PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Case No: **PSHS475-19/20**

Commissioner: **Adv.Terry Malgas- Senye**

Date of award: **6 April 2020**

In the matter between:

FARIDA MYBURGH Applicant

and

DEPARTMENT OF SOCIAL DEVELOPMENT- EASTERN CAPE Respondent

DETAILS OF HEARING AND REPRESENTATION

1. This unfair dismissal dispute was arbitrated in terms of section 191(5)(a) of the Labour Relations Act 66 of 1995 as amended ("hereinafter referred to as the Act"). The hearing was held at Department of Social Development at approximately 10h00 am and was digitally recorded. The matter was postponed on numerous occasions but finalised on 9-13 March 2020.

2. The Applicant was present and was represented by Mr. Kilian from PSA.

3. The Respondent was represented by Adv. Nyondo instructed by the State Attorney in East London.

ISSUE TO BE DECIDED

4. The issue to be decided concerns the fairness of the dismissal of the Applicant.

5. The Applicant is challenging the substantive and procedural fairness thereof and is seeking reinstatement with retrospective effect.

BACKGROUND TO THE ISSUE

6. It was common cause that the Applicant was charged for misconduct in terms of the disciplinary code of the Respondent and was subsequently dismissed at a disciplinary enquiry. She appealed the dismissal and was unsuccessful.

7. It is also common cause that the Applicant at the time of this matter was stationed at the Department of Social Department as a Chief Director Corporate Services.

8. After the failed appeal, she then referred an unfair dismissal dispute to the PHSDSBC.

SURVEY OF EVIDENCE AND ARGUMENT

9. This is a brief summary of the evidence considered as provided for in terms of Section 138(7)(a) of the Act relevant to the dispute at hand.

10. I must decide whether the Applicant's dismissal was substantively and procedurally fair. If I find that the Applicant's dismissal was substantively and/or procedurally unfair, I must decide what the appropriate remedy will be for such unfair dismissal.

11. The Applicant did not call any witnesses and testified in hers defence, as well as relied on a bundle of documents, noted as Bundle A.

12. The Respondent's case against the Applicant was supported by the testimony of 6 witnesses, Ms. Ntombekhaya Baart, Ms. Asanda Ngalwana, Ms. Andiswa Booi, Ms. Ntombefikile Ngaphi, Mr. Selwyn Collins and Ms. Chantell Williams and a bundle of documents, noted as Bundle B.

13. At the time of writing this award both parties submitted closing arguments on 31 March 2020.

RESPONDENT'S EVIDENCE AND ARGUMENT

Ms. Ntombekhaya Baart

14. That she was the Head of Department of the Department of Social Development. Her duties were management of the entire Department.

15. Ms. Baart testified that she became concerned about the Applicant's consistent requests for various payments allegedly related to her previous dismissal and subsequent reinstatement.

16. She testified that she then requested that she be given the settlement agreement and looked into it. She also looked at the amended settlement.

17. The witness stated and read into record that the below settlement:

" *Settlement agreement*

The parties hereto agree to withdraw their dispute in the above-mentioned matter subject to the terms and conditions stated herein below:

1. The Applicant agrees to reinstate the Respondent to the post of General Manager: Corporate Services on the same terms and conditions of employment that existed prior to the date of her dismissal, provided that payments in lieu of such reinstatement will not exceed the amount agreed upon at paragraph 3 (or 4) of this agreement.

2. The Respondent shall report for duty at the Applicant's workplace (Corner Hockley and Hargreaves Road, Beacon Hill Office Park, King William's Town) from Monday, 17th August 2015.

3. The Respondent will be reinstated on 021 Senior Managers Persal Scale Code.

4. Pursuant to the award that was issued under case number PSHS304-11/12 on the 30th December 2013 the parties hereto agree that the Applicant shall pay the Respondent an amount of R3'000'000.00 (Three million rands) less any statutory deductions.

5. That the Applicant shall pay the Respondent's taxed legal costs in respect of the review application only, which will not exceed the amount of R200'000.00(two hundred thousand rands).

6. The Applicant agrees to withdraw the review application under the above case number upon the conclusion of this agreement.

