



ARBITRATION AWARD

Case No: **PSHS918-18/19**

Commissioner: **Clarence Randall**

Date of award: **15 February 2019**

In the matter between:

RONEL DU PREEZ & 5 OTHERS

(Union/ Applicant)

and

DEPARTMENT OF HEALTH- EASTERN CAPE

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

- [1] The arbitration was held under the auspices of the PHSDSBC in terms of section 191(5) (a) of the Labour Relations Act 66 of 1995 as amended (the Act). This award is issued in terms of section 138 (7) of the Act.
- [2] The arbitration hearing took place on 23 January 2019, at the Respondent's Walton Building in Port Elizabeth.
- [3] The applicants were present and Mr. Chris Unwin, an attorney, represented the six applicants. Mr. van der Merwe, an employee of the Respondent, represented the Department in the matter.
- [4] The proceedings were digitally recorded.

ISSUE TO BE DECIDED

[5] I am required to determine whether the Applicants' suspensions were unfair. If so, I am required to grant the appropriate relief in terms of the Labour Relations Act, 66 of 1995 as amended (the Act).

BACKGROUND AND COMMON CAUSE ISSUES TO THE DISPUTE

[6] The amounts as set out below are not in dispute:

- Thulane Madonsela (Hospital CEO) – monthly remuneration equates to R116 239.29;
- Victor Tobo (Director - HR) – monthly remuneration equates to R72 317.52;
- Michael Byrnes (Director – Finance) – monthly remuneration equates to R89 682.85;
- Ronel Du Preez (Nursing Services Manager)– monthly remuneration equates to R70 926.90;
- Mojalefa Maseloa (Senior Manager - Medical Services) – monthly remuneration equates to R194 744.82; and
- Mcebisi Gcotana (Manager – Soft Services) – monthly remuneration equates to R65 964.74.

[7] The Applicants were made aware in terms of a letter dated 07 November 2018 signed by the Superintendent General (“SG”) that consideration was being given to placing them on precautionary suspension to allow for investigation into allegations of misconduct against them.

[8] The Applicants responded to the above by way of a letter dated 07 November 2018 contained wherein they request to be placed on special leave for the duration of the forensic investigation as an alternative to precautionary suspension.

- [9] The SG, also on 7 November 2018 and in writing, approves the request to be placed on special leave for the duration of the investigation.
- [10] The Applicants were not opposed to being “off-site” so as to allow for an unbiased forensic investigation process.
- [11] The SG, on 08 November 2018 and in writing, reverses the decision to place the Applicants on special leave and places them on precautionary suspension.
- [12] The Applicants acknowledge receipt of the notice of precautionary suspension on 09 November 2018 and were still on precautionary suspension at the time that the arbitration was finalised.
- [13] The Applicants representative submitted a bundle of documents numbered from page 1 – 65 and it was admitted into the record. The Respondent agreed that the documents are what they purport to be and will serve as evidence of what they purport to be. The parties agreed to submit written closing arguments by no later than 01 February 2019. The closing arguments were received from both parties.
- [14] Dr. Maseloa gave evidence as to the sequence of events which led to the suspension of the Applicants.
- [15] Mr. Tobo gave evidence as to the processes followed by the Respondent.
- [16] All six Applicants gave evidence as to the impact that the suspension has had on them.
- [17] The Respondent did not call any witnesses or produce any documents in support of its case but was afforded an opportunity to cross-examine the Applicants witnesses, which it duly did. The respondent did not cross-examine the Applicants in so far as their prejudice suffered is concerned.

SURVEY OF EVIDENCE & ARGUMENTS

[18] It must be noted that I have considered all the relevant evidence and argument placed before me by the parties, regarding the issues that I am required to determine, but I shall only refer to that which I regard as necessary to substantiate my findings in determining this dispute.

[19] It must also specifically be noted that I have not included the submissions of the Applicants in so far as the personal impact that their suspension has had on them – that part of their respective testimonies and supported medical reports were not questioned or disputed by the Respondent.

The Applicants' evidence and arguments

[20] *Mojalefa Maseloa ("Maseloa")*, was called upon to testify regarding the events leading up to suspension. He also had an opportunity to testify as to the impact that the suspension has had on him and his family.

