



# ARBITRATION AWARD

Panelist: Dineo Palesa Selelane  
Case No.: GPBC1222/2021  
Date of Award: 25 March 2022

**In the ARBITRATION between:**

**PSA OBO T.T. MOTSEKOA**

---

(Union / Applicant)

**And**

**DEPARTMENT OF THE PREMIER FREE STATE PROVINCE**

---

(Respondent)

**Union/Applicant's representative:** Mr. Jantjie Jack

Union/Applicant's address: n/a

Telephone: n/a

Email: n/a

**Respondent's representative:** Advocate Kagiso Tlhakung

Respondent's address: n/a

Telephone: n/a

Email: n/a

---

## ARBITRATION AWARD

---

### DETAILS OF THE HEARING AND REPRESENTATION

1. The arbitration hearing between PSA obo TT Motsekoa ("the Applicant") and Department of the Premier Free State Province ("the Respondent") was set down for 8 October 2021, 18 – 19 November 2021 and 17 -18 February 2022 in Thusong Service Centre in Zastron. The **Applicant, Teboho Tieho Motsekoa** was represented by **Mr. Jack Jantjie**, a Union Official from PSA. Whereas the **Respondent, the Department of the Premier** was represented by **Advocate Kagisho Tlhakung**, their **Manager from Legal Services. Ms. Philane Nyezi** was the assigned Interpreter.
2. The proceedings were digitally recorded. Parties requested to submit written closing arguments on 28 February 2022. Only the Applicant complied and forwarded the closing arguments. The Respondent did not submit and no explanation was offered.
3. The parties submitted a bundle of documents as Exhibit A, pages 1 – 59 for the Applicant. The Respondent's bundle of documents was admitted as Exhibit R, pages 1 – 11, Addendum R, pages 1 – 2.
4. The Applicant called two witness in support of their case, **Messrs. Tshitso Maleke and Lejoni Tshibane**. The Respondent called one witness, **Mr. Makhachane Albert Mphakoe**.
5. The parties submitted **Pre-Arbitration Minutes** which were read into record and adapted as a true reflection of what they purport to be.

### ISSUE/S TO BE DECIDED

6. Whether the Applicant's dismissal was both procedurally and substantively fair.
  - (i) whether or not the employee contravened a rule or standard regulating conduct in or of relevance to the workplace
  - (ii) whether the Respondent fulfilled the requirements of section 17(3)(a)(i) when he terminated the Applicant's services.

## BACKGROUND TO THE DISPUTE

7. The Applicant was employed on 1 March 2006 as an Administrative Clerk and stationed in Mohokare Thusong Service Centre, Zastron. The Applicant did not receive his salary for 15 December 2020. He was served with a letter of deemed dismissal on 22 January 2021 and his last salary was paid on 15 January 2021. The Applicant's salary notch was R 181641.00 per annum and his basic salary was R 15 136.75. Subsequent to his letter of deemed dismissal, the Applicant filed internal representations to the Office of the Premier which were turned down.
8. The Applicant sought reinstatement and six (6) months compensation.
9. The Respondent prayed for the dispute to be dismissed as the Applicant's services were terminated due to operation of law.
10. The Respondent submitted that the Applicant's services were terminated due operation of law. On the other hand, the Applicant, argued that his dismissal was procedural placed dismissal in dispute.

## SURVEY OF EVIDENCE AND ARGUMENT

### SUBMISSIONS ON BEHALF OF THE APPLICANT

11. I wish to state from the outset, that not all evidence presented will be set out hereunder. Only a summary of the evidence is contained herein.
12. ***Teboho Tieho Motsekoa (The Applicant)*** briefly testified under oath that his reporting hours were from 7h30 am – 16h00 pm and that their office had a complement of three (3) individuals, which were the Centre Manager, the Cleaner and himself. His duties included assisting the Centre Manger to compile the monthly report and doing administrative work.
13. Due to the Covid 19 pandemic in 2020, the Centre Manager, Mr. Mphakoe requested him to report for duty three days in a week, which where Monday, Wednesday and Thursday. The standard procedure when one reported for duty was you should first sign the attendance register at the security gate and the one in the office. During October 2020 – November 2020, he used to meet the Cleaner when he reported for duty on Mondays. Besides the Office of the Premier, there were other offices in the Thusong Service Centre like Departments of Agriculture, Home Affairs and Correctional Services. In December

