



ARBITRATION AWARD

Case No: PSHS828-22/23

Commissioner: Ncumisa Bantwini

Date of award: 15 May 2023

In the matter between:

NEHAWU obo Thembinkosi Ntanjana

Applicant

and

Department of Social Development-Eastern Cape

Respondent

DETAILS OF HEARING AND REPRESENTATION

1. This arbitration was heard on 02 May 2023 in the offices of the respondent in King Williams Town. It came before the PHSDSBC in terms of Section 186 (2) (b) of the Labour Relations Act 66 of 1995 as amended, (the LRA).
2. Parties were allowed to submit written closing arguments on 05 May 2023. Both arguments have been considered in the preparation of this award. The proceedings were digitally and manually recorded.
3. Mr. Pumzile Matu of NEHAWU appeared for the applicant while Mr. Sindile Bunguzana appeared for the respondent.

ISSUE TO BE DECIDED

4. I am required to decide whether the suspension of the applicant was fair or not. I have considered all the evidence and arguments, but because section 138 (7) of the Labour Relations Act, 66 of 1995, as

amended requires brief reasons. I have only referred to the evidence and arguments that I regard as necessary to substantiate my findings and determination of the dispute.

BACKGROUND TO THE DISPUTE

5. The applicant is employed by the respondent as a Deputy Director Corporate Services and he was suspended on 09 November 2022 and he seeks upliftment of his suspension with immediate effect as a remedy.

SURVEY OF EVIDENCE

The applicant's evidence

6. In his opening statement, Mr. Matu submitted that the applicant was placed on precautionary suspension from 09 November 2022. The respondent conducted investigations and issued 4 reports. The applicant will prove that no requirements were followed by the respondent prior the applicant's precautionary suspension. The notice of disciplinary hearing was issued on 16 March 2023 but the 3 disciplinary hearings were postponed.
7. The applicant, **Advocate Thembinkosi Ntanjana** testified as follows:
8. He believes that the precautionary suspension is unfair because the matter was investigated, approved by the District Director who is the accounting officer of the district on 01 September 2022 (pages 26 to 34).
9. A whistle Blower reported the same facts as approved by the accounting Officer and another investigation was conducted by Advocate Tsipa and a report which confirms part of the district investigation and was signed on 14 October 2022. The applicant made reference to paragraph 15 of the reports which reads:
"There is no prima facie evidence that points out that the employee committed an act of misconduct, taking into consideration the severity of the alleged offence, it is however imperative that all relevant evidence connected to the allegation is obtained. Of which in this case no adequate evidence was obtained to proceed with a disciplinary enquiry

RECOMMENDATION

No disciplinary proceedings should be taken against Adv Ntanjana"

10. On the same matter, the Risk Management unit also conducted a preliminary investigation but the matter was abruptly taken to the Labour relations department with no justification.
11. On 03 November 2022, the HOD signed the Preliminary investigation report on alleged fraud and corruption in respect of procurement processes at Amathole office (Annexure A). On 12 November 2022, he was served with a suspension letter after the investigations were conducted and concluded.
12. The applicant was again referred to paragraph 33.1 and 33.2 of preliminary investigation report which was conducted by Mr. Zimisele Sam and approved by the HOD. Paragraph 33.1 under recommendations reads:

33 Considering the aforesaid it is recommended that:

33.1 Each of Dr Vuyani Langa and Mr. Thembinkosi Ntanjana be immediately suspended from the public service on precautionary grounds with full pay until finalization of the prospective enquiries. Their presence in the Department might interfere with the investigation and possible evidence.

33.2 No disciplinary action be taken at this stage, against the other implicated officials mentioned in paragraph 32.6 as they can be used as Departmental witnesses in the event of disciplinary proceedings proffered against Dr Langa and Mr. Ntanjana. Such proceedings could be initiated against them in the event of them opting not to cooperate”

13. The applicant testified further that the implicated officials were not persecuted by the respondent and were coerced to say anything about him (the applicant) and about Dr Langa. Crucial information was also omitted by the official so that the second report could stand. He hoped that his suspension would be lifted after receiving the 5th report as the investigation was completed. On 13 February 2023, he was served with a notice of disciplinary hearing.
14. The applicant testified further that he was never interviewed during the investigation and even prior its commencement. He is being placed on precautionary suspension although 60 days had lapsed. The suspension has been extended although the investigation has been finalized.
15. Under cross-examination, the applicant testified as follows:
16. The report that appears on page 34 of bundle A was approved by Dr Langa, the District Director and the accounting officer of the district on 01 September 2022. He was appointed by him (Dr Langa) to

conduct an investigation when there was an occurrence at the supply chain section and nothing was reported about him (the applicant). Advocate Tsipa's report appears on pages 20 to page 24 of bundle A. The Risk Management section did not submit a report as the matter was abruptly taken from them and there was no need for another investigation afterwards.