[21] On 31 October 2018 NEHAWU & other Unions ("organised labour") commenced with an unprotected strike. It was indicated that they are unhappy with the Livingstone Hospital's management,

[22] Organised Labour insisted on a meeting with the SG on 02 November 2018 to discuss its unhappiness with the current hospital management.

[23] On 02 November the SG did not avail himself and as a result the unprotected strike continued. The strike turned violent and property was damaged.

[24] SG and Organised labour agreed to meet on 06 November 2018.

- [25] Due to the violent nature of the strike, the SG permitted Madonsela on 05 November (the CEO of the hospital), to seek POPS (Public Order Policing) intervention – POPS then intervened.
- [26] On 06 November 2018 the SG met with the Applicants and also with Organised labour. We were shown a list containing vague allegations by the SG, which he received from Organised labour.
- [27] The SG gave them three options to consider which would be for a period of three weeks so that the allegations may be properly investigated –
- Remain at work;
 - Look at transferring to another institution; or
 - Be sent home.
- [28] All six Applicants confirmed that they would prefer to be at home during the time of the independent investigation which was said to be concluded by 26 November 2018 – a decision would thereafter be taken in respect of the outcome of the investigation. There was no mention of a suspension.
- [29] On 07 November 2018 the Applicants each received a notice of intention to suspend from a Mr. Lose – the notice gave them two hours to respond. The notices contained the same content – only the details of the addressee varied.
- [30] They responded on the same day by presenting a request for special leave to be considered instead. The SG on the same day agrees to placing them on special leave.
- [31] The following day, the special leave approval was withdrawn, and the SG suspended the six Applicants.

- [32] Maseloa further testified that they were never afforded a proper opportunity to make representations in respect of the letters issued to them from the SG – the letters were vague and contained no details.
- [33] He further explained that all the Applicants acknowledged receipt of their respective suspension notices and confirmed that the notice stated – *“Your suspension will be reviewed within 30 days from the date of your receiving this notice, or until the disciplinary process has been concluded, whichever comes first”*.
- [34] Maseloa confirmed that none of the Applicants have had any feedback from the Respondent regarding the suspension and its investigation since being suspended on 09 November 2018.
- [35] During cross-examination, Maseloa confirmed that employees may be suspended from work pending the outcome of an investigation as per the disciplinary code and procedure.
- [36] Maseloa confirmed that the Respondent placed the Applicants on special leave pending the outcome of the forensic investigation.
- [37] Maseloa further confirmed under cross-examination that that they would be paid in terms of the provisions of special leave and would not have to report for duty during the time of the investigation, unless directed to do so to consult with the investigators – as per the letter from the SG approving special leave.
- [38] Maseloa denied that he was aware that the disciplinary code did not allow for special leave.
- [39] When referred to PSCBC Resolution 1 of 2003 (Disciplinary Code and Procedures for the Public Service), van der Merwe submitted that it only contains provisions for precautionary suspension and not special leave at 7.2 headed

Precautionary Suspension – 7.2 (a) & (b) were read into record. Maseloa confirmed the proposition but explained their case was different as they had been placed on special leave by the SG. He added that by being placed on special leave instead of being placed on a precautionary suspension, the investigation would still be allowed to run its course.

- [40] Maseloa further explained that the decision by the SG to reverse to leave and convert it to a suspension, could therefore only have been a punitive measure resulting in prejudice being suffered by the Applicants. He emphasized this by referring to clause 7.2 (c) which reads – *“If an employee is suspended or transferred as a precautionary measure, the employer must hold a disciplinary hearing within a month or 60 days, depending on the complexity of the matter and the length of the investigation. The chair of the hearing must then decide on further postponement”*. Maseloa stated that the 60 days had expired, no hearing has taken place and that he personally was not being paid his full remuneration as a result of the suspension.
- [41] During re-examination, Maseloa confirmed that their request to be placed on special leave were not representations in response to the letter from the SG headed “Possible Suspension from duty”.
- [42] Maseloa denies that the SG could have taken any representations into consideration from the Applicants, as claimed on the Precautionary Suspension letter received on 9 November 2018 as none were made.
- [43] Maseloa further disputed that the SG advised them that special leave would not be appropriate in the circumstances.
- [44] *Victor Tobo (“Tobo”), the HR Director*, was called upon to testify regarding the process of the suspension. He also had an opportunity to testify as to the impact that the suspension has had on him and his family.

