ARBITRATION AWARD

PHSDSBC
PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL

COMMISSIONER: **ARNE SJOLUND**
CASE NO: **PSHS89-16/17**
DATE OF AWARD: **19 JULY 2018**

In the matter between:

ENGELA VAN DER LINDE APPLICANT

and

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT RESPONDENT

DETAILS OF HEARING AND REPRESENTATION

1. This matter was set down for an arbitration hearing by the Public Health and Social Development Bargaining Council ("PHSDSBC") and was heard over several days as outlined below. On all days the hearing took place at the Department of Justice and Constitutional Development's offices situated in the Schreiner Chambers, Cnr Kruis & Prichard Street, Johannesburg.

2. On 21 July 2016 Adv Lamprecht ("Lamprecht") on instruction from Niewoudt of Spector Attorneys represented Ms van der Linde (hereinafter referred to as "the applicant"). The Department of Justice and Constitutional Development (hereinafter referred to as "the respondent") was represented by Adv Nkosi ("Nkosi"), employed by the respondent. On 21 July 2016

matter could not proceed as the respondent had previously agreed to provide the transcripts of the disciplinary hearing to the applicant party but had failed to do so. Issues were narrowed, and the parties agreed to have the matter heard on 18 and 19 August 2016. An agreement was also reached to have the applicant's possessions ("tools of her trade") returned that were kept by the respondent when she was suspended.

3. On 18 August 2016 when the matter was again set down for arbitration the parties agreed to revert to conciliation. Concerted efforts to resolve the matter were made, where another matter involving an alleged unfair suspension dispute brought by the applicant would also be settled. On 19 August 2016 a draft settlement was discussed and presented to the respondent. Nkosi requested time for the settlement to be presented to the Director General ("DG") for approval. It was agreed that should the DG not approve the settlement the matter would be place back on the roll. The applicant once again made a plea to the respondent to have her belonging returned.

4. When no settlement was forthcoming from the respondent the applicant requested that the matter be re-scheduled. The matter was then scheduled to be heard on 13 January 2017. On 13 January 2017 Nkosi failed to appear at the scheduled start time of the arbitration hearing or within one hour. After inquiring from the respondent's offices and the PHSDSBC of the whereabouts of Nkosi, Mr Ledwaba ("Ledwaba") an Acting Director, employed in the respondent's regional human resources department appeared. He submitted that Nkosi failed to report for duty and that an internal process was underway regarding Nkosi. He then made an application to postpone the matter. Ledwaba submitted that he only became aware of this matter during the same week and at a meeting held by the respondent it was decided that he should make an application for postponement. Postponement was opposed by the applicant party. Lamprecht submitted that Ledwaba had received the notice of set down on 06 December 2016 and that cost should be ordered against the respondent for not complying with the PHSDSBC rules. In the interest of justice

postponement was granted as it was clear that Ledwaba would be unable to proceed with the matter. The issue of cost was reserved.

5. On 20 March 2017 the matter was again set down for arbitration where Ledwaba arrived about an hour late and then left where he took another 20 minutes to "collect his witnesses". The matter then proceeded but could not be finalized and was adjourned due to time constraints.

6. On 22 March 2018 the matter proceeded where Ledwaba again arrived about 15 minutes late where after he requested time to go and collect his documents, he returned later where after the Lamprecht raised a point *in-limine.* Lamprecht submitted that cost should be ordered against the respondent for unnecessary delaying the process as the matter was previously postponed in order for the respondent to get their documents in order. The respondent submitted that the copiers were serviced by an external company and that the issue was out of his control. The issue for cost was reserved. The matter proceeded but could not be finalized due to time constraints.

7. On 23 June 2017 when the matter was again set down it was also established that the bundles of documents were not complete as there were blank pages and the numbering did not correspond. It was agreed to continue and that the respondent would arrange for the bundles to be corrected. Ledwaba then stated that their witness Ms Madike ("Madike") was pre-occupied and that the respondent was not ready to proceed and that we had to wait for another witness that was on his way. A ruling was made where after Madike came to testify.

8. On 17 August 2017 Adv Jacobs ("Jacobs") instructed by Zakeer Salooje Attorneys appeared on behalf of the applicant. Jacobs submitted that Lambrecht had withdrawn from the matter and that she was now representing the applicant. She submitted that she had not received all the documents. She however had the recordings of the previous sittings. The respondent submitted that they did not have the resources to copy all the bundles. The parties then agreed to revert to conciliation and the possibility

of settlement was again discussed. Ledwaba submitted that he would require two months the prepare a motivation and obtain a settlement from the DG, Mr Madonsela. On 18 August 2018 after the details of the settlement were further discussed the matter was postponed *sine die* with the understanding that should no settlement be obtained within two months the matter would be placed back on the role.

