



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Panellist: Advocate Ronnie Bracks

Case No.: PSHS178-12/13

Date of Award: 22 April 2017

In the matter between:

SAEPU obo Kabai MS and 120 others

(Employee)

and

Department of Health- Mpumalanga

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. The Arbitration was scheduled for hearing at the Respondent's premises at its boardroom in Emalahleni on 10 February 2017. The Applicants were represented Adv. MJ Molapo instructed by Baloyi Masango Attorneys while the Respondent was represented by Reckson Khoza – Director Labour Relations. *The proceedings were recorded both manually and electronically.*

ISSUE TO BE DECIDED

- 2 I need to determine the appropriate remedy for the unfair labour practice as directed by an order of the Labour Court under the hand of Honourable Judge Whitcher dated 1 November 2016.

BACKGROUND TO THE ISSUE

- 3 The matter was referred for review by the Labour Court in terms of section 145 of the Labour Relations Act. It was unopposed. The only issue the court had to determine was if the Applicants were entitled to a hearing prior to them being granted the sanction of unpaid suspension for engaging in an unprotected strike.
- 4 On 1 November 2016 the court granted the following order:
- The arbitration award issued by the second respondent under case PSHS178-12/13 is reviewed and set aside.
 - The award is substituted with an award that the third respondent committed an unfair labour practice.
 - The matter is remitted to the first respondent for a different arbitrator to determine the appropriate remedy for the unfair labour practice.
- 5 The matter was set down for hearing as mentioned above when the Respondent indicated that it was not aware of the Court Order and the last they heard was that the matter was still on review and hence they were not ready to proceed. I provided it with the order.
- 6 The Respondent's attention was drawn to the fact that the matter was remitted to be heard by a new commissioner to determine an appropriate remedy. Further that this was an aspect which could be addressed by way of Heads of Argument.
- 7 After a brief debate it was agreed that I would be addressed via heads of argument to be exchanged between the parties on the following dates:-
- 17 February - Applicants to submit their heads.
 - 10 March - Respondent is to respond (*this time is to allow the Respondent to consult as it only became aware of the Order at this hearing*).
 - Final submissions to be done on the 13 March 2017.
- 8 At the time of writing the award only the Applicant had complied with the above dates. It needs to be stated however that the Respondent had filed a Rescission application in the matter on 24 February 2017.

- 9 As the Respondent has failed to comply with the above agreed timeframes without any plausible explanation for its failure I am accordingly proceeding with the award.
- 10 I have considered all the submissions, but because the LRA requires brief reasons (section 138(7)), I have only referred to the evidence and argument that I regard as necessary to substantiate my findings and the determination of the dispute.

SURVEY OF EVIDENCE AND ARGUMENT

EVIDENCE

Documentary

- 11 The order of court was submitted.

***** As noted previously the proceedings were digitally recorded therefore what appears hereunder constitutes a summary of the evidence deduced by the parties in so far as is relevant for the purpose of this arbitration; it is by no means a minute of what transpired in the course of the proceedings.***

Employee's Evidence:

Summary of Employees' Heads of Argument

- 12 The Applicant submitted that:
- 13 It is trite that a collective agreement has the legal effect of forming part of each employee's contract of employment if it is applicable to them.
- 14 Resolution 1 of 2003 applied to all the applicants to this dispute during 2012 and as such the applicants expected in advance that the respondent would treat them in accordance therewith before any sanction, such as dismissal or a sanction short of dismissal could be imposed.
- 15 Respondent in its notice of sanction stated on the subject thereof that the sanction was in terms of Clause 7.4 of the Disciplinary Code and Procedures contained in Resolution 1 of 2003 of the PSCBC.
- 16 The applicant's arguments are premised on the Collective Agreement relied upon above when the decision was taken.

