ARBITRATION AWARD

Case Number: ***PSCBC568-23/24***
Commissioner: ***Minette van der Merwe***
Date of Award: ***28 November 2023***

In the **ARBITRATION** between

PSA obo Sewiwe Shwababa
(Union/Applicant)

And

Department of Agriculture, Land Reform and Rural Development (DALRRD)
(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. This is the arbitration award in the matter between the Public Servants Association (PSA) on behalf of Sewiwe Shwababa, the Applicant, and the Department of Agriculture, Land Reform and Rural Development, the Respondent, which matter was scheduled for arbitration by digital means (Microsoft Teams) on 3 November 2023 (13h00) and held under the auspices of the Public Service Co-ordinating Bargaining Council (PSCBC).

2. Parties were invited and had attended proceedings. The Applicant was represented by Mr Anthony Killian, whereas the Respondent was represented by Adv Nomvula Nhlapo, on instruction from Vuma Attorneys.

3. No digital recording was made of proceedings, and no interpretation was required.

ISSUE(S) TO BE DECIDED

4. The matter was referred to the PSCBC as a dispute relating to the interpretation and application of Resolution 1 of 2003, and in terms of section 24 of the Labour Relations Act, 66 of 1995, as amended ("LRA").

5. I am called upon to determine whether or not the Respondent was in contravention of clauses 2.3, 2.8, 6, 7.3(b) and 7.3(f) of Resolution 1 of 2003 by appointing legal practitioners as a Chairperson and an Initiator respectively in the disciplinary hearings of the Applicant.

BACKGROUND TO THE ISSUE

6. Parties wished to dispense with the case by way of written arguments, which were received as follows:
    i. Applicant's written arguments by 10 November 2023
    ii. Respondent's answering arguments by 17 November 2023
    iii. The Applicant's reply by 22 November 2023

SURVEY OF ARGUMENTS AND EVIDENCE

Bundles "A" was submitted into evidence on behalf of the Applicant and bundle "R" was submitted into evidence on behalf of the Respondent. The veracity of the documents was not disputed, and it was accepted as it purported to be.

Arguments of the Applicant (brief summary):

7. The Respondent had appointed Vuma Attorneys to take over the disciplinary function of the Respondent, and had appointed, as the Initiator in the Applicant's disciplinary hearing Adv Christinah Nhlapo and as the Chairperson had appointed Adv Refilwe More. These roles were clearly defined in PSCBC Resolution 1 of 2003, and the appointment of legal practitioners in these roles in disciplinary hearings were prohibited. The Respondent was in contravention of PSCBC Resolution 1 of 2003.

8. The Respondent could utilize employees of the State, employed in other departments and who were legally qualified, to fulfil the roles of Initiator and Chairperson in disciplinary hearings, if capacity was one of the reasons it could not utilized employees from within its own department.

Arguments of the Respondent (brief summary):

9. The Respondent listed a number of factors it had considered before it had decided to outsource the Initiator and Chairperson function and appoint legal practitioners to fulfil those roles on the Respondent's behalf in the disciplinary hearing of the Applicant. Some of these factors (not all repeated herein) were the complexity of the case, the monetary value involved in this and related cases of millions of rands, the legal questions that would be raised in this case, a lack of capacity within the Respondent of knowledgeable and experienced people to initiate and chair these types of disciplinary hearings, Covid-19 and its effects, a back-log of cases, the merger between the Department of Rural Development and the Department of Land Reform and Rural Development and prejudice the Repsondent could suffer.

10. It submitted that any rule which requires the outright rejection of requests for legal representation in all circumstances cannot be accepted. A presiding officer should exercise his/her discretion in the granting of legal representation. The Respondent is permitted to deviate from PSCBC Resolution 1 of 2003 in appropriate circumstances, provided that the deviations remain within the overall framework of the Code and may take place within the overall precepts required for a fair hearing. The primary condition

underpinning the necessity to allow legal representation is fairness. The Applicant has failed to mention of demonstrate how he would be prejudiced if the Respondent appointed legal practitioners to take the roll of an Initiator and Chairperson respectively in his disciplinary hearing.