9. When the respondent failed to revert to the applicant party the matter was re-scheduled for 05 July 2018. On 5 July 2018 Ledwaba arrived about 30 minutes late after Jacobs went and called him. On his arrival he made an application for proponent, he submitted that he had another part-heard matter scheduled at the GPSSBC under case number GPBC2342/2016. He testified that the respondent was not filling vacancies and that they had a capacity problem as he had to deal with the matters. Jacobs opposed the postponement application and submitted that the respondent had failed to comply with the PHSDSBC rules in applying for postponement and that postponement should be refused. She further submitted that they had contacted the GPSSBC and was informed that the matter Ledwaba was referring to was not part-heard. She also submitted that when the respondent failed to revert to them regarding the settlement within the two months as previously agreed, she during September 2017 inquired from the office of the DG whether the settlement proposal had been considered, she was advised that no such proposal was ever received by the office of the DG. Ledwaba did not dispute this allegation but submitted that the matter set down at the GPSSBC was part heard. Postponement was refused as the matter at the GPSSBC was set down for two days and should Ledwaba have arrived on time there was still a possibility that he could attend to the 1st day of the two-day matter at the GPSSBC. I also considered that the matter had been previously postponed by the respondent where they also failed to comply with the PHSDSBC rules. Ledwaba then closed the respondent's case and requested time to go a collect his bundles of documents. The matter then proceeded more than an hour after the scheduled start time and was concluded on the same day.

10. Five bundles of documents were submitted into evidence and utilized during the arbitration hearing market bundle (A pages 1 – 203), (B pages 1 – 275), (B-1 the Public Service Act), (C pages 1 - 258) and (D pages 1 to 43).

11. The hearing was conducted in English and was digitally recorded.

12. The matter was finalized on 05 June 2018 where after the parties agreed to submit their closing arguments in writing to the PHSDSBC by 12 July 2018. The closing arguments from both parties were only received on 13 July 2018 but considered in my award.

ISSUE TO BE DECIDED

13. This matter is brought in terms of section 191(1) [191(5)(a)] of the Labour Relations Act 66 of 1995, as amended ("LRA") and relates the dismissal of the applicant due to misconduct.

14. The applicant disputed the procedural fairness of her dismissal and submitted that she was not allowed to call an expert witness at the disciplinary hearing. Seven charges were brought against the applicant. It is the respondent's submission that the applicant was found guilty on charge 5, and the alternative to charged 5. It is the applicant's case that she is not guilty on the charges brought against her (A: 43 – 46) which reads as follow:

[Quote]

> *CHARGE 5 : You are charged with misconduct of FAILURE TO DISCLOSE, in that on or about the 1st January 2014 or any period incidental thereto, you failed to disclose your private business interest to the Director General, Deputy Director General or Office Head/supervisor for approval whereas you continue to practise at your own account, while you know that you are employed/ contracted to the DOJ/CD, while you knew or ought to have known that it is wrong to do so.*

ALTERNATIVE TO CHARGE 5: You are charged with misconduct of FAILURE TO DISCLOSE, in that on or about the 1st January 2014 or any period incidental thereto, you continue to practise as a private Social Worker wherein fees were payable to you without obtaining prior approval or permission to do so from the Director General, Deputy Director General or Office Head/ Supervisor, while you knew or ought to have known that it was wrong to do so.

[Unquote]

15. I am tasked to determine whether the dismissal of the applicant by the respondent was procedurally and substantively fair, and should I find in favor of the applicant order the appropriate relief.

BACKGROUND TO THE ISSUE

16. The applicant was employed by the respondent on 2 February 2014 as a Social Worker and placed on precautionary suspended on 20 April 2015. The applicant was issues with a notice to attend a disciplinary hearing on 1 June 2018 and dismissed on 16 October 2015. Her dismissal was confirmed on 30 March 2015. At the time of her dismissal she was earning a salary of R24 636-20. The applicant is seeking compensation as relief.

17. The respondent's main strategic goals are to, enhance organisational performance on all aspects of administration in line with set standards, and meeting and exceeding the needs and aspirations of key stakeholders; facilitate the (effective and efficient) resolution of criminal, civil, and family law disputes by providing accessible, efficient and quality administrative support to the courts; and effectively and cost-efficiently provide state legal services that anticipate, meet and exceed stakeholder needs and expectations.

