



ARBITRATION AWARD

Case Number: GPBC1469/2019
Commissioner: William Richard Pretorius
Date of Award: 28 September 2020

In the **ARBITRATION** between

PSA obo Lesiu LG

(Applicant)

and

Office of the Premier – Free State

(Respondent)

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Details of hearing and representation

1. This matter was set down as a virtual arbitration on 22 July 2020 and was finalised on 28 August 2020. The dispute concerns an alleged unfair suspension as contemplated in section 186(2)(b) of the Labour Relations Act 66 of 1995 as amended ("the LRA").
2. The Applicant, Lebogang Lesiu, was represented by Mr. Clement Fandie, an official from the Public Service Association of South Africa, ("the PSA"). On the other side, the Respondent, the Office of the Premier – Free State, was represented by, Mr. Kagisho Tlhakung.
3. The virtual proceedings were recorded digitally and in writing. The parties were granted indulgence to submit their respective heads of argument by not later than 21 September 2020.

Issue to be decided

4. I am required to determine whether the Respondent committed an unfair labour practice as contemplated in terms of section 186(2)(b) of the LRA in relation to the Applicant's precautionary suspension as provided for in clause 7.2 of Resolution 1 of 2003 ("the Resolution").

Background to the dispute

5. It is common cause that:
 - 5.1 The Applicant is an employee of the Office of the Premier ("the OTP"). He is employed as the Deputy Director: Bursaries and is earning a monthly basic salary of R77 541.11.
 - 5.2 The Applicant was placed on precautionary suspension as per letter 6 June 2019 by Mr. Ralikontsane, the Director General ("DG") of the OTP which *inter alia* states that the 'alleged misconduct involves the irregular/unlawful award of bursaries and payments to students and to yourself'.
 - 5.3 Subsequent to letter of precautionary suspension, the Applicant was served with the notice of disciplinary hearing dated 29 July 2019. The first sitting of disciplinary hearing was on 6 August 2019 and hearing is part-heard. The Applicant remains on precautionary suspension as at the date of these proceedings.
 - 5.4 The Applicant referred an unfair labour practice dispute to the Council on 25 July 2019.

Survey of evidence and argument

6. The parties have submitted written heads of argument in support of their respective cases. None of the documents submitted by the Applicant were disputed.
7. As it is only required that an award with brief reasons be issued, following is a summary only of the relevant evidence tendered under oath and heads of argument taken into account in the findings which follow:

Applicant's case

8. **Mr. Lebogang Lesiu**, the Applicant, testified that the notice of precautionary suspension dated 6 June 2019 was given to him on 7 June 2019 by his supervisor, Mr. Mtembu ("Mtembu") without any explanation regarding the content of the notice, including the reasons for his suspension. Mtembu told him that he (Mtembu) knew nothing about the suspension, because it was effected by the DG.
9. He pointed out that allegations are false, because he does not have the function to award bursaries or to effect the payments of bursaries. He has never made any payments in relation to bursaries. With regards to the notice of precautionary suspension, he said that he does not know whether the investigations into the alleged misconduct are still ongoing.
10. He confirmed that he received the notice of disciplinary hearing on 29 July 2019. He indicated that the disciplinary hearing proceeded on 27 February 2020. He is still waiting to present his side of the case against him. He confirmed that he is still on suspension which is excessive, because he is currently on suspension for 13 months and 15 days. .
11. In this regard, he said that the suspension should have been lifted when the investigations were finalised, as stated in paragraph 1 of the notice of precautionary suspension. He is still receiving his salary whilst being on suspension for more than a year which is against the provisions of the Public Finance Management Act 1 of 1999 as amended ("the PFMA"). He said that the allegations are baseless, false and without substance. In this regard, he said that he is not responsible for the awarding and/or payment of bursaries. He reiterated that he has never made payment of bursaries whilst in the OTP.
12. According to him, the unfair suspension has seriously affected his health, personal and family life and his status in the community. As a direct result of the unfair suspension, he is suffering from anxiety and stress related symptoms which have been confirmed by his medical doctor and occupational therapist. See Applicant's bundle of documents.