7. The terms and conditions of this agreement will be in full and final settlement of all disputes and current claims between the parties.[1]

Amended settlement Agreement

Whereas the Applicant and the Respondent (TheParties) entered into a settlement agreement and agreed that the dispute be withdrawn in the above-mentioned matter subject to the terms and conditions as particularised below:

1. The Applicant agrees to reinstate the Respondent to the post of General Manager: Corporate Services on the same terms and conditions of employment that existed prior to the date of her dismissal, provided that payments in lieu of such reinstatement will not exceed the amount agreed upon at paragraph 3 (or 4) of this agreement.

2. The Respondent shall report for duty at the Applicant's workplace (Corner Hockley and Hargreaves Road, Beacon Hill Office Park, King William's Town) from Monday, 17th August 2015.

3. The Respondent will be reinstated on 021 Seniour Managers Persal Scale Code.

4. Pursuant to the award that was issued under case number PSHS304-11/12 on the 30th December 2013 the parties hereto agree that the Applicant shall pay the Respondent an amount of R3'000'000.00 (Three million rands) less any statutory deductions.

5. That the Applicant shall pay the Respondent's taxed legal costs in respect of the review application only, which will not exceed the amount of R200'000.00(two hundred thousand rands).

[1] Pages 95-6 of BA.

6. The Applicant agrees to withdraw the review application under the above case number upon the conclusion of this agreement.

7. The terms and conditions of this agreement will be in full and final settlement of all disputes and current claims between the parties.

Now the parties wish to record the following amendments to the settlement agreement:

8. That the amount stated in paragraph 3 be amended and recorded as R4'500'000.00 (four million five hundred thousand rand).

9. That the Applicant has already paid the Respondent an amount of R3'000'000.00 (three million rand) in accordance with paragraph 3 of the settlement agreement.

10. That the Applicant will pay the Respondent an amount of R1'500'000.00 (one million five hundred thousand rand) in full compliance with the amended settlement agreement.[2]"

18. The witness testified that the settlement agreement was discharged on 11 December 2015 when the Applicant was paid the R3m.

19. The witness stated there were no documents to support the amended settlement agreement and there was no endorsement by the MEC.

20. The witness stated that the Applicant was the Programme Manager for Programme 1 of the Department that was responsible for the budget of the entire Department. She testified that the Applicant was responsible for the Administration of the Department. The processing of the R1.5m without the requisite supporting documents was a breach of section 45 (b) of the PFMA which provides that "an official is responsible for the effective, efficient, economical and transparent use of financial and other resources within that official's area of responsibility."

21. The witness testified that through her claim for something she was not entitled to, her actions amounted to a breach of trust.

[2] Bundle A pages 97-98

22. She testified that payment of the R3m in the previous settlement meant that there would be no more claims relating to the previous dispute with the Respondent. She stated that the agreement itself stated that no other monies had to be paid to the Applicant relating to the previous dispute.

23. She stated that there was no reflection on the agreement to the effect that the Applicant would have R3m in her pocket. The agreement stated that the R3m would be paid less statutory deductions.

24. The witness testified that it is a standard practice in government that there be paper trail in the form of a memorandum, detailing the various stages of recommendations up to the person who has to approve. She testified that there was nothing of this sort in the amended settlement agreement.

25. She testified that in the disciplinary hearing the Applicant acknowledged that she knew that in government there has to be a paper trail for what had to be done especially when it had financial implications.

26. The witness testified that in the public service there must be a directive that is relied upon in order to receive payments. She stated that there was no lawful basis or justifiable reason for the payment of the R1.5m, hence it is regarded as a product of a collusion between the HoD and the Applicant. She stated that there was a meeting of minds between the Applicant and the then HoD.

27. The witness stated under cross-examination that if the then HoD was duly authorised by the MEC he would have had the power to sign the agreement. The difficulty was that there was no paper trail that sanctioned the entering into the amended agreement. Before it went to Finance which was the final port of call, the documents would have had to be taken to various channels and stages.

28. Further during cross examination she testified that the memorandum would have had to be generated, sent to Internal Control and Audit, Budget section and approval by the MEC. The Applicant as Corporate Services Chief Director would have been expected to ensure even before she signed such a document that the paper trail was in place as Programme Manager who was responsible for the Administration and Budget of the Department. The authorisation by the MEC would not have been by word of mouth. It would be on paper.

