



# ARBITRATION AWARD

Case No: **PSHS419-19/20**

Commissioner: **Mr Anand Dorasamy**

Date of award: **25 September 2020**

In the matter between:

**PSA OBO SIZAKELE PATRICIA NCUBE**

(Union/ Applicant)

And

**DEPARTMENT OF SOCIAL DEVELOPMENT-KWAZULU-NATAL**

(Respondent)

---

## **DETAILS OF HEARING AND REPRESENTATION**

1. The arbitration proceedings commenced at 10H00 on the 30 September 2019 and the evidence concluded on the 14 September 2020 at the Lower Mfolozi Service Office Boardroom in Empangeni. After the evidence was completed the parties were to submit written closing arguments on the 21 September 2020. The applicant was represented by Mr. Mbusi Shibe and the respondent was represented by Mr. Nkululeko Hlongwane. The applicant lodged a dispute in terms of section 186(2) (b) of the Labour Relations Act (LRA) challenging the finding and sanction arising from the disciplinary action taken against her.

## **ISSUE TO BE DECIDED**

2. I am required to determine whether the Respondent (employer) had perpetrated an act of unfair labour practice against the applicant in respect of her disciplinary finding and sanction. Should I find in favour of the applicant, I am to determine what relief should be granted to her.

## **BACKGROUND TO THE DISPUTE**

3. The applicant was disciplined for misconduct and the disciplinary hearing chairperson found her guilty and recommended a sanction of three months suspension without pay and a final written warning and on appeal her sanction was changed to three- month's suspension without pay and a final written warning. The respondent reconsidered the sanction on appeal and gave her a sanction of two months suspension without pay.
4. The applicant seeks the reversal of the guilty finding as well as the sanction. The respondent prays that the application be dismissed.

## **SUMMARY OF EVIDENCE**

### **APPLICANT'S CASE**

#### **SIZAKELE PATRICIA NCUBE**

5. The salient aspects of the witness' testimony are recorded below.
6. The applicant was suspended on full pay in 2016 on an allegation of misconduct and in September 2018 received the charges. She was found guilty of the three charges and appealed the finding and sanction in December 2018 and her sanction was reduced to two months suspension without pay.
7. In charge one she is alleged to have compiled a report for the court and was placing the children with Nosipho Dubazane.
8. In respect of charge two she recorded that the biological father was unknown. She did not understand charge three.
9. She compiled the report for the three Biyela children and presented it to court. The Magistrate asked the applicant Ms Dubazane if the report was true and she did not have any objections. The children confirmed the report. The mother was deceased and a death certificate was produced and as a social worker she believed that all the children needed care and attention. The grandmother was shot dead in front of the children.
10. In respect of count three the policy guidelines are for Social Workers. She was not charged by the South African National Council for Social Workers for contravening the policy.
11. She seeks that count two and three be cancelled and on count three she did not contravene the guidelines.
12. Under cross examination she stated as follows:

13. She is employed by the Department for 16 years and is familiar with the processes involved in foster care placements. Children under the age of 18 years and whose parents are deceased or if one is deceased and the other cannot be traced or is neglecting or abusing the children are considered for foster care placements. If one parent is deceased and the whereabouts of the other is unknown the Social Worker is required to obtain an affidavit in respect of the unknown parent.
14. An article to trace the father ought to be placed in the newspaper. In this case the applicant did not exhaust all means to establish the whereabouts of the father. She was told by the aunt that the whereabouts of the father was unknown and she concluded that the whereabouts of the father was unknown.
15. She did not trace the paternal family.
16. In respect of count two she had 16 year's- experience and needed to act appropriately while doing her work. She was taught in her course about the Ethics and Rules of a Social Worker.
17. The mother and father of the children were married and it was her duty to unite the children and parents. The mother of the child passed away in 2005 and the report is in 2011. The grandmother passed away in September 2011 and in November 2011 the children were placed in foster care. This was an urgent case.
18. In respect of count three she was to uphold the professional integrity and policies.
19. She was placed on special leave because the MEC temporarily closed the office and she received her salary. She did not challenge her suspension.

**SILINDELE DUBAZANE (SILINDELE ZODUMO DUBAZANE)**

20. She lives in Esakhawini and knows the children Londeka Biyela, Sandile Thanduyise Biyela and Muzokhulayo Sandiso Biyela as they were her sister's children. Her sister passed away. She knows their father Siphamandla Biyela . The mother of the children was Lindiwe Pretty Biyela.
21. She knows the applicant as she helped when her mother passed away on 4 September 2011.
22. After Lindiwe passed away her mother took the children under her care but their father was supporting them financially.

23. The children were receiving foster grant and Ms. Nosipho applied for foster grant for them and she told the children to say their mother was deceased and they do not know the whereabouts of the father.
24. The father did not know about the arrangement. He lived in Durban and would come at the month end. When the mother was alive, she lived in Mabena and had a house there. When the mother passed away the children was under the care of Nosipho. The house was empty after the mother passed away and the father would come and stay there and the children would clean and lock the house.
25. Under cross examination she stated as follows:
26. She is 26 years old and knows all the children. They are not orphans. The father is taking care of the children at present. Nosipho was receiving grant on behalf of the children.
27. She was not interviewed by the applicant with regards to the children's father. The entire family was not interviewed. She was not present but outside when the applicant interviewed her sister. They were together with the children when they told the children that they do not know the whereabouts of their father and their mother was deceased. The interviews with the children were at home and were instructed on the way to court.