11. The Respondent was not in contravention of PSCBC Resolution 1 of 2003 as it had exercised its discretion, as provided for in clause 2.8 therein, to appoint legal practitioners as an Initiator and Chairperson for the disciplinary hearing of the Applicant. The Applicant's claim should be dismissed with cost.

ANALYSIS OF EVIDENCE AND ARGUMENTS

12. It was held in *Tabane v PSCBC and others* (LC) C27/15 (28 September 2017) that "*the purpose of section 24 of the LRA is to resolve disputes where a party to an agreement is alleged to have been in breach of the provisions of that agreement by failing to apply its terms either correctly or at all. The principles applicable to the interpretation of collective agreements are trite as restated in Western Cape Department of Health v Van Wyk & others* (2014) 35 ILJ 3078 (LAC) [22]."

13. It is trite law that a Commissioner may only make an order that gives effect to a collective agreement (section 138(9) of the LRA). A Commissioner is called upon to interpreter and/or apply a collective agreement (or Resolution) to give effect to its purpose and aim.

14. Resolution 1 of 2003 has at its purpose the following:

> "***1. PURPOSE AND SCOPE***
>
> *1 The purpose of this Code and Procedures is:*
>
> *1.1 to support constructive labour relations in the public service;*
>
> *1.2 to promote mutual respect between employees and between employees and employer;*
>
> *1.3 to ensure that managers and employees share a common understanding of misconduct and discipline;*
>
> *1.4 to promote acceptable conduct;*
>
> *1.5 to provide employees and the employer with a quick and easy reference for the application of discipline;*
>
> *1.6 to avert and correct unacceptable conduct; and*

1.7 to prevent arbitrary or discriminatory actions by managers toward employees."

15. Resolution 1 of 2003 has as its principles the following:

"***2. PRINCIPLES***

2 The following principles inform the Code and Procedure and must inform any decision to discipline an employee.

2.1 Discipline is a corrective measure and not a punitive one.
2.2 Discipline must be applied in a prompt, fair, consistent and progressive manner.
2.3 Discipline is a management function.
2.4 A disciplinary code is necessary for the efficient delivery of service and the fair treatment of public servants, and ensures that employees:

a. have a fair hearing in a formal or informal setting;
b. are timeously informed of allegations of misconduct made against them;
c. receive written reasons for a decision taken; and
d. have the right to appeal against any decision.

2.5 As far as possible, disciplinary procedures shall take place in the place of work and be understandable to all employees.
2.6 If an employee commits misconduct that is also a criminal offence, the criminal procedure and the disciplinary procedure will continue as separate and different proceedings.
2.7 Disciplinary proceedings do not replace or seek to imitate court proceedings.
2.8 The Disciplinary Code and Procedures constitutes a framework within which departmental policies may be developed to address appropriate circumstances, provided such policies do not deviate from the provisions of the framework."

16. It is trite law that any party to a Collective Agreement does not have a discretion to comply with such a Collective Agreement or Resolution but is obliged to comply with it. Resolution 1 of 2003 is applicable to all parties to this dispute, and subsequently, binding on all parties.

17. The Respondent is correct in its argument that a Chairperson has a discretion to grant or refuse an application by an employer or an employee to be represented by a legal practitioner in a disciplinary hearing, as is confirmed by case law and is permitted in terms of clause 2.8 of Resolution 1 of 2003, in <u>appropriate circumstances</u> (my emphasis), despite the specific prohibition in clause 7.3(f). The

distinction to be drawn is that such a discretion by a Chairperson is in instances when an application is brought by one or both of the parties (my emphasis). In the case before me, the Respondent elected to appoint an external Initiator in the form of a legal practitioner. The arguments which were advanced on behalf of the Respondent on which appropriate circumstances were applicable in the dispute at hand did, in my view, not warranted such a deviation from Resolution 1 of 2003.

