



# ARBITRATION AWARD

Case No: PSHS909-22/23

Commissioner: Ncumisa Bantwini

Date of award: 15 May 2023

In the matter between:

**PSA obo Doctor Vuyani Goodman Langa**

Applicant

and

**Department of Social Development-Eastern Cape**

Respondent

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## DETAILS OF HEARING AND REPRESENTATION

1. This arbitration was heard on 04 May 2023 in the offices of the respondent in East London. 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 11 May 2023. Both arguments have been considered in the preparation of this award. The proceedings were digitally and manually recorded.
3. Mr. Anthony Killian of PSA 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 District Director of Amathole District and he was suspended on 09 November 2022 and he seeks upliftment of his suspension with immediate effect and 12 months' salary compensation as a remedy.

## SURVEY OF EVIDENCE

### The applicant's case

6. In his opening statement, Mr. Killian submitted that the applicant was placed on precautionary transfer on 27 October 2022. The applicant is on sms level/salary level 13. Subsequent to the precautionary transfer, the HOD suspended the applicant and despite the instruction by the MEC to withdraw the suspension, the HOD failed to withdraw the suspension.
7. The respondent failed to issue a notice of disciplinary hearing within 60 days as stipulated in clause 2.7.2 of the SMS Handbook. The HOD issued an extension of the suspension whereas the SMS Handbook stipulates that the chairperson can decide on the extension of suspension of the employee.
8. The HOD did not have an authority to suspend the applicant. The employee seeks the upliftment of the suspension with immediate effect and 12 months' salary as compensation.
9. The applicant, **Doctor Vuyani Goodman Langa** testified as follows:
10. He is currently employed by the respondent as the District Director of Amathole District and is on salary level 13. The MEC has delegated powers over the SMS members and not the HOD.
11. He was informed of the allegations against him on 04 October 2022 which led to him being placed on precautionary transfer. He denied the allegations in the letter which indicated as to why he cannot be charged. He was placed on precautionary transfer by the MEC and was placed at the Deputy Director General's office.

12. On 10 October 2022, he was served with another letter placing him on precautionary suspension by the HOD. Nothing was directed to him prior his suspension and he believes that was unfair. The suspension letter is dated 09 November 2022 and was served via email as he was in Mthatha at the time. The main allegation is gross deliriction of duty.
13. He enquired about these changes from the HOD and this is when the Whistle Blower who reports to him (the applicant) was working from home. His first contention was that the suspension letter was signed by the HOD. He never challenged the precautionary transfer as it was issued by the MEC.
14. On 09 November 2022, he was served with 13 charges of allegations of misconduct and charges in relation to precautionary transfer and suspension were consolidated in the same charge sheet. He was invited to a disciplinary hearing after 86 days of being suspended. This is in contravention of chapter 7 of sms handbook.
15. He suffered reputation fulfilment / advancement as he could no longer write articles and this resulted in him being admitted to hospital on 26 March 2023 from severe depression and hypertension. He saw the extension of precautionary suspension dated 10 January 2023 for the first time during the arbitration process. The suspension extension is signed by the HOD instead of the chairperson of the disciplinary hearing.
16. The applicant testified further that being placed on precautionary transfer could not have made a difference in terms of investigation as it is a form of suspension.
17. Under cross-examination, the applicant testified as follows:
18. The precautionary transfer was in respect of sexual harassment allegations. The complainant works in the district and is based in Dutywa office. The charges levelled against him may be serious to a person who issued them. The applicant disputed that the Audi alteram paterm is no longer required before suspension as the case law should be read with policy directives, citing paragraph C of sms handbook (page 30 of bundle A).
19. It is not true that his presence in the office could interfere with the respondent's witnesses. The disciplinary hearing has been scheduled but postponed on 3 occasions.
20. Under re-examination, the applicant stated that on 20 February 2023 the chairperson did not extend his suspension, instead the suspension was extended by the HOD on 10 January 2023.

21. **Ms. Vuyokazi Macaula**, the applicant's witness testified as follows:
22. She works for the respondent at the MEC's office and she is aware about the applicant's suspension through correspondence and submission to the MEC. The applicant's precautionary transfer was signed by the MEC. Subsequent to the applicant's precautionary transfer, the applicant was placed on precautionary suspension by the HOD. The HOD does not have powers to suspend the applicant as he is a member of sms.
23. She is not aware of the misconduct allegations levelled against the applicant and that he must be reinstated at the Deputy Director General's office.
24. Under cross-examination, the witness testified as follows:
25. She is aware of sexual harassment allegations levelled against the applicant which led to him being placed on precautionary transfer. The MEC has powers over the SMS employees. When the witness was referred to the charges of misconduct levelled against the applicant, her response was that they are serious hence investigation was conducted.
26. Under re-examination, the witness stated that the MEC made a follow-up on the instruction to the HOD regarding the applicant's suspension.
27. In closing, **Mr. Killian** argued as follows:
28. Discipline in the public service is governed by a collective agreement (PSCBC Resolution 1 of 2003).
29. 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 Chapter 7 clause 2.7 (2) (c) of SMS Handbook. This renders the precautionary suspension as unfair hence it must be uplifted. The applicant was served with a notice of disciplinary hearing on 03 February 2023 and this was way after the expiry of 60 days.
30. Mr. Killian 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 and 12 months' salary as compensation as the respondent failed to conduct a disciplinary hearing within the prescribed 60 days as stipulated in the SMS Handbook.