17. It appears that the respondent did not trust other investigators as the same matter was reported. He does not view the allegations levelled against him as serious.
18. He understands that he is the second in command in the district of Amathole but he would allow an employee who has been charged with similar allegations as his to report for duties after 60 days had lapsed. The applicant conceded that his disciplinary hearing was postponed on 2 occasions based on his account but the third sitting which was scheduled for 28 April 2023 was postponed due to non-availability of the chairperson.
19. The applicant stated that his precautionary suspension is unfair based on the damage on his image and career issues. The respondent's witnesses were never suspended although the HOD issued an instruction for their suspension in the report.
20. Under re-examination, the applicant stated that it was proper for Dr Langa to sign his investigation report as he was acting on his instruction. He was interviewed by the Risk Management section and he also provided them with relevant documents.
21. The applicant stated also that his continued suspension is affecting his career and dignity as that the investigation has been completed.
22. In closing, **Mr Matu** argued as follows:
23. The applicant was never informed about the allegations brought against him prior his suspension and the extension. The respondent has failed to provide reasons as to why the disciplinary enquiry was not conducted within 60 days in line with clause 7.2 of PSCBC Resolution 1 of 2003. This renders the precautionary suspension as unfair hence it must be uplifted. The applicant was served with a notice of disciplinary hearing on 13 February 2023 and this was way after the expiry of 60 days.
24. Mr Matu argued also that the respondent committed an unfair labour practice within the meaning of section 186 (3) (b) of the LRA as the suspension violates the applicant's terms and conditions of employment in the public service. He seeks upliftment of the precautionary suspension as the

respondent failed to conduct a disciplinary hearing within the prescribed 60 days as stipulated in the code of conduct.

The respondent's case

25. According to Mr. Bunguzana's opening statement, the respondent will call a witness who will dispute the allegations of unfair labour practice against the respondent.
26. **Mr. Zimisele Arnold Sam**, the respondent's witness, testified as follows:
27. He works for the respondent as a Deputy Director Labour Relations. He prepared the preliminary Investigation report that is dated 26 October 2022. It was necessary for the respondent to conduct an investigation after serious allegations were brought against the applicant to check if there is a prima facie case against him (the applicant).
28. He recommended that more in-depth investigation to be done hence the applicant was placed on precautionary suspension. Document B relates to the in-depth investigation report wherein a total of 21 people were interviewed whereas during the preliminary report only 3 people were interviewed.
29. The allegations leveled against the applicant are very serious as they involve fraud from charges 1 to 10. With regards to the expiry of 60 days that has lapsed without the suspension not being lifted, the witness stated that cases differ in their complexity.
30. The respondent, according to the witness's further evidence extended the applicant's suspension due to the fact that the applicant's case is complex hence the suspension was extended. The 21 people who were interviewed are potential witnesses at the disciplinary hearing of the applicant. Under normal circumstances, employees are suspended as they may temper with evidence.
31. The 21 people who were interviewed are the applicant's subordinates and that means there is a reasonable potential of tempering with witnesses. The applicant's extension of precautionary suspension is for the benefit of both the applicant and the respondent as tensions in the office could be positive or negative.
32. Under cross-examination, the witness testified as follows:
33. The applicant's precautionary suspension was extended pending finalization of the disciplinary process (page 19, paragraph 1 of bundle A). After a preliminary report was issued, there was a need for an in-

depth investigation. The charges levelled against the applicant include fraud and they are very serious and will be tested during the disciplinary.

