



**ARBITRATION
AWARD**

Physical Address:
260 Basden Avenue,
Lyttelton, Centurion,
Pretoria

Postal Address:
PO Box 16663,
Lyttelton, 1040

Tel: 012 664 8132
Web: <http://www.gpssbc.org.za>

Panellist/s: Caroline Hlongwane
Case No.: GPBC637/2020
Date of Award: 14 September 2020

In the ARBITRATION between:

NEHAWU obo Pule Sekawana

(Union / Applicant)

and

Department of Agriculture, Land Reform and Rural Development

(Respondent)

Union/Applicant's representative:

Mr. Tshikani Maluleke

Union/Applicant's address:

NEHAWU

17th Floor, Marble Towers

Von Weilling Stret (Cnr Jeppe Street), Johannesburg

Telephone: 011 336 1508

Telefax: 011 333 1696

Respondent's representative:

Anton van Staden

Respondent's address:

184 Jeff Masemola Street

Pretoria Central

Telephone: 012 319 7334

Telefax: N/A

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION:

1. This is an arbitration award in terms of section 138(7) of the Labour Relations Act 66 of 1995 ("the LRA"), as amended. This award is in relation to an alleged unfair suspension dispute in terms of section 186(2)(b) of the Labour Relations Act 66 of 1995 ("LRA") referred by Mr Pule Sekawana ("the Applicant") to the General Public Service Sector Bargaining Council ("the Council") on 22 June 2020.
2. The arbitration proceedings were held virtually (via Zoom) on 02 September 2020. The applicant was part of the proceedings and Mr Tshikani Maluleke, NEHAWU union official represented the applicant. Whilst Mr Anton van Staden, respondent's Chief Director represented the respondent.
3. The parties submitted bundles of documents and the contents thereof were purported to represent what they were. The respondent's bundles were submitted already marked Bundle A and Bundle B and I decided to mark the applicant's bundle as Bundle C for the sake of consistency. Both parties decided not to call any witnesses and the representatives submitted oral arguments. The proceedings were digitally recorded, and the recordings were sent to the Council.

ISSUE TO BE DECIDED:

4. I am required to determine whether the respondent subjected the applicant to an unfair labour practice by suspending him and not convening a disciplinary hearing within 60 days as prescribed by chapter 7 of the SMS Handbook.
5. In the event that I find in favour of the applicant, the applicant sought compensation and the upliftment of suspension.

BACKGROUND TO THE MATTER:

6. The applicant is employed by the respondent as a Chief Director. The applicant was initially employed as Chief Director: Free State PSSC based in Bloemfontein, he was then seconded to the Head Office of the Department in Pretoria as an Acting Deputy Director General (DDG).

7. The applicant was issued with the notice of intention to suspend on 20 March 2020 and was given until 27 March 2020 to submit representations as to why he should not be suspended. The applicant did not submit any representations and was placed on precautionary suspension with full pay for reasons of alleged misconduct, pending an investigation as stipulated in the suspension letter sent to the applicant by the respondent via email on 24 April 2020. The applicant's case was based on the SMS Handbook which prescribes the time period for precautionary suspension and stipulates that the disciplinary hearing must be convened within the 60 days period. The disciplinary hearing did not take place nor the upliftment of the suspension.
8. Following the suspension, the applicant lodged a dispute on 22 June 2020. The matter was set down for a conciliation hearing on 23 July 2020. The dispute was declared unresolved in terms of section 135(5) of the LRA. The applicant then filed a request for Arbitration.