31. The applicant also seeks 12 months' salary as compensation in terms of section 194 (4) of the LRA read with section 195 as the applicant suffered prejudice by the respondent's conduct.

### **The respondent's case**

32. According to Mr. Bunguzana's opening statement, the respondent will call a witness who will dispute the allegations of unfair labour practice by the applicant. The HOD is the head of the administration and has powers to manage the affairs of the department while the MEC is the political head of the department.
33. The charges levelled against the applicant are very serious and his presence in the office will jeopardize the respondent's evidence and possibly interfere with witnesses. No prejudice is being suffered by the applicant as he is being paid in full.
34. **Mr. Zimisele Arnold Sam**, the respondent's witness, testified as follows:
35. He works for the respondent as a Deputy Director Labour Relations. The 2 precautionary transfer and suspension letters issued to the applicant are as a result of the first allegation of sexual harassment which he (the applicant) was placed on precautionary transfer for.
36. The second letter is in relation to allegations of fraud and corruption which attracted a precautionary suspension of the applicant. The HOD suspended the applicant as he has powers to do so in line with section 16 (A) (2) of the Public Service Act (PSA).
37. 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) or not.
38. He recommended that more in-depth investigation 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.
39. The allegations levelled against the applicant are very serious as they involve fraud and corruption. With regards to the expiry of 60 days that has lapsed without the suspension not being lifted is that the applicant's case is complex.
40. The respondent (HOD) extended the applicant's suspension on 10 January 2023 due to the fact that the applicant's case is complex. 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.

41. The applicant is the most senior person in the district and the 21 people who were interviewed are his subordinates and that means there is a reasonable potential of tempering with witnesses and the respondent's evidence.
42. The applicant's extension of precautionary suspension is for the benefit of both the applicant and the respondent as there could be negative tensions in the office as well as tempering with the evidence and potential witnesses of the respondent. The HOD suspended the applicant and he (the HOD) has powers to extend the suspension (Annexure C). The 13 charges levelled against the applicant are listed in Annexure D and are very serious as they include fraud and corruption. It is therefore not advisable to uplift the applicant's suspension before the finalization of the disciplinary hearing. The Amathole District is the biggest province in the Eastern Cape province.
43. The MEC has delegated authority over HOD and not anyone below the HOD hence the applicant's suspension was not withdrawn (page 16 of bundle A).
44. Under cross-examination, the witness testified as follows:
45. He conducted preliminary investigation and issued a report on alleged fraud and corruption in respect of procurement processes at Amathole District office (Annexure A). The applicant's precautionary suspension was extended pending finalization of the disciplinary process (Annexure C-paragraph 1). 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.
46. 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. 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.
47. In closing, **Mr. Bunguzana** argued as follows:
48. The respondent did not commit unfair labour practice in suspending the applicant as the suspension was in line Chapter 7 clause 2.7 (2) of the Public Service Handbook/SMS Handbook. The charges levelled against the applicant are very serious and the applicant testified that he is the most senior official 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.

49. The respondent's representative argued further that the applicant failed to prove that the chairperson has a right to extend the precautionary suspension and this was refuted by the respondent's witness stating that the chairperson grants postponement of the disciplinary hearing. He further made reference to section 7 (3) (b) as well as section 16 of the PSA No. 103 of 1994, chapter 7 paragraph 2.7 (2) of SMS Handbook as well as section 16A 1 (a) and 2 (a) of PSA.
50. 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.
51. Mr. Bunguzana made reference to other authorities and argued further that the applicant's suspension is pending finalization of the disciplinary process and is fair.

## **ANALYSIS OF EVIDENCE AND ARGUMENT**

52. It is common cause that the applicant was placed on precautionary transfer with effect from 27 October 2022 by the MEC and subsequent to that the HOD issued a precautionary suspension letter after there were 13 allegations of fraud and corruption against the applicant were brought to his (HOD) attention.
53. It is common cause also that the precautionary suspension was extended on 10 January 2023 pending finalization of the disciplinary process.
54. It is furthermore common cause that the applicant was served with a notice of disciplinary hearing dated 03 February 2023.
55. 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 2.7(2) of SMS Handbook.*
  - *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".*

56. It is undisputed evidence that the disciplinary hearing had been scheduled but postponed on 3 occasions. This means that the disciplinary hearing has not been finalized.
57. It is furthermore undisputed fact that all the charges levelled against the applicant relates to fraud and corruption and are very serious.
58. Chapter 7 clause 2.7 (2) (C) of SMS Handbook 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.
59. It is undisputed evidence that the applicant conceded that he is the most senior official in the Amathole District and that the 21 employees who were interviewed during the investigation are the respondent's potential witnesses during his disciplinary hearing.
60. 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.
61. I concur with the respondent's contention to the fact that an employer is not required to give an employee 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).
62. 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.
63. 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"*
64. 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".*



65. 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.
66. The above evidence has established that the applicant's precautionary suspension was procedural and substantively fair. The employee has failed to discharge the onus to prove the claim of unfair labour practice based on precautionary suspension by the respondent.

## **AWARD**

67. In the circumstances, I deem it reasonable to make the following award;
68. I find the precautionary suspension issued to the applicant, Dr Vuyani Goodman Langa by the respondent, Department of Social Development-Eastern Cape as fair and appropriate decision.
69. The applicant's claim is hereby dismissed.
70. The applicant is not entitled to any relief sought.



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**Ncumisa Bantwini**