29. The witness testified that the Applicant abused her position as Corporate Services Chief Director when she entered into the amended agreement with the HoD to benefit herself to the value of R1.5m without justification and valid grounds. She knew that the initial settlement agreements specifically said she was not entitled to any further payments relating to her previous dispute with the Respondent. This resulted to a breach of trust between her and the Department.

30. Under cross examination the witness stated that the Applicant violated her financial responsibilities in terms of the PFMA when she benefitted unduly from funds of the State through a non-transparent transaction whereby she and the HoD had a meeting of minds which resulted in her being paid R1.5m without justification.

Ms. Chantel Williams

31. The witness testified that that she was employed as a Director for Labour Relations in the Respondent. She stated that she had arranged a venue at the Gambling Board offices in East London for the holding of the disciplinary hearing on 01 March 2019.

32. The witness testified that Adv. Nyondo was running late for the start of the hearing because he had mistaken the venue to be the Head Office of the Respondent at King William's Town. She testified that he got to know about the proper venue when he had phoned Ms Williams after arriving at the King William's Town offices of the Respondent.

33. She testified that when the Chairperson, Adv. Cossie arrived at the venue, she was met by Ms Williams at the door and she accompanied the Chairperson to some waiting room while Adv. Nyondo was still on the way. Ms Williams testified that she did so in all good-will to manage the problem of the late-coming of Adv. Nyondo.

34. The witness testified that when Adv. Nyondo arrived,she called the Chairperson into the Boardroom wherein the case was due to be held. She submit that as soon as the introductions were done Adv. Nyondo addressed the Chairperson about his late arrival and asked for pardon from the Chairperson and expressed same to the employee party.

35. The witness testified that these developments led to the Applicant moving an application from the bar for the recusal of the Chairperson on the grounds that the fact that Ms Williams whisked her away before the arrival of Adv. Nyondo gave rise to an apprehension of bias. This apprehension was fanned by the knowledge of the Applicant that Adv. Cossie was known to Ms Williams and that Ms Williams had Adv. Cossie as one of her references in her CV.

36. During the witness testify, she read at the arbitration reference made to the transcribed record of the disciplinary hearing which was also part of the bundle of documents before the Commissioner. The witness stated that this was necessary especially in the light of the non-availability of Adv Cossie to testify at the arbitration.

37. The witness stated that Adv. Cossie had made it clear at the disciplinary hearing when it resumed on 08 April 2019 that she saw the documents appertaining to the enquiry at the disciplinary hearing on 08 April 2019. She had never discussed the case with Ms Williams at any stage.

38. She testified that She had known Adv. Cossie for many years and in the legal profession there were many people who knew each other and that in itself would not lead to any form of bias or conflict of interest. She stated that Adv. Cossie was an Advocate of the High Court for over twenty years and she has been an Acting Judge and she knew what has to be done relating fairness and adherence to professional standards.

39. She testified that Adv. Cossie(the chairperson) at the disciplinary hearing rejected the application for her recusal on the grounds that the Applicant had not shown any reasonable apprehension of bias. She gave that ruling ex tempore and included it in her findings as well.

40. The witness testified that she had worked in the Department of Justice as a Court Interpreter for many years and was the First Black Female to interpreter at the High Court. She had worked with many judges including retired judges such as the former Judge President of the Eastern Cape, Judge Somyalo.

41. She testified that she knew the boundaries of conflict of interest and she submitted that she had never discussed the case with Adv. Cossie and the fact that she had her as her referee had nothing to do with the case.

Mr. Anthony Selwyn

42. The witness testified that his evidence was to show that legal representative was granted by the Chairperson and the basis thereof.

43. He testified that it was a normal occurrence for the Department of Social Development to appoint legal representation in disciplinary hearings that involved SMS members especially where the cases were serious and would require issues of legalities.

44. Mr. Collins testified that there were many cases where there would be no objection to legal representation and the cases would run with legal practitioners participating. He cited the example of the previous HoD Stan Khanyile who had a disciplinary matter under the OTP that was held without any application for legal representation and that there was legal representation.