13. He is praying for the precautionary suspension to be lifted with immediate effect and that he should be compensated for the impact the unfair suspension had on his health, personal and family life.
14. Under cross-examination it was put to him that the suspension is not excessive because he referred the dispute to Council on 25 July 2019 which is a month after his precautionary suspension. He said that the suspension was not supposed to be longer than 30 days but was unable to substantiate where the 30-day period is coming from. It was put to him that by the time he referred the dispute to Council, the 60-day period mentioned in clause 7.2(c) had not lapsed. He disagreed with the version that he prematurely referred the dispute to Council in that he should have waited for the 60-day period to lapse before referring the dispute.
15. He later on agreed that the disciplinary hearing was convened within the 60-day period as provided for in clause 7.2(c) of the Resolution. He also agreed that the hearing is part-heard and ongoing. He emphasized that he was never told about the completion of the investigations as referred to in paragraph 1 of the notice of precautionary suspension. It was put to him, that there is nothing in the Resolution with reference to the finalisation of an investigation. He pointed out that he was referring to the notice of precautionary suspension, not the Resolution.
16. According to him, the unfair suspension has not only caused anxiety but has also resulted in stress related symptoms for which he is currently taking medication because of the false allegations against him. It has also caused fear, nervousness and his relationship with his family and friends have been negatively affected. He pointed out that he did not suffer from any of these symptoms before the suspension.
17. He pointed out that the allegations against him might be serious for the Respondent but to him they are baseless and false. He indicated that the allegations are serious only insofar it has destroyed his character and reputation. It was put to him that it is the right of the Respondent to protect its interests. He maintained that the allegations are false and baseless, because the Respondent was unable thus far to prove that he has done anything wrong.
18. He maintained his version that the precautionary suspension is linked to the finalisation of the pending investigations as stated in paragraph 1 of the notice of precautionary suspension. He reiterated that he was never informed about the finalisation of the said investigations. It was put to him, that it is the prerogative of the Respondent to suspend an employee provided it is done within the prescripts of the law. In response, he said that the Respondent must establish reasonable ground, on the balance of probabilities, before taking a decision to suspend.

19. It was put to him that the allegations stated in the notice of precautionary suspension is sufficient reason to suspend him. According to him, the Respondent cannot simply do so in writing. He explained that it is not part of his job description to award and/or to pay bursaries. He pointed out that he was suspended by the DG instead of his immediate supervisor, Mtembu, which is an indication of abuse of power. It was put to him that the DG as the Accounting Officer has the power to suspend any employee. He agreed but indicated that the DG should have consulted with his supervisor which was not done. He reiterated that Mtembu does not know the reason for his suspension. He maintained that the suspension was unfair because it was excessive and the allegations are false and baseless.
20. In re-examination he confirmed that it is not his duty to perform the functions as reflected in the allegations, namely the awarding and payment of bursaries. He indicated that he did not hear anything from the Respondent regarding his suspension after the disciplinary hearing commenced.

Respondent's case

21. **Mr. Kopung Ralikontsane ("Ralikontsane")**, the Director General of the Office of the Premier – Free State, testified that, as Accounting Officer, he is overall responsible for the management of the administration of the Respondent which include *inter alia* the disciplinary authority over all employees. He confirmed that he signed the notice of precautionary suspension dated 6 June 2019 which gave effect to the precautionary suspension of the Applicant. He did so following reports he received which alleged that the Applicant was involved in irregular payments of bursaries to students at the University of Free State, including himself.
22. According to him, there were sufficient grounds for the allegations to be properly investigated and as a result he placed the Applicant on precautionary suspension out of concern for possible interference with the intended investigations. He did so given the Applicant's position as the Head of the Bursary Unit.
23. He pointed out that further issues regarding the suspension of the Applicant would be for the decision of the chairperson of the disciplinary hearing. He confirmed that that the disciplinary hearing is ongoing due to several postponements for various reasons.
24. Under cross-examination he indicated that the right to suspend an employee beyond 60 days might depend on the circumstances or complexity of the matter. According to him, the Respondent's representative was supposed to argue before the chairperson of the disciplinary hearing for the suspension to be extended in line with the Resolution but he was unable to confirm whether such application was made. He agreed with the version that the Resolution refers to 'further postponement',

not suspension. It was put to him that the chairperson of the disciplinary hearing has no authority to lift a precautionary suspension. He said that he was not aware of it.