2020, he was not paid his salary and he made enquiries from the Finance Office. He was advised that his salary has been stopped as he did not work for two months. He was shocked to be told that he did not report for two months as he had been coming to work. His salary was eventually paid in January 2021.

14. He testified that before 15 December 2020 he did not receive any correspondence about absenteeism. The witness was referred to pages 23 – 39 of Exhibit “A” which were attendance registers from the security gate. He testified that for the month of October 2020 his attendance as per the security register was as follows:

**October 2020**

Page 24 he signed on 5 October 2020

Page 29 he signed on 12 October 2020

Page 31 he signed on 15 October 2020

Page 32 he signed 19 October 2020

**For November 2020 he signed as follows;**

Page 44 he signed 9 November 2020

Page 48 on 13 November 2020

Page 51 on 18 November 2020

Page 53 on 23 November 2020

Page 58 on 30 November 2020

15. He did not report for duty before the 15 January 2021 but sought assistance from Union to find out why his salary was stopped. Afterwards the Centre Manager called him to his office to come sign a letter in his office. He did not recall the date on which he came to sign for the letter. Page 6 of Exhibit R which was the letter that discharged him from the Public Service. His understanding of the letter was that he did not report for duty days exceeding one (1) month. He denied that he stayed away from one (1) full month. He was discharged from the Public Service on 2 November 2020, however there were days that he reported for duty.
16. Despite the access control attendance register from the security guard, there were officials from Home Affairs and the Security Guard who could attest that he was at work. He used to chat with them whenever

he was at work. The Office of the Premier's Office used to sign the attendance register, however it was his first times seeing those reflected on pages 3 – 5 of Exhibit "R".

17. He was not familiar with pages 1 – 2 of Exhibit "R" which was a letter the Director General instructing all government officials to return to work. Pages 10 -11 of Exhibit R was his statement that he wrote in which he disputed the allegations that he had been absent from work for a period exceeding one calendar. In the statement he also explained that he had arrangement with the Centre Manager that where he agreed to work three (3) days in a week. He sought reinstatement as he did not commit misconduct. He was a family man and a breadwinner
18. During cross-examination the witness testified that he admitted that as an employee he had certain responsibilities and the Respondent had some obligations too. He also confirmed that one of his duties was to report at work and be on time. He was cognisant that he should inform the Respondent if was not coming to work. He testified that he knew the Security Guards and that they were employed by the Department of Public Works. He agreed that the Respondent had three employees and it was easy to see who was absent. He further agreed that his primary responsibility was towards the Respondent.
19. The witness agreed that between October 2020 and November 2020 he only reported for duty nine (9) days in two months which was not an excellent. He agreed that page 1 of Exhibit R was a letter from the Director General dated 21 September which instructed all officials to return to work as the country was now placed on Level 1. The witness admitted that the letter rescinded the arrangements regarding their three (3) day shift, however that was his first time seeing the letter. He expected the Centre Manager to call him and inform that their working arrangements were cancelled and that. He agreed that he was not at work when the letter was issued.
20. He testified that it was the first time his first time to see the attendance register on page 3 of Exhibit R which reflected hundred percent absenteeism. He attested that their attendance registers were kept in the Centre Manager's office. He agreed that he did not report his absence to the Centre Manager. The witness testified the security official was his friend however was employed by the Department of Social Development. He disagreed that he did not report for two consecutive month, viz, October and November 2020.
21. On re-examination the witness testified page 4 of Exhibit R reflected that he was absent for two days in the first week of October. He denied that he was absent for the whole month in October 2020.