45. He testified that Ms. Chantel Williams went on to state that the Applicant as Chief Director Corporate Services would be one of the signatories in the memoranda that motivated for the engagement of legal representation in many cases before such memoranda would be approved by the HoD, paving the way for the Director Legal Services to write to the office of the State Attorney requesting the appointment of the required legal practitioner concerned. The witness stated that it was usual practice to write to the State Attorney in the usual format of instructing the State Attorney as they did in the instant case.

46. The witness testified that there was no merit in the challenge of the Applicant relating to the appointment of Adv. Cossie by the Department. He stated that The Department acted within the mandate of the SMS Handbook and disciplinary Code. Clause 2.7.3 (b) of the Code states " the employer must appoint a person from within or from outside the public service as chairperson of the disciplinary hearing." On this basis there is nothing wrong with the appointment of Adv. Cossie. It is the prerogative of the employer to choose a presiding officer.3 The SMS Handbook in par 2.7.3 (e) uses the word "may" in order to show that there is space for the employer to determine whether or not to engage legal representation.

[3] Moodley vs Knysna Municipality & Another (2007) 28 ILJ 1715 (C) par 36B.

47. He testified that having opted for legal representation an application to the chairperson would be done where necessary.

Ms. Asanda Ngalwana

48. The witness testified that she was called by her supervisor Ms Mkolwana to the office of the Applicant where the Applicant told her verbally to calculate the leave days due to her for the period she was dismissed.

49. She testified that she did so and quantified the value thereof which was R361773.02. The calculations were verified and signed on 02 February 2018 and sent to the Applicant. On 12 February 2018 the Applicant submitted a request to the HoD for the payment of the leave. Ms Ngalwana submitted that the DPSA Directive applied to all employees. She further stated that the Applicant was the custodian of the Department's policies.

50. The witness testified that the Applicant testified that when she had the meeting with Ms Mkolwana in her office, the two of them held the same view that she could apply to the HoD for the encashment of her leave during the period of her dismissal. That is why Ms Ngalwana was called in as the champion for leave. She asked Ms Ngalwana to calculate her leave as shown.4 She submitted that the official did not inform her that she was not entitled to payment for that leave.

Ms. Andiswa Booi

51. The witness testified Andiswa Booi testified that it was expected of the Applicant to pay her portion of the pension into the Department immediately after she was advised on 28 March 2018 that her portion of the pension was paid by the Department to the GEPF. As Programme Manager for Programme 1, she knew every month when there are reports given at the IYM about debts that she was also part of those people who owed money to the Department

52. She confirmed that the non-reporting of this debt had affected the Department's Annual Financial Statements for the financial years 2017/2018 and 2018/2019 in that the

[4] Bundle B page 21.

Recoverables were understated and the Expenditure was overstated. She knew that she had to pay R181104.25. That information was readily available.

53. Ms. Booi testified that when the proof of payment on 28 March 2018 was copied per email to the Applicant, she was made to know thereby that the Department had paid her portion of the pension to the GEPF and her duty was to pay the money she owed back to the Department immediately and the payment on 12 June 2019 was not immediate.

Ms. Ntombifikile Ngaphi

54. 55. This witness testified that she was called to the office of the Applicant and the Applicant orally instructed her to calculate pay-progression and back-pay of notch differences from 2008/09; 2011/12; 2012/13; & 2013/14. Ms Ngaphi drew up the document accordingly.5

55. She testified that pay-progression was linked to PMDS and that it could only be calculated after the employee had been assessed. The Applicant had given her the copies of the award and settlement agreement (2 pages of each) and stated that the Respondent and her lawyers had agreed that she be paid these monies.6

56. Ms. Ngaphi stated that PMDS rules are the following:

-the employee must be at work for the period 01/4 to 31/3 of the following year,

- the employee and supervisor must have signed a performance agreement,

-the employee must perform for 12 months,

-the employee must assess herself and be assessed by the supervisor as well,

-there must be a 6 monthly review,

- the assessment must be rated by both employee and supervisor,

-the assessment and rating must be submitted to the Moderating Committee,

-the outcome of the assessment must be approved by the MEC after moderation.