SURVEY OF EVIDENCE AND ARGUMENT:

9. I have heard brief arguments from both parties. The parties made oral closing submissions arguments.

APPLICANT'S CASE

10. The applicant's representative, Mr Tshikani Maluleke ("Tshikani") submitted that in terms of the SMS Handbook, Chapter 7 disciplinary hearing must be convened within 60 days after precautionary suspension. On the date of the hearing, the applicant was on his 71 days suspension without the hearing. The lapse of the 60 days was on the 24th of June 2020.
11. The conduct of the respondent by not complying with the SMS Handbook is not fair. If the respondent was able to issue notice of suspension during lockdown, they should have been able to conduct the disciplinary hearing during lockdown; if not, they should have at least convened a hearing via zoom or telephone to extend the suspension.
12. He referred to the case of *Vusi Mashiyane v Department of Public Works* (J1773/2012) where the court concluded that the provision of the SMS Handbook in relation to clause 2.7.2(c), is that any extension of such a suspension cannot be done by any other person except by the chairperson of the hearing. The provision is peremptory because it directs the employer to convene the hearing, if the hearing is not held during the stipulated time, the conduct of the employer is considered to be unlawful.

13. The respondent does not have the right to extend the suspension after 60 days, only the chairperson can extend the suspension.
14. If the respondent's argument is that it was not possible for the disciplinary hearing to be held, then there was no need for the applicant to be suspended during lockdown.
15. They requested that the suspension be declared as unfair and set aside and the suspension be uplifted.

RESPONDENT'S CASE

16. The respondent's representative, Mr Anton van Staden ("Anton") submitted that the matter originated in the Free State in 2015/2016 while the applicant was acting as a Chief Director. Subsequent to that he was appointed as Acting Deputy Director General ("DDG") for cooperative services based in Pretoria. On the 20th March 2020 the applicant resigned as an Acting DDG.
17. The respondent's intention is to conduct a joint disciplinary hearing against the applicant and his erstwhile junior, Ms MB Matshediso who was a Director and reported to the applicant when the misconduct was committed because both the applicant and Matshediso worked together although on different capacities. Page 43-45 (Respondent's bundle of documents). No interprovincial travel was allowed then.
18. The respondent agrees with paragraph 2.7.2(c) of the SMS Handbook, however, it was not practical for the respondent to comply with it because of the lockdown. Most of the people dealing with this case are Pretoria based and they would need to travel to Bloemfontein. It was not possible for them to travel to Bloemfontein in order to convene the disciplinary hearing or conduct it by electronic means due to the complexity of the matter. The respondent immediately acted as soon as the lockdown level 2 came in place.
19. The notice of the disciplinary hearing was issued on 18 August 2020 in fact; the disciplinary hearing should have been held on 26 August 2020 but was postponed due to the unavailability of the applicant's representative. The hearing will now take place on 11 September 2020. The applicant did not suffer any damages as far as the respondent is concerned because most employees due to the lockdown are working from home.
20. He further submitted that it is important to look at the situation as a whole, there was lockdown in the entire country which affected most industries, the CCMA as well; there is a backlog of most disputes.
21. The respondent relied on the case of *Manamela Nanna Ida v Department of Co-operative Governance Human Settlements & Traditional Affairs Limpopo Province* (J1888/2013) although this case dealt with *audi alteram partem* principle.

ANALYSIS OF EVIDENCE AND ARGUMENT:

22. Section 138(7) of the LRA provides that the commissioner must issue an award with brief reasons. It is therefore not my intention to provide a detailed record of all the evidence that was placed before me. Even though all submissions were considered, I have only referred to the salient points that I found to be the most pertinent to making a determination in this matter. However, it should not be construed that I overlooked some of the evidence submitted in these proceedings as I have considered all the submissions.
23. The crux of the matter is that the applicant was put on precautionary suspension by the respondent on 24 April 2020 and that the respondent failed to convene disciplinary enquiry within 60 days as prescribed by the SMS Handbook. It is common cause that although the notice of intention to suspend was issued on the 20th of March 2020, suspension took place on 24 April 2020 which was during level 5 of the South African national lockdown as declared by the president of the Republic of South Africa; at the time the country was in total shut down. It is further common cause that the 60 days period started running immediately the notice of suspension was sent to the applicant by the respondent.
24. The applicant's argument was that the respondent's conduct for failing to convene the disciplinary hearing within the 60 days as prescribed by the SMS Handbook constituted an unfair labour practice in terms of section 186(2)(b) of the LRA. His representative further argued that the respondent could have at least convened the hearing via zoom or telephone for the chairperson to extend the suspension should they have foreseen that they would not be able to conduct proper hearing during lockdown (my emphasis).
25. The respondent conceded that it did not comply with clause 2.7.2 (c) of the Resolution. The respondent's argument was that it was not possible to comply with the 60 days period as prescribed by the SMS Handbook because the alleged misconduct the applicant is charged with occurred in Free State, Bloemfontein and interprovincial travel was not allowed because of the lockdown. Furthermore, it was also not possible to convene the hearing neither by electronic means nor by telephone due to the complexity of the matter.
26. The question of precautionary suspension is governed by the SMS Handbook (or for that matter Resolution 1 of 2003 which contains similar provisions), being a collective agreement in terms of section 23 of the LRA. The SMS Handbook: Chapter 7: Misconduct and Incapacity (2003) reads as follows:
- “(2.7) Disciplinary Enquiry*
- (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 jeopardize any investigation into the alleged misconduct, or endanger the wellbeing 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 judgement and must be on full pay.