18. Many departments within government have embarked on the process to develop its own internal disciplinary codes and policies, as allowed for in clause 2.8 of Resolution 1 of 2003, to specify when the appointment of an external Chairperson is permitted. I had no evidence before me that the Respondent has developed its own internal disciplinary code and policy, which had to be read and considered in conjunction with Resolution 1 of 2003, which then leaves the Respondent bound by the parameters of clause 7.3 of Resolution 1 of 2003. Clause 7.3(c) make specific provision for which external persons may be appointed as a Chairperson of disciplinary hearings, and this may be done only by agreement, and this does not include legal practitioners.

19. Clause 7.3(b) states that: "*the chair of the hearing must be appointed by the employer and be an employee on a higher grade than the representative of the employer*". It is clear that there is no discretion and or flexibility in clause 7.3(b) as it states "must", and not "may". Clause 7.3(c) states that: "*the employer and the employee charged with misconduct may agree that the disciplinary hearing will be chaired by an arbitrator from the relevant sectoral bargaining council appointed by the council. The decision of the arbitrator will be final and binding and only open to review in terms of the Labour Relations Act, 1995. All the provisions applicable to disciplinary hearings in terms of this Code will apply for purposes of these hearings. The employer will be responsible to pay the costs of the arbitrator*."

20. By including this clause in the Resolution, it can safely be assumed that it was envisaged by the parties that circumstances may arise, where it would be best for them to utilize legal representation or at most, where that option was given to them. Outside of the provisions of this particular clause however, it cannot be said that the Respondent could on its own, decide to engage the services of an outside legal practitioner to preside over the enquiry. The Respondent's contention was that in order to cater for its lack of capacity and a plethora of other reasons, it was compelled into utilizing the services of a legal practitioner as a Chairperson. It is my view that considerations of expediency in the guise of alleged procedural fairness and a desire to comply with substantive requirements of the Code cannot be countenanced.

21. It is clear that the appointment of a legal practitioner as an external Chairperson by the Respondent was in contravention of Resolution 1 of 2003. As previously stated, the failure of the Respondent to develop its own internal disciplinary code and policy, as allowed for in terms of clause 2.8 of Resolution 1 of 2003, leaves it bound by the parameters of clause 7.3 of Resolution 1 of 2003.

22. The appointment of the Chairperson, in contravention of clause 7.3 of Resolution 1 of 2003, would have rendered the Chairperson without the necessary power to determine an application for legal representation at the disciplinary hearing. It is reiterated that, in this case, an application for legal representation was not applied for by the Respondent, but rather, the Respondent appointed an external Initiator (my emphasis). Although clause 7.3(f) places a specific prohibition on legal representation in disciplinary hearings, it is now established law that the discretion lies with the Chairperson to grant or refuse an application for legal representation argued before him/her in a disciplinary hearing. It is clear that the appointment of the external Initiator by the Respondent of a legal practitioner was in contravention of Resolution 1 of 2003.

23. The interpretation of Resolution 1 of 2003 and having considered the relevant judgement on this aspect as well as parties' arguments, I find that the Respondent has contravened Resolution 1 of 2003 by appointing an external Chairperson and an external Initiator (Employer Representative) in the form of legal practitioners in the disciplinary hearing of the Applicant.

AWARD

24. The Respondent, **the Department of Agriculture, Land Reform and Rural Development**, has contravened of Resolution 1 of 2003 in the disciplinary hearing of the Applicant, **Sewiwe Shwababa**, by unilaterally appointing legal practitioners as Chairperson and Initiator respectively in the disciplinary hearing of the Applicant.

25. No order is made as to cost.

PSCBC Panelist: **Minette van der Merwe**