargaining Council. The President is responsible for the applicant's career incidents, as correctly



submitted by the Minister (but the President is not the applicant's employer as confirmed by the Court in Vukela. That he did not do so in the form prescribed by the PSA, ought not change that the grievance has in fact been submitted and exhausted internally. The applicant therefore contends that the requirement of first exhausting internal grievances prior to referring unfair labour practice disputes is in conflict with the LRA and, pursuant to section 210 of the LRA, cannot be upheld, even if there was such a requirement, in substance, Qonde has referred two grievances to the President, which were exhausted prior to referring the dispute. According to the applicant there is accordingly no bar to the hearings of the unfair labour practice dispute for any purported lack of exhaustion of internal grievance processes.

- 9.1 Analysis: The applicant is correct that the first respondent did not deal with the issue regarding exhaustion of internal processes in his closing arguments. However, The Bargaining Council is creature of statute it can't grant itself jurisdiction to adjudicate disputes. In the case of unfair labour practice, an employee is required to lodge a grievance before referring a dispute to the CCMA/Bargaining Council. See in this regard the Labour Court in the City of Johannesburg Metropolitan Municipality and South African Municipal Workers Union and Others Case No: JR 214/2016 in which the court held:

"21 The Second and Third Respondents were obliged and bound to apply the provisions of the MCA and which they failed to adhere to. The third respondent is obliged to exhaust all processes as prescribed by the MC before any dispute can be adjudicated by the Second Respondent"

- 9.2 The applicant as DG his conditions of service are governed by the SMS Handbook, and the rules for dealing with grievances of members of the senior management service including heads of department is Chapter 10 Section 1.2 provides as follows:

"Section 35(3) of the Public Service Act, 1994, determines that-

- (3) *A head of department may lodge any such grievance with-*

(a) the relevant executive authority in terms of subsection (1); or

(b) directly with the Commission under the prescribed circumstances; on the prescribed conditions and in the prescribed manner.

(4)(a) An employee may only refer a dispute to the relevant bargaining council in the public service or the Commission for Conciliation, Mediation and Arbitration (CCMA), or institute court proceedings, in respect of a right referred in subsection (1) if-



(i) he or she had lodged a grievance in terms of that subsection; and

(ii) the department does not resolve the grievance to his or her satisfaction within the period prescribed in the rules, contemplated in subsection (5) or the period for referring such dispute or instituting such court proceedings, whichever period is the shorter”.

9.3 It is common cause that the applicant wrote two letters of complaint to President as he was aggrieved with the conduct of the First Respondent. The question is whether the letters applicant wrote to the President, has he complied with exhausting of internal processes before referring his dispute to Council. Chapter 10 of the SMS Handbook clause 6 Heading Procedural Stages to address a grievance of a member provides as follows:

“(a) a member must use the Grievance Form at Annexure A lodge a grievance with the designated employee appointed by the department to facilitate the resolution of grievances. A grievance which is not submitted to a designated employee is not regarded as a grievance lodged in terms of the grievance procedure”

9.4 The question is whether the applicant lodged a grievance before referring his dispute to the Council: the applicant wrote two letters to the President. This is not in compliance with clause 6 (a) of Chapter 10 of the SMS Handbook that clearly states, “a member must use the Grievance Form at Annexure A to Lodge a grievance.” the applicant did not use the grievance form at annexure A when he lodged his complaint with the second respondent and as result is not a grievance as contemplated by the SMS handbook. As result the applicant failed to comply with the internal process before referring his dispute to the GPSSBC

9.5 It is the contention of the applicant the LRA provides for the referral of disputes within 90 days from the occurrence of the act or omission occurring. The LRA does not provide that, as precondition for a referral of unfair labour practice, one must first refer the matter to internal grievance proceedings. It true that the LRA does not have precondition that an unfair labour dispute must be referred to internal grievance proceedings. the LRA does not prescribe such a pre-condition however the purpose of the Act encourages that policies be developed within the workplace to regulate condition of service within the workplace. See in this regard Section 1 of the Labour Relations Act which provides as follows:

“1 Purpose of this Act



The purpose of this Act is to advance economic development, social justice, labour peace and democratisation of the workplace by fulfilling the primary objects of this Act, which are-

- (a) To give effect to and regulate the fundamental rights conferred by section 23 of the Constitution of the Republic of South Africa, 1996;*
- (b) To give effect to the obligations incurred by the Republic as a member state of the international Labour Organisation;*
- (c) to provide a framework within which employees and their trade unions, employers and employers' organisations can-*
 - (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and*
 - (ii) formulate industrial policy; and*
- (d) to promote-*
 - (i) orderly collective bargaining;*
 - (ii) collective bargaining at sectoral level;*
 - (iii) the effective resolution of labour disputes.*

9.6 Whether the conditions imposed by the PSA and SMS Handbook do not accord with the provisions of the LRA: I do not agree with the contention by the applicant there is a conflict between the provisions of the LRA and the PSA and the SMS Handbook. Grievance procedures are developed by employers, Bargaining Councils to attempt to resolve disputes of employees within the workplace. See in this regard the Purpose and application of Chapter 10 which provides as follows:

"Purpose and application

- (a) The purpose of the grievance procedure is to advance sound labour relations and address grievances of members. The primary objectives of the procedure are-*



- (i) *To give effect to section 196(4)(f) of the Constitution, 1996, which empowers the PSC to investigate grievances of employees in the Public Service concerning official acts or omissions, and recommend appropriate remedies;*
- (ii) *To give effect of section 35 of the Public Service Act, 1994 (as amended) and*
- (iii) *To promote-*
 - (a) *The speedy, impartial and equitable handling of grievances;*
 - (b) *Sound labour relations; and*
 - (c) *The resolution of individual grievances."*

9.7 The grievance procedure makes provision within what time period your dispute should be attended to allow you sufficient time if you are not satisfied with the outcome to refer your dispute to the CCMA/Bargaining Council. In the SMS Handbook clause 4(d) provides as follows:

"(d) A grievance should be resolved within 45 days from the date it was lodged, and the period may be extended by mutual agreement in writing between the employer and the member."

9.8 As result the applicant failed to comply with the grievance procedure set out in Chapter 10 of the SMS handbook, conditions that are peremptory, he failed to refer his grievance in a prescribed form. In terms of the SMS handbook the applicant failed to lodge a grievance before referring a dispute to the Council. The two letters of complaint that he wrote to the President was not in compliance of the grievance procedure as set out in the SMS Handbook and the Public Service Act. As result I find the applicant has failed to exhaust internal grievance proceedings before referring his unfair labour practice dispute to Council and as result Council does not have jurisdiction to adjudicate over the applicant's dispute

10.1 Costs: In arbitration proceedings the costs do not follow the result, we are allowed to order costs against a party under exceptional circumstances. The issues that have been raised are issues that assist in development of labour. I have ruled in favour of the applicant on two preliminary issues and against the applicant on the issue I raised of exhausting of internal proceedings. As result, no order as to costs both parties carry their own costs in relation to defending this dispute. Accordingly, I make the following award:



AWARD

- 11.1 I find the applicant's employer as the Head of the Department is the State and not the President of the Republic of South Africa for purposes of the LRA.
- 11.2 I find the First Respondent represents the State as the Minister of Higher Education, Science and Innovation, and is correct person for the applicant to seek relief against him as he represents the State.
- 11.3 I find that the applicant failed to comply with the grievance procedure set out in Chapter 10 of the SMS handbook clause 1.2 and 6(a) when he failed to use the Grievance Form at Annexure A to lodge his grievance.
- 11.4 As result Council does not have jurisdiction to adjudicate over his dispute.
- 11.5 There is no order as to costs

GPSSBC Commissioner: P M NGAKO

Signature: _____