25. He agreed that the pending investigations referred to in paragraph 1 of the notice of precautionary suspension were finalised by 6 August 2019, which was the commencement of the disciplinary hearing.
26. He pointed out that the Applicant, although not directly involved with the bursary files, has direct access to the system and could have exploited the system to award and pay the bursaries given his position as Head of the Bursary Unit. The Applicant was in a position to influence to outcome of the awarding and payment of bursaries.
27. It was put to him that he had no grounds to suspend the Applicant. He disagreed and indicated that the investigations confirmed the need for the Applicant to account for his alleged conduct in a disciplinary process. He pointed out the charges are clear, i.e. they are reflecting the outcomes of the investigations and the Applicant was subsequently served with notice of disciplinary hearing where the matter will be fully ventilated.
28. He disagreed with the version that the decision to suspend the Applicant was arbitrary and that there was no *prima facie* case against the Applicant. According to him, the allegations brought to his attention were serious which warranted an investigation. He pointed out that the Applicant was suspended, because of the risk of him interfering with the investigation. He said that with information at his disposal at the time, he believed that the allegations were serious and that there was sufficient ground to investigate the matter in order to determine whether charges should be brought against the Applicant.
29. He further explained that the allegations came to his attention during middle of May 2019 and he requested information from the University of Free State and it was alleged that an amount of R55 000.00 was paid to the Applicant, including a letter was allegedly written by the Applicant to this effect. When he considered the information at his disposal and found it to be serious and that it should be further investigated and that the Applicant should be suspended to protect the investigation.
30. It was put to him that the Applicant was not made aware of the reasons for his suspension before he was suspended. He said that he instructed Mtembu to meet with the Applicant and it was confirmed that such a meeting was held when the notice of suspension was given to the Applicant.
31. It was put to him that his version was not put to the Applicant during cross-examination to respond and that it is therefore unfair to accept his version. According to him, that was the duty of Respondent's representative.

Heads of argument

32. The Applicant's argument states in summary:

32.1 The precautionary suspension is unfair because (a) it is excessive and (b) there are no fair reasons for the suspension as the allegations leading to his suspension are baseless and untrue.

32.2 His suspension is excessive in that he is currently on suspension for 13 months and 15 days. This is in contravention of clause 7.2(c) of the Resolution. The Respondent should have held the disciplinary hearing within a month of the suspension and did not. The investigations were finalised when he was issued with the charge sheet and the first disciplinary hearing convened. Therefore, there was no reason for him to remain suspended.

32.3 The Respondent has failed to put version of the DG to the Applicant when the Applicant was cross-examined; hence it follows that it would be unfair to consider the evidence of the DG at all. See **Ngululu Bulk Carriers (Pty) Ltd v Mokhawane & others case number (JR2459/17) [2019] ZALCJHB 178 ("Ngululu")**.

32.4 Having regard to the *Public Service Precautionary Suspension Guide, of the Department of Public Service and Administration* ("the DPSA guidelines"), the Respondent has breached the peremptory clauses of the Resolution when it failed to hold the disciplinary hearing timeously. See **Schierhout v Minister of Justice 1926 AD 99 ("Schierhout")**; **Denel (Pty) Ltd v DPG Voster (13/2003) [2004] ZASCA 4 (5 March 2004) ("Denel")** and **SAMWU obo Jacobs v City of Cape Town and Others (C701/13) [2014] ZALCCT 25**.

32.5 The Applicant is entitled to compensation given his unfair suspension, because he has since developed anxiety and stress and is on anti-depression medication. His family life is negatively affected and is reputation damaged.

33. The Respondent's argument states in summary:

33.1 The Applicant has failed to prove his case on a balance of probabilities that the suspension was (a) without any bias and (b) excessive under the circumstances. The Respondent has complied with the relevant provisions of the Resolution with reference to clauses 7.2(a)(i)&(ii).

33.2 Nowhere in the Resolution is there any timeframe set for how long the suspension should last. Having complied with the peremptory provision to hold the disciplinary hearing within 60 days of the suspension, it was now out of the hands of the DG as to what happens further with the suspension, but it was now in

the hands of the chairperson of the disciplinary hearing. See ***Tsietsi v City of Matlosana Local Municipality (2015) 7 BLLR 749 (LC) (“Tsietsi”)***. The length of the suspension will therefore depend largely on the length of the disciplinary hearing unless the chairperson of the hearing decides otherwise.