[5] Bundle A pages 145 to 149.
[6] Bundle A page 150 par 3.2 and 3.3

57. She testified that none of these factors were present in the case of the Applicant but she was carrying out the instruction because it was stated to her that this was agreed upon by the lawyers of the Applicant and the Respondent. The Applicant was not entitled to pay progression for the years that she was not at work. The settlement agreement did not say she must be paid money in terms of PMDS.

58. The witness testified under cross-examination that she was requested to calculate pay-progression for the period that the Applicant was dismissed. The Applicant was paying attention to the changes in the salary notches as per the calculations on the memo. She stated that was immaterial because while the calculations on page 146 had placed the salary scale at R1,04m, the Applicant had been reinstated at a higher notch of R1,17m anyway. The witness testified that the key in the charge was the unlawful misrepresentation and the attendant attempt by the Applicant to be paid R95803.84 to which she was not entitled.

APPLICANT'S EVIDENCE

59. The Applicant testified as follows:

60. The Applicant testified during his evidence in chief that all the charges levelled against her was false and she is not guilty to all charges.

61. The Applicant testified and dealt with evidence on legal representation first. She testified that the Applicant's submission was that before the appointment of a legal representative by a Department, there must be an application to the Chairperson of the disciplinary hearing who must then determine the application and pronounce on it. The Applicant submitted that no such an application was made in the instant case.

62. She testified that at the hearing the Chairperson listened to the application of the Applicant for the rejection of the presence of legal representation. The main point of submission was that legal representation could not be appointed unless an application

was made and granted by the Chairperson of the disciplinary hearing.She submit that this made her feel unease.

63. She testified that the Chairperson allowed the representative of the Respondent to answer to the query- which was done. She testified that at the disciplinary hearing that the Applicant never objected to the presence of legal representation even though it was foreshadowed in the notice of disciplinary hearing.

64. She testified that though the seriousness of the charges and her seniority warranted the presence of legal representation, she knew she would challenge her issues after the outcome of the hearing. The matter was left to the discretion of the Chairperson. The Chairperson ruled that legal representation in the case was permitted.7

65. The Applicant further testified that she was approached by MEC who asked her if she had been paid the settlement amount as agreed. She told the MEC she had not been paid at that time. She testified that the MEC requested her to inform her when she was paid.

66. She testified that she was called by the thenHoD and she went to his office. She found the HoD in the company of Adv. Sangoni who was the Chief Director in the office of the HoD and Mr Maseti who was the Director Legal Services. She was told the then MEC had approached the HoD. She held a discussion with them about the amended contract. She asked them if it was fine to do something like this. She was assured that it was fine.

67. She stated that when she signed the amended agreement she believed that the Department was honouring the agreement with Ms Phakade an attorney. She stated that she did not see the signing of the contract as indicating that she was acting in cahoots with the HoD. She testified that there was no collusion between her and the HoD. She stated that the amended agreement was in line with what she had discussed with the MEC.

68. She testified that she did not tell the people who drew up the contract to do so. She found the contract already drawn when she was called to the office of the then HoD. She read

[7] Bundle A pages 36-7paragraphs 5.1 to 5.3.3.

the document and signed it. She denied that she abused her position as Chief Director Corporate Services.

69. She testified that the Respondent could not blame her for documents that were not kept relating to this amended agreement and subsequent payment of R1.5m when the transactions were between the MEC and HoD.

70. She submitted that there was something happening that was beyond her at Social Development. She denied that there was a breach of trust between her and the Department. She mentioned that for financial management the HoD had rated her a 4 in the annual assessment in December 2018. She submitted that it could not be therefore that the Department was charging her with breach of the PFMA and that the Department had lost trust in her

71. Under cross-examination the Applicant testified that the payment of R1.5m per the amended agreement was taking her pay closer to the amount that was agreed upon with the MEC, the HoD and Ms Phakade. She conceded that she stood to benefit from the payment of the R1.5m.

72. The Applicant conceded that the initial settlement of R3m was discharged when it was paid on 11 December 2015. She agreed that she was a party to the signed amended agreement. She agreed that the settlement agreement of R3m was a compromise between the parties. She agreed that the R3m would be paid less statutory deductions. She further agreed under cross examination that the R3m was in full and final settlement of the dispute. She conceded that the agreement stated that there must be no other payments in excess of the R3m related to the reinstatement.