- 17 The arbitrator shall be requested to express in his award what the legal effect of a collective agreement is, in any alleged commission of an offence as well as the role of an impartial chairperson in any disciplinary hearing.
- 18 Respondent's sanction was pre-emptive in that there was clearly no individual investigation of the alleged misconduct and therefore the respondent could not have known what a disciplinary hearing chairperson's sanction would have been.
- 19 Specific reference to clause 7.4 of the PSCBC Resolution 1 of 2003 headed "SANCTIONS", is the applicable disciplinary code and procedure to the applicants. It provides that; "*If the chair finds that an employee has committed misconduct, the chair must pronounce a sanction depending on the nature and seriousness of the misconduct, the employee's previous record and any mitigating and aggravating circumstances*".
- 20 The respondent acted unfairly by not convening a disciplinary hearing before any sanction short of dismissal could be imposed. Clause 5 of the said Resolution provides for the procedures and disciplinary actions to be followed once a form of misconduct is alleged to have been committed by an employee. Item 5.5 of the said clause provides that, "**for less serious forms of misconduct, no formal enquiry shall be held.**"
- 21 Reference was made to various legal authorities but as this are on record it will not be repeated in detail save to state that they were **Administrator, Natal & Another v Sibiya & Another 1992 (4) SA 532 (A) and; Minister of Water Affairs v Mangena & others (1993)14 ILJ 1205.**
- 22 For the overwhelming majority of workers in this country their job is about all they and their families depend upon for a living. If you take away their job, you almost take away their whole being and you subject them, their families and, sometimes, their communities to famine and starvation.
- 23 The respondent's witness's thumb-sucked the reasons why hearings could not be conducted. No actual investigation was conducted to confirm whether or not the hearings could not be conducted at any place of work and no actual incident with a causal connection was cited as the reason for the impossibility.
- 24 In **Hospersa v MEC for Health (D218/03) 2003 LC 89**, the Court stated as follows: that; "there are two mechanisms available to the respondents if employees absent themselves from work without permission. The first is to charge them for misconduct for having breached the Code. Schedule A of the Code includes as an offence: "Absence or repeatedly absenting him/herself from work without reason or permission."
- 25 The second respondent knew the reason for the second applicant's absence from his duties with the respondents. It was in contact with the applicants to process the arbitration and this application.
- 26 The Respondents cannot reasonably infer, in those circumstances, that the Applicants committed misconduct. His absence from the respondents' workplace since 10 July 2003 has been occasioned by the respondents' insistence on applying section 17(5). He has had the protection of the Court against the application of section 17(5) since 1 April 2003.

27 The only sanctions the respondent could have imposed without a hearing under the collective agreement are those under clause 5.1 to 5.6 of Resolution 1 of 2003. The procedures under clause 5 of the collective agreement actually do permit the respondent employer to impose sanctions varying from a verbal warning to a final written warning without a formal disciplinary hearing. The disciplinary actions under clause 5 do not unfortunately include the one under dispute, being the salary suspension of two months;

28 In this instance the arbitrator can order that the respondent impose any of the sanctions under clause 5, yet with effect from 2012, with the effect that any such sanction would have been removed already from their personal files;

29 The applicants seek the implementation of clause 7.4 of Resolution 1 of 2003. The actions of the Respondent constituted an unfair conduct on the part of the respondent, when it was done without a disciplinary hearing, and further order that the applicants' salaries of 1 April to 31 May 2012 be reinstated and paid back to them as well as benefits reinstated as per the schedule of each individual attached.

30 The applicants are low income earners, and the arbitration and the labour court matter were costly to them, including the requests for postponements to longer periods. It is submitted that the remedy awarded should also include a costs order.

Employer's Evidence

Summary of Employer's Heads of Argument

31 The Respondent made no submissions.

ANALYSIS OF EVIDENCE AND ARGUMENT

32 The above hearing emanated from an order of the Labour Court on 1 November 2016 which stipulated as follows:

- The arbitration award issued by the second respondent under case PSHS 178-12/13 is reviewed and set aside
- The award is substituted with an award that the third respondent committed an unfair labour practice
- The matter is remitted to the first respondent for a different arbitrator to determine the appropriate remedy for the unfair labour practice.

33 The parties entered into an agreement to submit heads of argument however the Respondents have failed to comply with the deadlines and provided no plausible explanation except that it presented an

application for rescission on the 24 February 2017. That application in my view did not prevent the arbitration from proceeding as it was not an order of court barring it. In fact the Respondent was well aware when the matter was heard on 10 February 2017 that it had agreed to the timeframes and that I was required to comply with the court order.

34 In the absence of any submissions from the Respondent I have considered the submissions of the Applicants and concur that the Applicants should be compensated for the period they were suspended without any loss of benefits which could have resulted from the suspension.

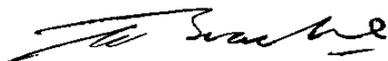
35 Furthermore the Applicants presented a list of the Applicants names and the compensation they were seeking. As there are no challenges to this evidence it formed the basis of Annexure "A" attached hereto.

36 Further that the suspension without pay be removed from their files.

AWARD

37 The Respondent is ordered to pay the Applicants the amounts as set out in Annexure "A" hereto which is the equivalent of two months' salary.

38 The above order is to be complied with within 30 (thirty) days of this award being served on the Respondent but no later than 1 June 2017.