- 33.3 The Applicant is not entitled to compensation as he is author of his own misfortune and should stand and fall by his actions.
- 33.4 The DPSA guidelines are mere guidelines which should not have a bearing on the Resolution entered into between the parties. Therefore, a failure to follow the guidelines is not fatal for the Respondent’s case.
- 33.5 The Applicant has to prove his case on a balance of probabilities. It follows its case should reach a particular threshold to pass master and if it fails, he cannot blame his failure to properly cross-examine the DG on the assertion that the DG’s version was not put to the Applicant. The Respondent has nothing to prove, that is on the shoulders of the Applicant. The Respondent only bears a duty rebuttal, which was not really necessary in this matter.

Analysis of evidence and argument

34. Section 186(2)(b) of the LRA states:
‘Unfair labour practice’ means any unfair act or omission that arises between an employer and an employee involving –
(b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;
35. It is settled law that unfairness implies a failure to meet an objective standard and may include arbitrary, capricious or inconsistent conduct whether negligent or intended. An employee who alleges that he is the victim of an unfair labour practice bears the onus of proving all the elements of his claim, on a balance of probabilities. The employee must not only prove the existence of the disputed practice, but also that it is unfair.
36. Clause 7.2 of the Resolution styled as ‘Precautionary suspension’ reads as follows:
- (a) The employer may suspend an employee on full pay or transfer the employee if:*
(i) the employee is alleged to have committed a serious offence; and
(ii) the employer believes that the presence of an employee 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 of this kind is a precautionary measure that does not constitute a judgement, and must be on full pay.*
- (c) *If an employee is suspended or transferred as a precautionary measure, the employer must hold a disciplinary hearing within one month or 60 days, depending on the complexity of the matter and the length of the investigation. The chair of the hearing must then decide on any further postponement.*

37. I start my analysis by noting that I am confronted with two mutually destructive versions. The Applicant's claim is that his suspension is unfair, because it is based on false allegations and not in compliance with clause 7.2 of the Resolution given its excessive duration. On the other hand, the Respondent's case is that the Applicant's suspension is fair and in compliance with clause 7.2 of the Resolution.

38. It is settled law that a precautionary suspension, even though it is not disciplinary action, can still be an unfair labour practice, if there is no fair reason for it, if it causes undue prejudice to the employee, or if it endures inordinately long without proper explanation for the duration. I will now apply these principles in my analysis of the relevant evidence and arguments hereunder.

39. The first issue to decide is whether there is a fair reason for the suspension. In ***Edumbe Municipality v Putini and Others (DA20/16) [2019] ZALAC 74*** the Court at par. 38 held as follows:

...This is because an employer is not required to prove the guilt of an employee in an unfair labour practice dispute concerning the question of whether an employee's suspension in (sic) procedurally and substantively fair. The employer is only required show that at the time of suspending the employee there were allegations that he or she had committed serious offence/s and the employer reasonably believed that the employee's presence at the workplace might jeopardize the investigation or endanger the well-being or safety of any person or property.

40. Denning MR in ***Lewis v Heffer & others 1978 (3) All ER 354 (CA)*** ("**Lewis**") held:

Very often irregularities are disclosed in a government department or in a business house; and a man may be suspended on full pay pending enquiries. Suspicion may rest on him; and he is suspended until he is cleared of it. No one, as far as I know, has ever questioned such a suspension on the ground that it could not be done unless he is given notice of the charge and an opportunity to defend himself and so forth. The suspension in such a case is merely done by way of good administration. A situation has arisen in which something must be done at once. The work of the department or office is being affected by rumours and suspicions. The others will not trust the man. In order to get back to proper work, the man is suspended. At that stage the rules of natural justice do not apply... (at 364 c-e) [my underlining]