(c) If a member is suspended as a precautionary measure, the employer must hold a disciplinary hearing within 60 days. The chair of the hearing must then decide on any further postponement”.

27. Arising out of the above is the following:

- The 60 days within which a hearing must be held is peremptory.
- The chairperson of the disciplinary hearing can extend the 60 day period.
- A failure to hold a disciplinary hearing within 60 days entitles an employee to the right to file an unfair labour practice to have the suspension uplifted.

28. This brings me to a consideration of whether the respondent has, in failing to adhere to clause 2.7(2) (c) of Resolution 1 of 2003, committed an unfair labour practice.

29. *Section 186 (2) (b) states the following:*

“Unfair labour practice” means any unfair act or omission that arises between an employer and an employee involving -

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

30. An unfair labour practice arises out of an unfair act or omission committed by an employer. In the present matter, the respondent’s failure to hold a disciplinary hearing within 60 days of the applicant’s suspension impacts on the fairness of the suspension.

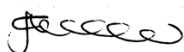
31. It is important to consider the submissions as to the reasons for the delay for not convening the disciplinary hearing within the time frames as prescribed by the SMS Handbook before deciding whether the fairness of such conduct. Whilst I appreciate that lockdown regulations indeed did not allow interprovincial travel from level 5 to advanced level 3, and that no one anticipated that things would get longer to get back to normal, I am not totally convinced that it was not possible for the respondent to convene disciplinary hearing through electronic means for the purposes of extending the suspension by the chairperson. In light of that, I agree with the applicant’s argument that the respondent should have made other plans to ensure that the applicant’s suspension is extended until interprovincial travel was permitted. I have also noticed when reading the respondent’s bundles that the respondent had been in constant communication with the applicant, responding to most of his requests and/or queries, therefore it is clear that they were alert that there is a matter which is pending and need to be attended within the time frames prescribed by the SMS Handbook.

32. Furthermore, the respondent's submission was that almost all employees were working from home therefore the applicant did not suffer any prejudice; if this was indeed the case I am failing to understand why the respondent insisted on suspending the applicant during lockdown while most of the employees were working from home. I further struggle to comprehend why the applicant's suspension could not have waited until the time when the respondent would have been able to properly suspend, investigate and convene disciplinary enquiry within the prescribed period.
33. I therefore find that the respondent failed to comply with clause 2.7.2(c) and such non-compliance was unfair. At the time of this hearing, the respondent had already scheduled the disciplinary hearing for 26 August 2020, but the hearing was postponed. The agreement by the parties was to convene with the disciplinary hearing 11 September 2020.

AWARD:

34. I therefore make the following order:

- 34.1. The respondent failed to comply with the time frames set out in Resolution 1 of 2003, clause 2.7.2 (c) in that it did not convene the disciplinary hearing within the 60 days' time limit.
- 34.2. The non-compliance as explained in 34.1 above was unfair. The applicant however did not suffer any material prejudice.
- 34.3. The applicant is not entitled to any relief.



Name:

(Council name) Arbitrator