- [45] Tobo testified that in his capacity, as HR Director, he is responsible for the implementation and monitoring of Human Resource Policies and Practices.
- [46] Tobo explained that he is familiar with the provisions of the Public Service Disciplinary Code and Procedure (1 of 2003) as he needs to refer to it in his capacity.
- [47] He further testified that in light of 7.2 (c) which reads – *“If an employee is suspended or transferred as a precautionary measure, the employer must hold a disciplinary hearing within a month or 60 days, depending on the complexity of the matter and the length of the investigation. The chair of the hearing must then decide on further postponement”*, that a disciplinary hearing must take place within a month or 60 days and that only the chairperson of the enquiry has the authority to postpone the matter going forward.
- [48] Tobo explained that the SG informed them that the investigation would be concluded within three weeks and that he confirmed in their letters of suspension that their suspensions would be reviewed after thirty days.
- [49] Tobo also referred the arbitration to the SMS handbook, specifically chapter 7 which he also refers to in his capacity as HR Director. Clause 2.7.2 specifically refers to Precautionary suspension or transfer. At 2.7.2 (c) it provides that the Respondent must hold a hearing within sixty days where an employee has been suspended.
- [50] Tobo furthered the arbitration to the DPSA guidelines on Precautionary Suspensions in the Public Service. Tobo testified that he in his capacity as HR Director is also required to refer to the said guidelines in the execution of his duties.

- [51] Tobo explained that as per the guidelines, two aspects need consideration when suspending an employee, being- reasonable suspicion of misconduct and reasonable belief that the employee may interfere. Tobo testified that none of the Applicants were provided with reasons as to how are why they would interfere with the investigation into the alleged misconduct.
- [52] Tobo indicated that the Applicants were not afforded an opportunity to make representations prior to being placed on suspension.
- [53] During cross-examination, Tobo confirmed that allegations of fraud and corruption were considered to be serious offences. He confirmed that it was for those two allegations that the SG issued them with a notice of possible suspension from duty.
- [54] Tobo disputed that the letter issued on 7 November regarding the possible suspension from work was an extension of the conversation that the Applicants had with the SG the previous day.
- [55] Tobo agreed that there would be a perception that the Applicants may interfere if they were present at the workplace during the time of the said investigation.
- [56] Tobo disputed that the Applicants made representations to their possible suspension when they were directed to do so by the SG on 07 November 2018. He clarified that they did not make representations and instead raised other issues.
- [57] When probed about the SG referring to representations made by the Applicants in their respective letters of suspension that he issued to them, Tobo disputed that any representations could have been considered as none were made.

[58] It was argued that the Applicants' suspensions are both procedurally and substantively unfair and stands to be uplifted immediately.

[59] It was also argued that in the case of the Applicants, compensation should be awarded due to the effect that the unfair suspension has had on the dignity of the Applicants, including their reputational damage suffered. In addition, the Applicants have had to incur medical and legal expenses.

[60] It was submitted that compensation of no less than three months remuneration be awarded to each Applicant and that Maseloa be awarded the outstanding remuneration owing to him, being R56 586.82.

The Respondent's arguments

[61] The Respondent argued that although the Respondent initially acceded to the request of placing the Applicants on special leave, it, after further consideration, reversed the special leave and placed the six Applicants on precautionary suspension with effect from 09 November 2018.

[62] The Respondent further argued that the Public Service Disciplinary Code and SMS Handbook are prescriptive whereas the DPPSA guide is merely a guideline.

[63] The Respondent is of the view that a fair process was followed in effecting the precautionary suspensions as the employees were advised of the possibility of being suspended and were given an opportunity to make representations.

[64] It is the Respondent's view that its failure to convene disciplinary enquiries for the Applicants within the prescribed timeframes does not automatically render the continued suspensions unfair.