41. From both the **Putini** and **Lewis** judgments referred to above, it is clear that the threshold for the substantive fairness of the precautionary suspension is very low. It follows that, given the very low threshold for substantive fairness, an employee claiming unfair suspension must set out his case in sufficient detail to pass muster in relation to substantive fairness and should not merely rely on unsubstantiated accusations and statements.
42. The Applicant's main contention as reflected in his heads of argument is that the evidence of the DG should not be considered at all, because his evidence was not put to the Applicant under cross-examination. [my emphasis] In this regard, the Applicant relied in the main on the judgment in **Ngululu**.
43. It is a trite principle that the purpose of a proper cross-examination is to place a one-sided version, which often results from examination-in-chief, into proper perspective by eliciting facts which places a different complexion on the matter, or by demonstrating that the witness is untruthful. Similarly, it is also a trite principle that 'he who asserts, proves and not he who denies, since a denial of fact cannot naturally be proved provided that it is fact that is denied and that the denial is absolute. The onus is on the person who alleges something and not on his opponent who merely denies it'. The onus can never shift from the party upon whom it originally rested – what may shift is the evidential burden, i.e. the burden of adducing evidence in rebuttal.
44. The notice of precautionary suspension dated 6 June 2019 provides *inter alia* that the suspension of the Applicant is *with full pay pending the finalization/outcome of investigations into the alleged misconduct which inter alia involves the irregular/unlawful award of bursaries and payments to students and the Applicant himself. The Applicant's suspension is occasioned by the seriousness of the allegations and to allow investigations to continue without any hindrance and concern that the Applicant's presence may endanger the administration*. It must be noted that the notice of disciplinary hearing dated 29 July 2019 mirrors the same allegations stated in the notice of suspension albeit in more detail.
45. In the matter before me, the case made for the Applicant seeks to have allegations of misconduct contained in the notice of precautionary suspension presented in such detail so that he can virtually plead in relation thereto. I am alive to the judgment in **Nothnagel v Karoo Hoogland Municipality and others C431/12 ("Nothnagel")** where the Labour Court said in explaining the municipality's apprehension that an employee might jeopardize an investigation that repetition of the words of the Regulation is not enough but that a basis for these fears has to be set out "i.e. why they had reason to believe that the applicant's presence at the workplace may lead to any of these consequences".
46. In this regard, the Court in **Tsietsi** pointed out that the judgment in **Nothnagel** should not be understood to amount to propositions that (a) *the particularity of the allegations of misconduct must be of such detail*

as to allow for the setting out of a defence in response thereto and (b) that a party must set forth evidence to show that the person involved may interfere in the conduct of the investigation against him or herself.

47. Given the above, I am satisfied that the version that was put to the Applicant during his cross-examination is sufficient to escape the Applicant's claim made in reference to the **Ngululu** judgment. This is because the version that was put to the Applicant regarding the contents of the notice of precautionary suspension with reference to the nature and seriousness of the allegations; the Respondent's prerogative to suspend an employee and the legal authority of the DG to suspend employees, is on the face of it sufficient to give context and content to the subsequent evidence of Ralikontsane which revolved and extend around the notice of precautionary suspension under his signature and personal knowledge.
48. I have observed both witnesses and have no reason to doubt their credibility and reliability. The Applicant, apart from being emotional at times and understandably so, was a good witness. However, in my view, he missed the opportunity on his own version, to penetrate the issue to show that the decision to suspend him was unfair, bearing in mind that he bears the onus to prove all the elements of his case. It was not good enough to simply indicate that it was not his duty to award and/or pay bursaries. He had the duty to show that apart from him not being responsible for the awarding and payment of bursaries that he was not capable of influencing the outcome of the said processes, directly or indirectly. He failed to submit documentary evidence, e.g. his performance agreement to substantiate his claim that it was not part of his duties to award and/or to pay bursaries whereas he did so to support his claim regarding his medical condition post his suspension.
49. His evidence that Mtembu told him that he does not know the reasons for his suspension as it was done by the DG is based on hearsay and of little probative value. There is no evidence to show cause why Mtembu was not called as a witness. The fact that the Applicant did not call Mtembu as a witness to confirm his role and responsibility in the said processes has tilted the probabilities in favour of the Respondent. This is because the only plausible inference to be drawn from this omission is that Mtembu would not have supported his version, because Mtembu did explain to him the grounds for suspension when he presented the Applicant with the notice of precautionary suspension on 7 June 2019.
50. There is no evidence to show that the suspension was 'trumped up', politically inspired or unrelated to the allegations stated in the notice of precautionary suspension. His failure to appreciate, at least subjectively, the seriousness of the allegations as per the notice of precautionary suspension came back to haunt him in terms of his claim that the suspension negatively affected his health and family life. If, indeed the allegations were not serious on his own version, he had no reason to be concerned.