Adv. RONNIE BRACKS

Annexure "A"

Surname

Initials

**Compensation
Amount (R)**

| | | |
|---------------|----|-----------|
| Baloyi | TW | 20 498.50 |
| Baloyi | CM | 16 122.00 |
| Bembe | LE | 15 220.50 |
| Boshielo | DT | 14 127.50 |
| Chetty | M | 13 918.00 |
| Dlamini Kwezi | N | 16 264.00 |
| Dlou | SS | 13 918.00 |
| Galiya | S | 16 496.00 |
| Guliwe | BD | 9 212.36 |
| Gumede | JP | 8 452.38 |
| Kabai | MS | 34 990.98 |
| Kgafela | TL | 16 644.00 |
| Kgatle | EK | 13 918.00 |
| Kharidzha | R | 16 832.00 |
| Khoza | RP | 16 442.00 |
| Khumalo | T | 16 324.00 |
| Konyane | G | 16 576.00 |
| Kulu | NI | 17 052.00 |
| Kunene | VH | 17 230.00 |
| Langa | LA | 8 269.78 |
| Lebakeng | TJ | 14 127.50 |
| Lebona | BD | 16 450.00 |
| Lebudi | MR | 16 396.00 |
| Letswalo | KT | 13 918.00 |
| Mabelane | SM | 14 339.00 |
| Mabena | PF | 16 124.00 |
| Mabodi | MD | 16 264.00 |
| Mabote | NS | 16 332.00 |
| Mabunda | MM | 14 127.50 |
| Maelane | KW | 14 555.00 |
| Mahlalela | MJ | 14 339.00 |
| Mahlangu | JM | 16 892.00 |
| Mahlangu | MK | 18 470.00 |
| Mahlangu | JV | 15 680.50 |
| Mahlangu | WT | 15 448.00 |

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|-----------|-----|-----------|
| Mahlangu | CV | 14 127.50 |
| Mahlangu | TB | 17 476.00 |
| Mahlangu | DT | 17 504.00 |
| Makhuba | DJ | 17 250.00 |
| Makolane | D | 17 713.20 |
| Makona | NC | 14 773.00 |
| Manama | IK | 17 244.00 |
| Maseko | VN | 14 127.50 |
| Masenya | DM | 14 127.50 |
| Mashele | WX | 17 044.00 |
| Mashiane | MN | 15 680.50 |
| Mashigo | BL | 14 127.50 |
| Masina | MA | 16 124.00 |
| Mathebula | ODK | 16 252.00 |
| Mathebula | MT | 16 126.00 |
| Mathelela | FJ | 15 680.50 |
| Matlaila | SS | 16 180.00 |
| Matsane | SS | 17 444.00 |
| Mayaba | CT | 17 444.00 |
| Mbele | MN | 14 339.00 |
| Mnguni | M | 17 654.00 |
| Modisane | LI | 17 904.00 |
| Mofokeng | JD | 15 915.00 |
| Mohale | TJ | 14 127.50 |
| Moloto | C | 14 127.50 |
| Monama | MG | 13 918.00 |
| Monama | IK | 14 555.00 |
| Monareng | SU | 15 448.00 |
| Motsepe | HN | 16 200.00 |
| Motshwene | LW | 13 942.00 |
| Moumakwe | SS | 14 557.22 |
| Mthombeni | WT | 15 518.00 |
| Mtshweni | WJ | 16 501.00 |
| Ngwenyana | MP | 17 040.00 |
| Nhlapo | NA | 18 747.00 |
| Nicolosi | BE | 17 252.00 |

| | | |
|--------------|----|-----------|
| Nkabinde | SA | 17 332.00 |
| Nkambule | SM | 16 470.00 |
| Nkosi | CA | 5 278.44 |
| Nkosi | GJ | 14 555.00 |
| Nkosi | NP | 17 520.00 |
| Nkosi | DT | 17 160.00 |
| Nkosi | DI | 16 500.00 |
| Nkosi | EF | 17 440.00 |
| Nonyana | PN | 17 780.00 |
| Ntini | BS | 14 127.50 |
| Ntuli | GS | 16 396.00 |
| Nzima | JM | 14 555.00 |
| Phopedi | LJ | 17 780.00 |
| Radebe | JP | 15 680.00 |
| Ramakatsa | F | 17 200.00 |
| Ramothibe | MS | 13 918.00 |
| Ratau | M | 14 127.50 |
| Sekgala | NC | 9 824.94 |
| Sekwane | BJ | 14 555.00 |
| Sgudu | T | 17 040.00 |
| Sibanyoni | DT | 13 918.00 |
| Sibiya | RJ | 11 612.04 |
| Sibiya | H | 17 320.00 |
| Simelane | MC | 14 127.50 |
| Sithole | JP | 13 918.00 |
| Sithole | NT | 12 929.10 |
| Skosana | TE | 18 196.50 |
| Soko | SJ | 17 910.70 |
| Thobela | NE | 9 800.84 |
| Thwala | ZP | 13 918.00 |
| Thwala | MT | 16 201.20 |
| Tlou | MD | 13 918.00 |
| Tshabalala | TJ | 17 705.00 |
| Tshukutswane | TG | 17 256.00 |
| Twala | ZC | 17 045.00 |
| Vilakazi | J | 16 316.00 |

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|----------|----|-----------|
| Vilakazi | S | 16 534.00 |
| Zulu | TL | 15 098.00 |