22. The witness testified that page 5 of Exhibit R showed that he was not absent for the whole month in November 2020.
23. **Tshitso Maleke (Maleke)** briefly testified under oath was employed at the Department of Public Works as Security at their Zastron. In 2020 he was still employed as a Security Officer Access Control at the gate. He controlled entrance of both officials and public members entering into the Mohokare Municipality Service Centre by ensuring that they sign the access control attendance register. Pages 23 – 58 of Exhibit A were the access control registers for all officials. The access control register was his responsibility and no official could access it without his permission. During October and November 2020 he used to see the Applicant reporting for duty, although it was on a staggered basis. He supported his evidence pointing out pages 24- 44 of Exhibit “A” which were copies of the attendance which had the name and the signatures of the Applicant. He denied that the Applicant was at any stage absent for the whole month in October 2020 and November 2020..
24. During cross-examination he testified that his home town was in Botshabelo, however he stayed in Zastron. The witness testified that he knew the Applicant as his colleague. He barely socialise with him as he stayed in town and the Applicant in the township. He agreed that he recently learned about his dismissal and was sympathetic towards him. He attested that he did not know who made copies of the attendance registers. He agreed that the attendance registers did not show who was on duty, and that there were probabilities that he was not the official on duty. The witness maintained that he saw the Applicant several times in October. He testified that as a Security Officer he patrolled all the offices at the Centre. He attested that he was aware of the working arrangements the Respondent had with its officials, but did not know that it was rescinded in September 2020.
25. On re-examination he testified when he was doing his patrols, he used to see the Applicant sitting at his desk.
26. **Lejoni Tshibane (Tshibane)** briefly testified under oath that he was employed by the Department of Home Affairs and was stationed in Zastron. The Applicant was both his friend and colleague. In January 2020 the Applicant told him that he was dismissed. Page 44 of Exhibit A was the access control attendance register for all officials for 9 November 2020. Both his name and that of the Applicant were recorded on the page. According to the copies of the access control registers, on pages 51, 53 and 58 of Exhibit R, the Applicant was at work on 18 November 2020, 23 November 2020. On 30 November 2020 both him and the Applicant were at work.

27. During cross-examination he agreed that his evidence should be approached with caution because of his relationship with the Applicant. He attested that there was an attendance register he signed at his workplace which confirmed that he worked. He testified that the access control attendance register guided their supervisors that the officials were at work. He explained that the supervisors confirmed and verified their presence with the security guard at the gate. The witness agreed that the access control attendance registers could be falsified. He testified that he was not aware that the Applicant did not sign the Respondent's attendance registers.
28. On re-examination he testified that access control attendance registers confirmed that the Applicant was at work during November 2020.

### **SUBMISSIONS ON BEHALF OF THE RESPONDENT**

29. I wish to state from the outset, that not all evidence presented will be set out hereunder. Only a summary of the evidence is contained herein.
30. **Makhachane Albert Mphakoe (Mphakoe)** briefly testified under oath that he was in charge of the Respondent's office Zastron. The Applicant reported to him together with his colleague. He was aware that the Applicant absented himself from work for more than thirty (30) days. He last saw the Applicant in September 2020. Page 1 of Exhibit R was the a letter which instructed all Officials to return to work due to Alert Lever 1. He communicated the contents of the letter to the Applicant and his colleague, and explained that they were instructed to work normal hours. The Applicant did not have permission to absent himself from more for period exceeding 30 days Page 3 of Exhibit R was the attendance register which had to be filled by all officials. The Applicant did not report for duty for the month of February 2020.
31. Page 4 of Exhibit R was the Applicant's work attendance register for the month of October 2020. It reflected that from 1 October – 27 October 2020 the Applicant did report for duty.
32. Page 5 of Exhibit R was a mirror image of page 4 as it had the same pattern. The Applicant did not come to work.
33. The work attendance registers were placed on the desk next to the entrance. The operating procedure was that when an official was at work, they should be stationed at his desk. The Applicant's evidence that he did not know about the work attendance registers were indicative that he was not at work. He denied that the Applicant reported for duty in November 2020. Although the Applicant's signature

appeared on pages 53 and 58, there was no date on the documents. He maintained that the Respondent's work attendance, which had his signature were the ones that proved that an Official was on duty.