51. For the sake of completeness, I now turn to the other relevant issues raised by the Applicant in his heads of argument. Firstly, the Applicant referred to the judgment in **Schierhout** claiming that the Respondent disregarded statutory provisions which is fatal for the validity of the proceedings affected with regards to the DPSA guidelines. I respectfully disagree. I concur with the Respondent that the guidelines are mere guidelines and does not replace the collective agreement between the parties. In any event, I am satisfied that the disciplinary hearing was held within 60 days which is in compliance with clause 7.2(c) of the Resolution. Simply put, the yardstick for compliance is the Resolution, not the DPSA guidelines.
52. Secondly, I am not convinced that it was an abuse of power for the DG to suspend the Applicant. Besides the fact that the claim is unsubstantiated, the Applicant accepted the version under cross-examination that the DG is the Accounting Officer of the Respondent and that it is the prerogative of the Respondent to suspend an employee provided it is done within the prescripts of the law. I am persuaded by the well-announced argument and explanation of the Respondent that the DG's powers are derived from the Public Service Act 104 of 1994 as amended ("the PSA") read with its regulations. There is no proof that other employees in a similar position as the Applicant were suspended by officials other than the DG.
53. The Respondent's witness, Ralikontsane, was an impressive witness in that his evidence was clinical, clear and objective. He remained calm, composed and focused under cross-examination. His evidence regarding his legal authority to suspend the Applicant was persuasive in that it was supported by the relevant legal framework, unlike the unsubstantiated claim made by the Applicant that the DG abused his powers in suspending him. I have no reason to believe that he had ulterior motives when he decided to suspend the Applicant. This became evident in the remark of Mr Fandie at the end of cross-examination when he commented that Ralikontsane is still referring to the Applicant as 'his colleague'.
54. I accept his version that the disciplinary hearing was held within 60 days as provided for in the Resolution and that the hearing is currently part-heard. However, I am unpersuaded with his explanation regarding the length of suspension, in that it was left to the chairperson of the hearing to decide on whether the Applicant should remain on suspension. I say so, because on his own version he confirmed that he legally placed the Applicant on suspension and by so doing determined the conditions of the suspension. He was obligated to apply for the extension of the suspension. In my view, he was clearly let down by the representative who failed to apply for extension of the suspension during the first disciplinary hearing as per his evidence under cross-examination.
55. Given the above, I find that the Applicant, on a balance of probabilities, has failed to discharge the onus that the precautionary suspension is not for a fair reason.

56. Having found that the reason for the suspension is fair, I now turn to whether the Applicant suffered any prejudice in relation to the suspension. The Court in **Mosiane v Tlokwe City Council (2009) 30 ILJ 2766 (LC)** (“**Mosiane**”) said:

...All employees who get dismissed or suspended and believe that they are innocent, have their reputations tarnished by their dismissals or suspensions. They will eventually get an opportunity to be heard where the employer should justify the charges against them. Should they fail to do so, such employees will be reinstated with no loss of benefits. I accept that some damage to their reputations would have been done. This court however is not in the business of ensuring that an employee's reputation should not be tarnished. If so, it will open the flood gates... [my emphasis]

57. It is settled law that where a precautionary suspension is on full pay, the prejudice flowing from the action is significantly contained and minimized. See also the **Lewis** judgment referred to above and the **Gradwell** and **Long** judgments below. It is common cause that the Applicant's suspension is on full pay. I am satisfied that the suspension is precautionary and that there are no extra-ordinary circumstances which show that the suspension prejudiced the Applicant. The evidence of the Applicant regarding his medical condition and damage to reputation fall within the band of cases referred to in the **Mosiane** judgment referred to above.
58. Given the above, I find that the Applicant, on a balance of probabilities, has failed to discharge the onus that he suffered prejudice in relation to the suspension.
59. The last issue to determine is whether the Applicant's precautionary suspension is excessive. In **Member of the Executive Council for Education, North West Provincial Government v Gradwell (2012) 33 ILJ 2033 (LAC)** (“**Gradwell**”), the Court at par. 44 held that:

...When dealing with a holding operation suspension, as opposed to a suspension as a disciplinary sanction, the right of a hearing, or more accurately the standard of procedural fairness, may legitimately be attenuated, for three principal reasons. Firstly, as in the present case, precautionary suspension tend to be on full pay with the consequence that the prejudice flowing from the action is significantly contained and minimized. Secondly, the period of suspension often will be (or least should be) for a limited duration. The SMS handbook for example imposes a 60-day limitation. [my emphasis] And, thirdly, the purpose of the suspension – the protection of the integrity of the investigation into the alleged misconduct – risks being undermined by a requirement of an in-depth period of operation are in place, the balance of convenience in most instances will favour the employer...