## **RESPONDENT'S CASE**

### **NIKEZIWE PRETTY MHLONGO**

28. The salient aspects of her testimony are recorded below.
29. She is the Social Worker Manager since 2014 and employed since 1995.
30. In 2016 there was an investigation by the Department. She was appointed as a member of the task team in respect of children placed on foster care. The verification was conducted through perusal of the files, documents and interviews with the family of the children on foster care.
31. The charges relate to the Biyela children. The finding was that the children were placed on foster care but were not entitled to it. They were not children in need of care in terms of the Act which states who are children in need of care example orphaned or those whose parent's whereabouts are unknown, children whose parents cannot take care of them.
32. The report in this case stated that the father's whereabouts are unknown. In reality the father was alive and was maintain the children and maintaining contact with them.

Also, according to the information both families knew each other very well and the parents were married. Even both families were situated in the same vicinity a walking distance from each other.

33. The information obtained from the foster parents was the only information used by the Social Worker. She had to verify the information by the client. The whole circumstances around the children had to be obtained. Also when conducting an interview other aspects including advertising, tracing his parents whereabouts are provided in the legislation. The Social Worker had to provide a correct report to address the needs of the children.
34. The Social Worker's report assists the court to take a right decision in the circumstances around the children. The presiding officer takes the Social Worker's report into account when making a decision. The procedure is known by Social Workers and is in the Legislation.
35. Under cross examination she stated as follows:
36. The time frame for foster care placements is 90 days. The children said that their father was alive and they know him and he was always maintaining them and was in contact with them. The foster parent agreed that they knew the father of the children and he was maintaining them. The father was present at the grandmother's funeral.
37. The children were staying with Betty Dubazane before passed away.

## **CLOSING ARGUMENTS**

38. The parties submitted written closing arguments on the 21 September 2020 and the arguments were considered when I made my determination.

## **ANALYSIS OF EVIDENCE AND ARGUMENT**

39. This matter was cited as an unfair labour practice dispute in terms of Section 186 (2) (b) of the LRA.
40. The issues to be decided was whether the respondent (employer) perpetrated an act of unfair labour practice against the applicant in respect of the finding and sanction meted out to the applicant and if my finding be in the affirmative , what would the appropriate relief be to her.
41. I have taken cognizance of the decision in *Sweeney/ Transcash* [2000] 6 BALR 712 (CCMA) where the commissioner held that arbitration hearings constitutes a rehearing

de novo on the merits. The award must accordingly be based on evidence led at the arbitration.

42. The issues in dispute in this matter are fairly straightforward.
43. The applicant was found guilty at a disciplinary hearing and sanctioned and on appeal her sanction was reduced to two months suspension without pay. She challenges the finding and sanction imposed.
44. In order not to protract my determination I dealt with the matter on the submissions.
45. The chairperson of the disciplinary hearing considered appropriate that the applicant be found guilty and sanctioned but the sanction was changed by the appeal chairperson. The applicant now challenges the findings of both the chairpersons because the appeal chairperson only reviewed the sanction and recommended a sanction of two months suspension without pay.
46. In respect of the finding of guilty I intend only to deal with the salient issues because the applicant knew the rule in respect of the procedure to be followed in dealing with a case of placing children in foster care. She did not gather the correct information in this case as the children's father was still alive had contact with them and was maintain them.
47. She did not verify the information provided by the foster parent and she could have advertised for the alleged father of the children whose whereabouts were unknown. The father went to the family home which was nearby and attended the grandmother's funeral.
48. She compiled a report without following the procedure as set out in the Legislation. The breach occurred as a result of the actions of the applicant. I do not believe that the finding was inappropriate. Therefore, the finding of guilty is sustained.
49. I now turn to the applicant's prayer of having the two-month suspension without pay be set aside.
50. Discipline is the prerogative of an employer and a commissioner's role in unfair labour practice disputes is to determine if the respondent's conduct is fair. The sanction meted out to the applicant is within the provisions of Resolution 1 of 2003. Therefore the sanction of two-month suspension without pay appears to be fair in the circumstances. Further the applicant was a senior employee (16 years' service) and ought to have set a better example to the other employees. I am of the view that the finding and sanction should not be altered because there was a transgression by the

applicant and she received a sanction according to the provisions of Resolution 1 of 2003.

51. As a consequence of the above I find the Respondent (employer) did not perpetrate any act of unfair labour practice against the applicant in respect of her disciplinary finding and sanction.

### **AWARD**

52. The respondent did not perpetrate any act of unfair labour practice against the applicant.

53. The applicant's claim is hereby dismissed and she is not entitled to any relief.

54. There is no order of costs.

A handwritten signature in black ink that reads "a.s. Dorasamy". The signature is written in a cursive style with a large, looping 'D' at the end.

Anand Dorasamy