34. He changed the attendance registers twice as he realised the initial one was complicated. He communicated same to the Applicant. Maleke was not involved on the daily operations of the Respondent.
35. During cross-examination he testified that the Department of Public Works role was to provide security services and manage access control. He admitted that Maleke's duty involved patrolling their offices at large. He confirmed that as the supervisor he knew that the access control attendance register for Officials gave them access in the centre.
36. The witness testified that he was unable to answer how could the Applicant append his signature on 9 November 2020 if he was not at work. He testified that the Respondent did not have an attendance register which could prove that the Applicant was at work in September 2020.
37. He agreed that he normally signed off the whole month on the working attendance register during the month, but whenever an Official was absent he wrote absent.
38. The witness testified that although he was aware that the Applicant had been absent for five (days) in October 2020 and November 2020, he did nothing as he had no obligations to establish his whereabouts. He held the view that was not part of his job description. He confirmed that made no efforts to locate the Applicant or sent someone to go look for him.
39. He confirmed that the Applicant reported for work page 6 of Exhibit R was confirmation that the Applicant was at work on 1 November 2020. He confirmed that on 13 November 2020 the Applicant reported for duty. He confirmed that his work attendance registers proved that the Applicant was at work on 1 and 13 November 2020. He further agreed that implied that the Applicant was not absent from work for thirty (30) days.
40. He agreed that he compiled two different work attendance registers for the Applicant and his colleague. He maintained although the documents were different, that was enough to show that the Applicant did not come to work. He testified that the Applicant was a habitual absentee.
41. On re-examination he testified that an Official signature was the one that proved he came to work.



## ANALYSIS OF EVIDENCE AND ARGUMENT

42. Section 186 (1)(a) of the Labour Relations Act stipulates that a dismissal occurs when an employer terminates a contract of employment with or without notice.

The Public Service Act (the "PSA") provided in Section 17(3)(a)(i) as follows:

An officer, other than a member of the services or an educator or a member of the National Intelligence Services, who absents himself or herself from his or her official duties without permission of his or her head of department, office or institution for a period exceeding one calendar month, shall be deemed to have been discharged from the public service on account of misconduct with effect from the date immediately succeeding his or her last day of attendance at his or her place of duty.

43. In order to apply section 17 of the PSA the deeming provisions should firstly be met, viz. the employee should be an officer, he should be absent, he should be absent for a period of longer than 30 days and without permission. Once these deeming provisions have been met, the Bargaining Council or CCMA would lack jurisdiction to determine the dispute.
44. As an arbitrator I am required to determine whether all the provisions have been met. A simple claim by the Respondent that section 17 of the PSA applied will not suffice on its own. I am required to consider all surrounding circumstances and facts.
45. It was a common cause that the Applicant was employed in the Public Service since 2006. It was also not in dispute that between October 2020 – November 2020 there were days where the Applicant was absent without permission. However, there is no evidence which suggests that the Applicant was absent from work for a period exceeding one Calendar month which is thus a far cry from an unequivocal termination of an employment contract as contemplated by section 17 (3)(a)(i) of the Public Service Act, 1994 as amended.
46. During his evidence in chief, the Applicant testified that in October 2020 he reported for five (days) whereas in November 2020 he worked four days. During cross-examination he confirmed that in a period of two months he worked nine days which was not a hallmark for a good employee.