ANALYSIS OF ARGUMENTS

- [65] This dispute has been referred in terms of section 186 (2) (b) of the Act. The section provides that:
- “(2) '**Unfair labour practice**' means any unfair act or omission that arises between an employer and an *employee* involving-
- (b) the unfair suspension of an *employee* or any other unfair disciplinary action short of dismissal in respect of an *employee*;"
- [66] The Respondent argued that the Applicants were placed on precautionary suspensions pending an apparent forensic investigation relating into alleged fraud and corruption at the Livingstone Hospital where they are employed.
- [67] The Applicants had the onus to prove that the suspensions were unfair. The Applicants testified to discharge that onus.
- [68] The Respondent presented no evidence to rebut the Applicants' evidence. The Respondent also did not call any witnesses to support the versions or propositions proffered to the Applicant's during cross-examination. The Respondent only presented closing arguments. In **De Beer v Trudon (Pty) Ltd (1994) 15 ILJ 1057 (LAC)** the Court with approval referred to the matter of **Food and Allied Workers Union and Others v Amalgamated Beverage Industries Ltd (1994) 15 ILJ 1057 (LAC)** where it was held that an evidential foundation had to be laid and that a party could not merely rely on arguments only, as arguments without an evidential basis would be no more than speculation. The respondent relied on arguments without any evidence foundation. My award is therefore based mainly on the Applicants undisputed testimony.
- [69] The oddity in all of this is the fact that a discussion was held between the Applicants and the SG regarding an independent investigation that was to be concluded by 26 November 2018 in so far as organised labour's concerns regarding the hospital management. Three options were given to the employees, whereby they all elected to be sent home during that period so as to protect the

integrity of the investigation against them. What happens thereafter is just bizarre to say the least, in that;

- They get a letter of possible suspension from the SG which did not form part of their discussions;
- They request instead to be placed on special leave whereby the SG accepts the request and places conditions attached to the special leave in his correspondence to them;
- The SG then makes a U-turn the following day and issues notices of suspension instead.

[71] No reason is given as to why there is this sudden turnabout nor is there clarity given as to what representations were considered, as contained in the suspension notice, as the Applicants disputed ever having made any representations. I can only infer that the SG was ill-advised as to the options he had at his disposal in terms of handling this delicate situation or undue influence played a part in him reversing his decision to have the Applicants placed on special leave.

[72] It is important to note that there are three parts to a precautionary suspension – In ***POPCRU obo Masemola & Others v Minister of Correctional Services (2010) 31 ILJ 412 (LC)*** the court held, relying on ***Mogothle v Premier of the Northwest Province & Another (2009) ILJ 605 (LC)*** that - Fairness requires the following before suspending an employee pending an investigation or disciplinary action:

- *first that the employer has a justifiable reason to believe, prima facie at least, that the employee has engaged in serious misconduct;*
- *secondly, that there is some objectively justifiable reason to deny the employee access to the workplace based on the integrity of pending investigation into the alleged misconduct or some other relevant factor that would place the investigation or the interests of the affected parties in jeopardy; and*
- *thirdly, that the employee is given the opportunity to state a case before the employer makes a final decision to suspend the employee.*

- [73] On the 1st point – the Applicants contended that the notice of possible suspension was vague – there is no annexure attached setting out the various allegations against them. It just states - *“Investigation is currently being conducted with regards to allegations of serious misconduct against yourself. The said allegations relate to the reported acts of fraud and corruption in Livingstone Hospital”*. If there was a justifiable reason to suspend the employees, the Respondent hopelessly failed to properly articulate this to the Applicants in its notice of possible suspension.
- [74] On the 2nd point – the Applicants agreed to be sent home to protect the integrity of the apparent forensic investigation as conveyed to them by the SG. This investigation was to be concluded by 26 November 2018 according to the SG and in light of that, the Applicants were amenable to be placed on special leave during that time.
- [75] On the 3rd point – this simply did not happen. It is clear from the written correspondence to the SG that they were not in a position to make representations in any event due to the vague nature of the allegations and also in light of the fact that they were only given two hours to make such representations. Instead, they proposed an alternative, being special leave, which was accepted by the SG. It must be noted that this request was formally made as the Applicants were under the impression when they were given the three options the day before being issued with the possible suspension notice by the SG, that by agreeing to be sent home for the duration of the forensic investigation, it would be recorded as special leave.
- [76] It is important to note as well that as much as it was spoken that a forensic investigation was being conducted, that is about all we know. No further details regarding the progress of the investigation, who is conducting the investigation, why the investigation was not completed by 26 November 2018 and why the decision to review the Applicants’ suspensions after thirty days (as per the suspension notice) was not communicated to them was not shared with the arbitration proceedings.