34. It is not correct that the chairperson has an authority to extend applicant's suspension as he was suspended by the HOD hence the extension was made by the HOD. It is not true that the applicant was singled out for suspension. The employees that are cited in paragraph 33.2 and 33.3 of the report are potential witnesses of the respondent and the respondent's suspicion is that if the applicant's suspension is lifted, he may interfere with the potential witnesses.
35. Dr Langa who is the applicant's immediate Manager is also on precautionary suspension and not on precautionary transfer. Both the precautionary suspension and its extension thereof are legal.
36. In closing, **Mr Bunguzana** argued as follows:
37. The respondent did not commit unfair labour practice in suspending the applicant as the suspension was in line with the disciplinary code and procedures (PSCB Resolution 1 of 2003).
38. The charges levelled against the applicant are very serious and the applicant testified that he is the second in command in the district office and that respondent's potential witnesses report to him. The applicant's presence will threaten the employees who will testify during the disciplinary hearing if the suspension is lifted.
39. Mr. Bunguzana argued also that clause 7.2 (a) (i) of Resolution 1 of 2003 stipulates that the employer may suspend an employee beyond 60 days on full pay if the employee is alleged to have committed a serious offence.
40. The respondent's representative further argued that Audi alteram partem rule is no longer a requirement before suspending the employee citing Long vs South African Breweries and others case wherein the Constitutional Court decided that there was no need for a pre-suspension hearing in the instance of a precautionary suspension.

ANALYSIS OF EVIDENCE AND ARGUMENT

41. It is common cause that on 12 November 2022 the applicant was served with a precautionary suspension letter by the respondent.

42. It is common cause also that the precautionary suspension was extended on 10 January 2023 pending finalization of the disciplinary process. It appears that the suspension extension was done within the prescribed 60-day period.
43. It is furthermore common cause that the applicant was served with a notice of disciplinary hearing dated 13 February 2023.
44. Paragraphs 1 and 2 of the extension letter reads:

You are advised that your precautionary suspension is being extended with immediate effect pending the finalization of the disciplinary process. The precautionary suspension is in terms of clause 7 of Resolution 1 of 2003 (Disciplinary Code and Procedures).

The Department believes that your presence in your current office might jeopardize the disciplinary process and proceedings on serious allegation against you and you still may compromise its integrity and image. Take note that the Precautionary suspension is with full pay and benefits”.
45. It is undisputed fact that charges 1 to charge 10 levelled against the applicant relates to fraud which is a very serious offence.
46. It is undisputed evidence that the applicant conceded that he is the second in command in the Amathole District and that the 21 employees who were interviewed during the investigation are the respondent's potential witnesses during the applicant's disciplinary hearing.
47. The respondent's contention to the fact that the applicant's presence in his current office might jeopardize the disciplinary process and may compromise its integrity and image was not disputed.
48. I concur with the respondent's contention to the fact that an employer is not required to give an employee an opportunity to make representations before a precautionary suspension with full pay is issued. See *Long v South African Breweries (Pty) Ltd and Others* (CCT61/18) {2019} ZACC 7 (19 February 2019).
49. I further concur with the respondent's contention to the fact that the HOD has a delegated authority over employees below his position hence the applicant was suspended by him. He has an authority to extend the applicant's suspension and not the chairperson of the disciplinary hearing hence he (HOD) extended it.

50. Section 7 (3) (b) of the PSA provides:

“Subject to the provisions of paragraph (c) and (d), a head of department shall be responsible for the efficient management and administration of his or her department, including the effective utilization and training of staff, the maintenance of discipline, the promotion of sound labour relations and the proper use and care of State property, and he or she shall perform the functions that may be prescribed”

51. Section 16A of the PSA further provides:

(2) A head of department shall-

(a) immediately take appropriate disciplinary steps against an employee of the department who does not comply with a provision of this Act or regulation, determination or directive made thereunder:

(b) immediately report to the Director General: Public Service and Administration the particulars of such non-compliance”.

52. On the basis of the above evidence, I found that the applicant has failed to prove unfair labour practice by the respondent based on precautionary suspension.

53. The above evidence has established that the applicant’s precautionary suspension was procedural and substantively fair. The applicant has failed to discharge the onus to prove the claim of unfair labour practice based on precautionary suspension by the respondent.

AWARD

54. In the circumstances, I deem it reasonable to make the following award:
55. I find the precautionary suspension issued to the applicant, Advocate Thembinkosi Ntanjana by the respondent, Department of Social Development-Eastern Cape as fair and appropriate decision.
56. The applicant's claim is hereby dismissed.
57. The applicant is not entitled to any relief sought.



Ncumisa Bantwini