47. Maleke and Lejoni corroborated the Applicant's evidence. This version was supported by the access control attendance registers for Officials.
48. Further, during cross-examination, Mphakoe admitted that the Applicant was not absent for a period exceeding one calendar month. The term calendar month may be interpreted in two ways, either as a month as it appears on the calendar or a month reckoned in terms of one day in a particular month until the corresponding day of the next month. On the contrary, the 30 days were interrupted. In addition, paragraph 2 of the letter which discharged the Applicant from the Public Service does not state the period within which the Applicant absent himself in line with section 17(3)(a)(i) of the Public Service Act. In my view, there is no shred of evidence which suggests that the Applicant was absent from work for a period exceeding one calendar month as contemplated in section 17 (3)(a)(i) of the Public Service Act. It is from this background that I find that the Respondent could not rely on provisions of section 17 of the Public service to terminate the Applicant's service.
49. In **SOLIDARITY & ANOTHER v PHSDSBC & OTHERS (2014) 8 BLLR 727 (SCA)** it was held that a suspended employee was unlawfully dismissed because the deeming provisions were wrongly invoked.
50. After being suspended pending the investigation of allegations of misconduct against him, the appellant employee obtained employment with a firm belonging to a relative. A few months later, the employee received a letter from the respondent employer, the Free State Department of Health, informing him that he had been deemed discharged for misconduct in terms of the then section 17(5)(a) of the PSA. Having unsuccessfully attempted to have the decision reviewed internally, the appellants referred a dispute to the respondent bargaining council. The arbitrating Commissioner ruled that the council lacked jurisdiction to entertain the dispute. A review of that ruling was dismissed by the Labour Court, and that ruling was upheld by the Labour Appeal Court . The appellants contended, *inter alia*, that the Commissioner's ruling was wrong because section 17(5)(1)(a)(ii) does not apply to suspended employees. The Court noted that dismissed employees who dispute the fairness of their dismissals

may refer the dispute for conciliation and arbitration to a bargaining council, if the employee falls within its registered scope. However, the procedure provided by the LRA is not available to employees discharged under section 17(5)(a) because their services are deemed to have been terminated by operation of law, which does not constitute a dismissal as defined by the LRA. Foundational to the LAC's judgment was that the employee was absent from duty without permission when he accepted outside employment. This was obviously incorrect; the employee was indeed absent from duty. But he was not absent from duty without permission.

51. The Court held further that the LAC's other finding, that the employee had effectively resigned by assuming alternative employment, was equally untenable. Self-evidently, his suspension relieved him of the obligation to tender his services to the employer. The appeal was upheld, with costs, the award set aside, and the matter remitted to the bargaining council for arbitration
52. It cannot be right that the Applicant absconded or deserted and had no intention of returning to work. My finding is based on the fact that Mphakoe admitted that he had two different work attendance registers for two officials reporting to him. He did not furnish a plausible reason for this anomaly. The only inference I can draw is that Mphakoe wanted the Applicant flushed from the Public Service. It is for this reason that I find the Applicant's termination falls within the scope of section 186 of the Labour Relations Act 66 of 1995. It is also my finding that the Applicant's dismissal was procedurally and substantively unfair. What is painfully glaring is that the Applicant is a habitual absentee who deserved to be disciplined.
53. The Applicant sought reinstatement as a remedy. I order reinstatement as a remedy.

## AWARD

54. I order the Respondent, the **Office of the Premier's Office: Free State Province** to reinstate, the Applicant, **Teboho Tieho Motsekoa** on the same terms and conditions of employment which governed the employment relationship prior his dismissal dated **2 November 2020**. The said reinstatement is to operate retrospectively with effect from **2 November 2020 with no loss of benefits..**

55. As a result of the retrospective effect of the reinstatement, the Respondent, **Office of the Premier's Office: Free State Province** is ordered to pay the Applicant, **Teboho Tieho Motsekoa** remuneration calculated from **2 November 2020 to 30 April 2022**:

**R 15 136. 75 x 17 Months = R 257 324.75 on 29 April 2022**

56. The Applicant, **Teboho Tieho Motsekoa** is ordered to report for duty at **Department: Office Of The Premier : Free State at Mohokare Thusong Service Centre, Zastron** on **2 May 2022 at 8h00 am**.



\_\_\_\_\_  
**Name: Dineo Palesa Selelane**

**(GPSSBC) Arbitrator**