73. The witness testified that when she had the meeting with Ms Mkolwana in her office, the two of them held the same view that she could apply to the HoD for the encashment of her leave during the period of her dismissal. That is why Ms Ngalwana was called in as the champion for leave. She asked Ms Ngalwana to calculate her leave as shown.8 She submitted that the officials did not inform her that she was not entitled to payment for that leave.

[8] Bundle B page 21.

74. She testified that she was aware that she had to pay the employee portion of the pension to the Department.

75. The witness testified that when she was advised that she had been over-paid relating to her claim for travelling, she had immediately gotten into touch with the relevant official and ensured that she paid the money back to the Department. In the instant case she did not show that diligence.

76. The Applicant testified that after 28 March 2018 there was no letter addressed to her from the HoD to say she must pay her pension fund portion. The letter she had received was dated 28 July 2017 indicating that she had to pay her portion of the pension to the Respondent. She submitted that was premature because the debt arose only on 28 March 2018 when the Respondent paid her pension portion to GEPF.She submitted that when she received the letter from the HoD dated 28 July 2017 she was excited because she thought the Respondent had paid her portion of the pension to the GEPF.

77. She testified that she called Mr Jaceni and asked for an invoice so that she could pay and Mr Jaceni told her that the debt could not be raised at that stage because the Department had not paid the money to the GEPF.

78. She stated that she had kept the money in a bank account to ensure that it could not be used. She paid in June 2019 after she heard the HoD saying that if Mrs Myburgh knew that she had to pay the money, she could have paid the money. She then conferred with her representative and she decided to pay the money on her own volition.

79. Under cross examination she conceded that when discussing the IYM, this debt did activate something in her conscience which said that she is one of the people who owe the Department money.

80. She testified that when she wanted to pay the money when she was suspended she was not sure where to pay the money.

81. The Applicant testified that she was asking for the payment of the pay-progression for the year that was already approved. She denied that she asked for pay-progression for

the years during which she was dismissed. She dwelled on the ripple effect of the payment of a higher notch that is back-dated and that was of no moment to the charges.

82. The Applicant testified that she did not feel that she was making a misrepresentation when she requested the payment of leave as she did. She submitted that she "found it to be disingenuous for the Department to charge and dismiss her as it had done."

RESPONDENT'S CLOSING ARGUMENT

83. The Respondent's representative, Adv. Nyondo argued that the Applicant's case should be dismissed. He believes that the evidence tabled by the Respondent's witnesses has proven that the Applicant was guilty of serious misconduct.

84. Furthermore, the Respondent presented evidence of 5 witnesses who all were credible witnesses who presented their testimony with candour. Their testimony was not tailor made to suit any ulterior motive, they were calm witnesses who made concessions where necessary and their evidence corroborated each other.

85. The Respondent further submits that the Respondents evidence stands uncontested as no contrary evidence was submitted by the Applicant.

86. He prayed for the dismissal to be upheld.

APPLICANT'S CLOSING ARGUMENTS

87. The Applicant's representative, Mr.Killian argued that Applicant never committed the charges levelled against her. The evidence of the Respondent failed to show that the Applicants committed any misconduct.

88. He prayed for retrospective reinstatement.

ANALYSIS OF EVIDENCE AND ARGUMENT

89. Since the dismissal is not in dispute, it is the Respondent who bears the onus of proving that the dismissal of the Applicant was substantively and procedurally fair. Section 185(a) of the Act, which fortifies the employee's constitutional right to fair labour practice, and guarantees employees a right not to be unfairly dismissed.

90. Section 188 of the Act recognises the conduct of the employees as one of the broad reasons on which the dismissal could be justified. Section 188(1) requires that if misconduct is the reason for dismissal it must be a fair reason. Schedule 8, item 7, provides that when considering the substantive fairness of a dismissal for misconduct the commissioner must consider the following:

(a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and

(b) if a rule or standard was contravened, whether or not-

(i) the rule was a valid or reasonable rule or standard;

(ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;

(iii) the rule or standard has been consistently applied by the employer; and

(iv) Dismissal was an appropriate sanction for the contravention of the rule or standard.

Did the rule exist?