60. It must be noted that the wording used in the SMS handbook is the same as in clause 7.2(c) of the Resolution. In light of the **Gradwell** judgment, I find it more probable than not that the suspension of the Applicant of more than 13 months is excessive. In this regard, I agree with the Applicant that the duration of his suspension is link to the finalization of the investigations as per the notice of precautionary suspension. It is common cause that the investigations into the alleged misconduct were finalised at the commencement of the first disciplinary hearing, i.e. 6 August 2019.
61. The Respondent submitted in argument that having complied with the peremptory provisions of the Resolution 'it was now out of the hands of the DG as to what happens further with the suspension, but was now in the hands of the Presiding Officer of the disciplinary hearing'. I am unpersuaded that it was 'out of the hands of the DG', because it must be born in mind it was the DG who set the condition of expiry of the suspension as "pending the outcome of investigation". The DG could have thrown the net wider by saying until the finalization of the disciplinary hearing. He did not. In my view, suspension as per clause 7.2(c), falls away after the 60 (sixty) days unless the chairperson of the disciplinary hearing extends that period on application, and not automatically as implied by the Respondent.
62. It follows that the onus was on the Respondent to make application to the chairperson of the disciplinary hearing for the suspension to be extended following the expiry of 60 days referred to above. There is no evidence before me that such an application was made which confirms the Applicant's uncontested version that he was not provided with a reason why he should remain suspended. Even in these proceedings, no plausible explanation was given for (a) the Applicant's seemingly protracted suspension and/or (b) why the Applicant should remain suspended. Absent a plausible explanation, it is more probable than not that the Applicant was unceremoniously marginalised which is an unfortunate practice, not foreign to some employers in the public service. See **Mogothle v the Premier of the North-West and Another (J2622/08) [2009] ZALC 1** at par. 38.
63. In the circumstances, I find on a balance of probabilities that the decision (act) by the Respondent to suspend the Applicant in excess of 60 days after the investigations were finalised and its omission to apply for extension of the suspension and to provide the Applicant with an explanation for the ongoing duration is arbitrary and amounts to an unfair labour practice as contemplated by section 186(2)(b) of the LRA.
64. The relief sought by the Applicant is twofold: (a) the suspension to be uplifted and (b) compensation for damage to his reputation and negative impact on his health. Guided by section 193(4) of the LRA, I find that the setting aside of the precautionary suspension of the Applicant is an appropriate relief as it carries no risk for the disciplinary hearing or the workplace, because potential risks, at this point

in time, have been attenuated by the effluxion of time in terms of the finalised investigations. I have also considered the nature of the allegations as well as the silence of the Respondent regarding the possible return of the Applicant to work.

65. The Constitutional Court in ***Long v South African Breweries (Pty) Ltd and Others (CCT61/18) [2019] ZACC 7 (“Long”)*** held that:

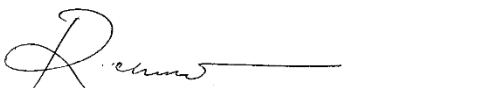
Generally where the suspension is on full pay, cognisable prejudice will be ameliorated. The Labour Court’s finding that the suspension was precautionary and did not materially prejudice the applicant, even if there was no opportunity for pre-suspension representations, is sound.

66. I find that the Applicant is not entitled to compensation as a form of *solatium*, because there is no evidence of extra-ordinary circumstances which show that the suspension prejudiced the Applicant. His suspension is precautionary and with full pay. I have also taken into consideration that the Applicant’s suspension is unfair only in relation to its excessive duration.

67. Accordingly, I make the following award and order:

Award

68. The Respondent, the Office of the Premier – Free State, has committed an unfair labour practice as contemplated in section 186(2)(b) of the LRA.
69. The Respondent, the Office of the Premier – Free State, is hereby ordered to uplift the Applicant’s precautionary suspension dated 6 June 2019 with immediate effect and allow the Applicant, Lebogang Lesiu, to resume his duties as Deputy Director: Bursaries, pending the finalization of his disciplinary hearing. The Applicant is not entitled to compensation.
70. The Applicant, Lebogang Lesiu, must report for duty within 48 hours of becoming aware of this award.



William Richard Pretorius

(GPSSBC Arbitrator)