SURVEY OF EVIDENCE AND ARGUMENT

18. It is not the purpose or the intention of this award to provide a detailed transcription of all the evidence that was placed before me even though all evidence and arguments were considered. I have summarised the evidence that I found to be the most relevant to decide in this dispute.

Respondent's Case:

19. Adv Nameng ("Nameng") testified on 20 and 22 March 2018. She testified that she is appointed by the respondent as a Senior Advocate and had been employed with the respondent since 2009. She testified that she is responsible for the management of day-to-day operations of the Family Advocate. The mandate of the Family Advocate is to protect the best interest of minor children in disputes where minor children are involved. She testified that she was part of the selection panel when the applicant was interviewed, during the interview the applicant stated that she had closed her private practice when asked by the panel and that the applicant was dishonest. Later; after the applicant was appointed the respondent became aware that the applicant was conducting private business. After requesting and obtaining guidance she decided to suspend the applicant. Nameng testified that the applicant after being requested provided a list with the matters she was still busy with but some of the matter she was involved with was not on the list. She could recall the van der Merwe matter. During their investigation they discovered invoices for work that was done by the applicant. She testified that in terms of the Public Service Act employees were not supposed to perform work outside of the public service unless prior approval was obtained. During cross-examination Nameng was questioned whether she was an admitted Attorney of the High Court and she knew what it meant testifying under oath, she testified that she was an admitted Attorney of the High Court and understood what it meant testifying under oath. She also testified that at the disciplinary hearing of the applicant she testified under oath. When questioned what the applicant was charged for she testified that the applicant was charged for failing to disclose her private work. When directed to the bundle of documents she testified that the applicant was not charged for performing remunerated work and was found not guilty on the alternative to charge 5. Nameng testified that the applicant never disclosed her private business. When Nameng was directed to (B:

169) she testified that it was matters the applicant was wrapping up. When questioned where the rule was that permission had to be obtaining to do private work Nameng testified that it was on the respondent's intranet, she conceded that she did not provide the policy to the applicant. Nameng was questioned as to where the applicant had to obtain approval to do private work, she testified that it was the Executive authority who she believed was the DG. Nameng was questioned whether she lodged a complaint against the applicant at the Council for Provisional Conduct on 1 February 2017, she conceded that he had and that the complaint against the applicant was for corruption. She also conceded that the applicant was not dismissed for corruption. Nameng when questioned whether she was aware that the applicant was wrapping up some of the matters that were not concluded, she agreed. She also testified that the applicant had provided a list of matter she was busy wrapping up to the respondent on 19 February 2018. Nameng was directed to the bundles of documents where she (Nameng) testified at the disciplinary hearing that the applicant stated that she would be closing her private practice, during her job interview.

20. Ms Madike ("Madike") testified that she is appointed as Family Counsellor Supervisor by the respondent and that she was the applicant's direct supervisor. She testified that the applicant was appointed as the Family Counsellor and that she was a panel member when the applicant was interviewed for the job. She testified that the applicant was dishonest during her interview where she stated that she had closed her private practice. She testified that she had sent the applicant an email after the applicant failed to send her a list of matters she was still busy with. Madike testified that the applicant attended induction where the policy regarding work outside the public service was explained. On 23 June 2017 when the arbitration hearing continued proceeded Madike testified that the applicant stated that she would close down her private practice. She testified that she became aware that the applicant was still in private practice when she (the applicant) sent her a SMS that she was off sick, but she would come to the office to assist with the van der Merwe case. She testified that she reminded the applicant that's she should close her private practice as the applicant during her interview stated that she would close her private practice. When

questioned on which charges the applicant was found guilty on, she testified that the applicant was found not guilty to the alternate charge to charge 5. When directed to the bundles, Madike could not provide any proof that the applicant received remuneration for private work whilst employed with the respondent.