91. In the present case the Applicant was dismissed for serious misconduct namely:

Charge No 1

1. *It is alleged that you have committed the offence of corrupt activities relating to public officers in breach of section 4 (1) (A) (B) (II) (III) (IV) of the prevention and combating of corrupt activities Act No 12 of 2004 as amended in that:-*

Count 1

You colluded with the former Head of Department on or about 23 March 2016 in signing an amended contract that added R1.5m to the earlier settlement agreement that was discharged on 11 December 2015 when the agreed to amount of R3m was paid to you. There was no explanation provided as part of the amended contract for the increase of R1.5m to the initial settlement amount of R3m. The amended contract amounted to :-

(i) An abuse of your position of authority as Corporate Services Chief Director;

(ii) Breach of trust between you and the Department of Social Development;

(iii) Violation of your legal duty to ensure that State finances are used for the effective, efficient, economical and transparent use as required by section 45 (b) of the PFMA.

Charge 1 Count 2

You attempted gratification in that you instructed junior officials to calculate the leave you would have been entitled to during the time you were dismissed and requested payment to the value of R361773.02 while you knew or ought to have known that you were not entitled to the payment for that leave.

Charge 2

It is alleged that you committed gross dishonesty in that you did not ensure that the Directorate for Human Resources Administration activated the Debt Recovery processes for you to repay the R276415.30 back to the Department despite the fact that you were advised on 28 March 2018 that R276415.30 was paid to Government Employee Pension Fund (GEPF) as your pension contribution and you were advised by the Head of Department that you would have to pay that pension fund contribution yourself.

Charge 3

It is alleged that you committed unlawful misrepresentation.

Count 1

You committed misrepresentation in that you stated that the Department of Social Development owed you monies under the Performance Development System (PMDS) as part of the settlement agreement when in fact that was not stated in the settlement agreement. You instructed the Acting Deputy Director: PMDS to implement pay progression that was due to you for the years that you were dismissed.

Count 2

You misrepresented the true facts when you claimed money on the basis of the settlement agreement while the agreement categorically stated that "payment in lieu of such reinstatement will not exceed the amount agreed upon at paragraph 3 (or 4) of this agreement and in paragraph 7 it states the terms and conditions of this agreement will be in full and final settlement of all disputes and current claims between the parties.

Count 3

On 12 February 2018 while claiming the payment of R361773.02 for leave, you mentioned the awards of Mzana and Msuthu as the basis of your claim when you knew or ought to have known that their cases were different from yours in that they were never dismissed.

92. In the first instance it must be determined whether or not the rules existed. In the second instance, if the rule existed, it must be determined whether or not the employees contravened it. The formulation of the disciplinary rule is the right and responsibility of the employer.

93. The Applicant had knowledge of the rules in that she signed a contract of employment which contains company's Code of Conduct and policies. He therefore were aware that the charges levelled against her constituted a disciplinary offence. Furthermore the Applicant worked for four years for the Department of Social Development and surely knew the Code of Conduct.

94. Once this is established the second issue is whether there was a contravention of the rule. Neither the Act nor the Code stipulate on what facts the employer may rely to prove contravention of the rule. In this particular case the Applicants are aware of the rule.

95. This matter essentially turns on this dispute of fact. The Labour Court had occasion to remark on the appropriate manner for a commissioner to deal with such disputes. In *Sasol Mining (Pty) Ltd v Nggeleni and others* (Case No: JR 1595/08), Van Niekerk J highlighted that the duty of a commissioner is to assess the credibility of a witness, consider the inherent probability or improbability of the version that is proffered by the witness as well as an assessment of the probabilities of the irreconcilable versions before the commissioner.

96. In weighing the probabilities and improbabilities,I am of the view that the Respondents witnesses were truthful in giving evidence and account of what happened.

97. Furthermore, in *Marapula v Consteen (Pty) Ltd* [1999] 8 BLLR 829 (LC), it was held that the employer's onus is discharged if the employer can show by credible evidence that its version is the more probable and acceptable version. The Applicant was not a credible witness, she changed her versions many times during the cross examination, up to the time that when she does not want to answer questions, she submitted that her representative will deal with those issues that she will not answer. She further blamed everyone around her and did not own up to her part during the misconduct. She is not seeing any wrong in her actions.