- [77] Without dissecting every shortcoming on the Respondent's part in so far as following due process is concerned when taking into account the Notice of possible suspension, the notice of suspension, the Disciplinary Code and Procedure for the Public Service, read with the SMS Handbook and guided by the Department of Public Service and Administrations' (DPISA) - Public Service Precautionary Suspensions Guide, it is plain to see from the evidence led by the two witnesses that the Respondent horribly failed in the execution of its duties to fairly suspend these Applicants.
- [78] At worst, it states that a hearing must take place within sixty days from the suspension of an employee. This has not even taken place – in fact, no charges had even been levelled against the Applicants at the time of the arbitration. The guideline even goes as far to state that the suspended employee may return to work when the sixty days has lapsed.
- [79] It was held in **SAPO Ltd v Jansen Van Vuuren NO & Others (2008) 8 BLLR 798 (LC)**, that a suspension, even whilst investigations are underway, amounts to an unfair labour practice, if the period of suspension exceeds the period stipulated in a disciplinary code, collective agreement, regulations, or contract of employment. This also supports my reasoning above.
- [80] I therefore find the suspension of the Applicants to be procedurally and substantively unfair.
- [81] The Applicants argued that compensation would be appropriate in these circumstances. The facts in the Labour Court judgment in **IMATU obo Sankhanyane v Emfuleni Local Municipality [2016] ZALCJHB 29** (handed down on 29 July 2016) were similar to the facts before me. Sankhanyane was on protracted suspension with pay. The Respondent led no evidence and thus failed to justify the prolonged suspension. Sankhanyane testified that her prolonged suspension in the absence of any disciplinary action, together with having to

constantly fend off questions about her situation from family, friends and colleagues had left her feeling humiliated and violated by the Respondent. The court, in the case above, also held that when the arbitrator finds that a suspension of an employee amounted to an unfair labour practice, it was irregular to simply order his return to work without considering whether, based on the facts of the case, to consider awarding compensation as a form of *solatium*.

[82] I found that it is appropriate to award compensation in this matter. The delay was protracted and more punitive than being precautionary. There was no basis for the prolonged suspension.

[83] In determining the value of the compensation, consideration was given to the Applicant's high-profile positions within the establishment, the resultant damage to their reputations, as well as the effect thereof on both their well-being and that of their families. The duration of their suspension and the continuing unfairness deserves a substantial award of compensation in my view.

[84] In further determining the amount of compensation due, I also took into account that the Applicants did not hesitate to challenge their suspensions. Their respective suspensions were humiliating and impacted their professional reputations negatively. All were suspended with full pay except for Dr Maseloa, the first witness – he was not paid according to his agreed remuneration structure.

AWARD

[85] The decision to suspend the Applicants' employment is an unfair labour practice.

[86] The decision by the Respondent to suspend the Applicants' employment on 9 November 2018 is overturned.

[87] The Respondent is ordered to uplift the suspensions with immediate effect and take the Applicants back into its employ with effect from 25 February 2019.

[88] The Respondent is ordered to pay each Applicant, compensation equivalent to six months remuneration for the unfair suspension. The amounts to be used to calculate the remuneration are set out, under the heading *Background and common cause issues to the dispute*, above.

[89] In addition, thereto, the Respondent is further ordered to pay Dr. Maseloa the outstanding remuneration owing to him, being R56 586.82.

[90] The payments in paragraph 88 and 89 above must be paid to the Applicants on or before 15 March 2019.

Signature:



Commissioner:

Clarence Randall