Applicant's case:

21. The applicant testified that she applied for the position of Family Councilor and was interviewed during 2013. She previously had her own private practice and stated working for the respondent on 02 January 2014. At this time she had closed her private practice but there were cases she had to wrap up. The fact that she was in private practice was included in her CV. She testified that she never failed to disclose the cases she was busy finalizing and on 19 February 2014 she wrote a note to Madike with all the cases she was busy with and in the process of closing. She also discussed the matter she was still busy with Head Office. She testified although she had started with induction she was removed as there was a need of an Afrikaans Councilor and she immediately started working. She testified that Nameng and Madike came to her office on 20 April 2015 and handed her a suspension letter. They confiscated her computer and memory stick and she was escorted by security from the building. At the time her personal belonging was kept by the respondent. This included the tools she needed to practice as a Counselor. The applicant disputed receiving any remuneration for private work whilst employed with the respondent. During cross-examination the applicant was asked if she had disclosed that she was still busty with private matter, she testified that the issue was discussed at her interview and during meeting thereafter, she also provided the respondent with a list of matter she was busy wrapping up. When asked about the policy to disclose she testified that she had approached Nameng and Madike on for had to be completed to disclose but they did not know, she also went to human resources.

ANALYSIS OF EVIDENCE AND HEADS OF ARGUMENT

22. It is the applicant's case that her dismissal was procedurally unfair due to the respondent refusing her to call an expert witness at the disciplinary hearing. No evidence was placed before me regarding this issue during the arbitration hearing. The respondent submitted that the applicant's dismissal was procedurally fair. Under the circumstances I find the dismissal of the applicant by the respondent procedurally fair.

23. It is the respondent's case that the applicant conducted private work outside the public service whilst she knew she was supposed to obtain permission to do so. It is also their case that the applicant failed to disclose the private work. It is the applicant's case that she had disclosed what cases she was busy with and that she was not aware of the requirements of the Public Service Act on how to disclose. I am faced with two mutually destructive versions in this matter. In the matter of *Cooper and another v Merchant Trade Finance Ltd* 2000 (3) SA 1009 (SCA) the Court found that the approach to be adopted when inference is sought to be drawn from other facts was summarized. The Court in drawing inferences from the proved facts, acts on a preponderance of probability. The inference of an intention to prefer is one in which is on a balance of probabilities the most probable although not necessary the only inference to be drawn. If the fact permits of more than one inference the Court must select the most plausible or probable inference. If it favors the party on whom the onus rests, he is entitled to relief. If on the other hand an inference in favor of both parties is equally possible, the party who bears the onus will not be entitled to relief.

24. I will first deal with the alternative to charge 5 brought against the applicant. Both Nameng and Madike, during cross-examination testified that the applicant was found not guilty on this charge. This is also confirmed in the Chairpersons finding (D: 7), where it states, "it is not necessary to make a finding on the alternative to charge 5 due to my finding on the main charge therein". I therefore find the applicant not guilty on the alternative to charge 5 which deals with the issue of alleged fees that were payable to the applicant. Even if this was to be considered this element of the charge no

evidence was placed before me that the applicant received money for the cases she had done after being appointed by the respondent.

25. Charge 5 brought against the applicant relates to the applicant misconducting herself by failing to disclose her private business interest to the DG, Deputy DG, or her office head, supervisor for approval where the applicant, knew or should have known to do so. During the arbitration hearing Nameng and Madike testified that the applicant during her interview stated that she had closed her private practice and she was therefore dishonest. The applicant testified that she had closed her private practice and had to conclude matter she was still busy with. The fact that the applicant had to conclude the matter she was still busy with was not disputed. The testimony of Nameng and Madike changed during the arbitration hearing where they after testifying during evidence in chief that the applicant stated during the interview that *she had closed* her private practice during cross-examination testified that the applicant *agreed to close* her private practice. Also, it would appear that during the disciplinary hearing their testimony also remained inconsistent and contradictory. Bundle (C :148) Nameng testifies that "she (the applicant) indicated that she is closing her private practice". Bundle (C: 172) Nameng testifies that "she made an undertaking that she is closing her private practice". Bundle (C: 181) Nameng testified that "she was wrapping up the list of matter she gave us". Although there are many inconsistencies in the testimony of the respondent's witnesses on this issue, the applicant was not charged for not closing her private practice, she was charged for failing to disclose her private business interest. Madike testified that the applicant was inducted and knew what process to be followed when applying to do work outside the public service. Nameng and Madike referred to the Public Service Act which states:

"The Authority to approve that an employee may perform remunerated work outside employment in the Public Service has been delegated to the Deputy-Director-General. For an employee to perform remunerative work outside employment in the Public Service, prior authorization must be obtained in accordance with section (b) of the Public Service Act, 1994".

26. It is common cause that this clause relates to remunerated work outside of the public service, for which the applicant has been found not guilty. The guidelines in cases of dismissal for misconduct as enshrined in the LRA states that, “any person who is determining whether dismissal for misconduct is unfair should consider, (a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to the workplace, (b) whether the rule or standard was contravened, and (ii), whether the employee was aware, or could reasonably be expected to have been aware, of the rule or standard”.