98. The court went on to say, "The credibility of witnesses and the probability or improbability of what they say should not be regarded as separate enquiries to be considered piecemeal. They are part of a single investigation into the acceptability or otherwise of the employer's version, an investigation where questions of demeanour and impression are measured against the content of the witness' evidence, where the importance of any discrepancies or contradictions are assessed and where a particular story is tested against facts which cannot be disputed and against the inherent probabilities, so that at the end of the day one can say with conviction that one version is more probable and should accepted, and that therefore the other version is false and may be rejected with safety".

99. In the present case and considering the impressive evidence presented by the Respondent, it is submitted that the evidence of the Respondent is more probable and is the most acceptable version as compared to that of the Applicant who presented a case that was not put to the witnesses for the Respondent.

100. Furthermore, the Applicant agreed with the Respondent that she knew her duties as a Chief Director Corporate Services and did help with assistance and drafting of policies and other in relation thereto.

101. Furthermore, it is beyond doubt that an employer-employee relationship between the Applicant and the Respondent had irretrievable broken down and as such no employment relationship could continue between the two. This was proved through the witnesses of the Respondent.

102. Referring to *Standard Bank SA Ltd v CCMA* [1998] 6 BLLR 622 (LC) at paragraphs 38-41 Tip AJ said:

"It is one of the fundamentals of the employment relationship that the employer should be able to place trust in the employee…A breach of this trust in the form of conduct involving dishonesty is one that goes to the heart of the employment relationship and is destructive of it."

103. I agree with the submissions of the Respondent and the Applicant held a position of trust and she abused it. She further as a very senior employee misused a position and rank. The Applicant acted against her fiduciary duty to her employer, acted in her own selfish interests and to the prejudice of hers employer and the members. She was aware that she was not entitled to monies she claimed. That in itself destroyed the employment relationship.

104. What is very important is that the Applicant was in the employment with the Respondent in a senior position and do not accept any responsibility of her actions.

105. Furthermore, I accept that as soon as the settlement agreement was discharged on 11 December 2015, the dispute became res judicata. The res judicata doctrine prohibits the

reconsideration of a case already finally determined.9 This authority therefore firmly states that there was no settlement agreement to amend after the discharge thereof on 11 December 2015.

106. I further accept that the actions of the Applicant and the then HoD were therefore unlawful and invalid. That rendered the payment of the R1.5m to the Applicant to be without a lawful basis. It became as good as the two of them coming together to sign the document just to enable the Applicant to be paid R1.5m. Collusion cannot be shown in a better way.

107. I further accept that the actions of the Applicant in colluding with the then HoD and receiving an unjustified payment of R1.5m meet all the provisions of section 4 of the Prevention and Combating of Corrupt Activities Act 2004 as alleged in charge 1. As against section 4 (1) (a) she accepted R1.5m pay-out; as against section 4 (1) (b) (ii) her actions amounted to abuse of her position of authority (ii) (aa); as against (iii) the actions were designed to achieve an unjustified result of receiving a pay-out of R1.5m unduly; violation of her duty in terms of section 145 (b) of the PFMA breaching section (ii) (cc); breach of trust (ii) (bb); all showing that the Applicant is guilty of the offence of corrupt activities relating to public officers in (iv).

108. What is more evident is that the Applicant displayed a frightening level of dishonesty and disdain towards the Respondent. Firstly, the Applicant attempted to pull wool over the heads of everybody by capitalising on all the departmental lameness with which the matter was handled since 2017.

109. It is sad that she was blaming officials and the Department of not informing her of how much she had to pay. She did not accept any responsibility of her actions.

110. Therefore, the contents of the evidence of all Respondent witnesses made the Respondents version more probable. Consequently, I find that the dismissal of the Applicant was procedurally and substantively fair.

111. In the premise, I render the following award:

[9] Thwala vs S 2019 (1) BCLR 156 (CC) par 10.

AWARD

112. The dismissal of the Applicant, Farida Myburgh was substantively and procedurally fair.

113. The Applicant's case is dismissed.

Signature: 

Commissioner: **Theresa Malgas-Senye**

Sector: **Social Development**