27. The Public Service Act *supra* paras 25 states that the employee must obtain permission from the *executive authority* of the department. During the arbitration hearing Nameng when questioned who the executive authority was found it difficult to explain but concluded that it was DG. In closing Ledwaba also submitted that the executive authority was the deputy DG. The aforementioned clause however states that permission must be obtained from the Deputy DG. It can be concluded when the charges were drawn up the respondent themselves did not know from who the executive authority must be as the charges state that the applicant should have obtained approval from *the Director General, Deputy Director General or Office Head/supervisor*. The respondent also failed to dispute the applicant’s testimony that she had not completed her induction and was not aware of this provision. I therefore find that the applicant was not and could not have been aware of the rule to disclose and private business to the Deputy DG. The applicant therefore did not break the rule presented by the respondent. The applicant although not being aware of the provision of the Public Service Act made the respondent aware during her interview of the matter she still had to conclude, and in subsequent meetings. She also presented them with a list on 19 February 2014 with the cases she was wrapping up, matters brought over from her private practice. One would expect that Nameng, who stated that her responsibility was to protect the interest of the child would understand that the applicant could not just abandon the matters she was busy with.

28. In establishing guilt on charge 5 brought against the applicant I have considered the reliability of the witnesses. The testimony of Nameng and Madike remained inconstant, evasive and contradictory. Nameng not only contradicted herself regarding the material fact of this case but testified that she reported the applicant to the Council of Professional Conduct for corruption whilst she knew that the applicant was never charge or found guilty for corruption. The respondent has failed to dispose of the onus to prove that the applicant is guilty on this charge, on the balance of probabilities. I find the applicant not guilty on the charge 5 brought against her. The dismissal of the applicant was therefore substantively unfair.

29. In considering the appropriate relief, it is noted that the applicant submitted that she seeks compensation as relief. In considering compensation that would be just and equitable under the circumstances I will consider the reasons for the dismissal of the applicant, the consequences to the parties, the impact of wrongdoing on the applicant and the conduct of the respondent in undermining the objectives of the LRA. The matter of *Dr. D.C Kemp t/a Centralmed v Rawlins (2009) 30 ILJ 2677B (LAC)* is kept in mind. It should also be noted that this matter is one of the worst I have encountered in terms of the miscarriage of justice where the respondent constantly acted contrary to the purpose of the LRA. Ledwaba in his capacity of Acting Director frustrated and delayed this matter with unnecessary delays as per paras 4 to 9. During the last sitting Ledwaba once against applied for postponement, this after arriving about 30 minutes late, after being called by the Jacobs. He failed to dispute that the motivation for settlement was never handed to the office of the DG. I am of the view that he never intended settling the matter and the purpose of the proposed settlement was to delay the conclusion of this matter. The respondent only released the applicant's possessions (her tools of her trade) after the second siting of the arbitration hearing rendering the applicant unemployable after her dismissal. Nameng, as mentioned above lodged a complaint with the Council of Professional Conduct against the applicant alleging corruption whilst she knew this was not true, impacting on the applicant's reputation and her possibility to find alternative employment. This conduct can only be regarded as vexatious and no plausible reason is provided for her conduct. This very simple matter

that took more than two years to finalize and could have been concluded in one sitting should the respondent arrived on time, their documents have been in order and the witnesses ready to testify. I believe that compensation equal to 12 months of salary would be just and equitable.

30. The issue of cost was raised throughout the arbitration hearing and Jacobs in her closing argument submitted that I should make a punitive cost order. As outlined in this award, was a clear lack of urgency by the respondent in finalizing this matter which failed to give effect to the purpose of the LRA. Although I consider the conduct of Ledwaba sufficient to make a cost order *de bonis propriis*, I have decided to only order cost (arbitration fee) for 13 January 2017. Accordingly, I order as follow:

AWARD

31. The dismissal of the applicant by the respondent was procedurally fair but substantively unfair.

32. The respondent must pay the applicant the amount equal to 12 months of salary amounting to R295 634-40 (R24 636-20 x 12 = R295 634-40).

33. The amount stipulated in paras 31 above must be paid into the applicant's bank account, less applicable statutory deductions not later than 01 August 2018.

34. The respondent is ordered to pay one day of the arbitration fee, the quantum to be determined by the PHSDSBC.

Arne Sjolund

Commissioner