



# ARBITRATION AWARD

Case Number: GATW 2019-21  
Commissioner: BUTI MALUBANE  
Date of Award: 19 OCTOBER 2021

In the **ARBITRATION** between

**MR. KLAAS MOGALE**

(Union/Applicant)

And

**SOUTH AFRICAN HEALTH PRODUCTS REGULATORY AUTHORITY (SAHPRA)**

(Respondent)

**APPROVED**  
DETAILS OF THE HEARING AND REPRESENTATION

- [1] This is an arbitration between Mr. Klaas Mogale (Employee) and South African Health Product Regulatory Authority (SAHPRA) (Employer). The arbitration took place over 5 days, being 08 and 12 March 2021, 23 and 25 August 2021 and finalised on 11 October 2021 in Tshwane CCMA Towers 345 corner Pretorius and Sisulu Streets. The Employee was represented by Mr. Tebogo Kekana PSA (Public Servant Association) shop steward, while the Employer was represented by Miss. Corlette Mamabolo its Human Resource manager.
- [2] The proceedings were digitally recorded and hand written notes were taken. Both parties submitted bundles of documents. The Employer's bundle was marked A paginated 1 to 59, while the Employee's bundle was marked B paginated 1 to 46.

- [3] I will constantly refer to the Labour Relations Act 66 of 1995 as amended as "the Act" in this case.

### **ISSUE TO BE DECIDED**

- [4] In line with the signed pre-arbitration minutes of the parties, I'm required to determine if the Employee's dismissal was both procedurally and substantively unfair or not. Should I find that the dismissal was fair on both grounds; I will dismiss the Employee's claim. However, should I find that the dismissal was unfair on either ground, I will further determine and grant an appropriate remedy which is in consonant with the provisions of section 193(1) of the Act.

### **BACKGROUND TO THE ISSUE**

- [5] I will only highlight salient points in this case, the rest are included in the pre-arbitration minutes. According to the minutes the Employee had a permanent contract with the Employer commencing from 01 December 2010, holding a position of a senior administration clerk, earning R 13500.00 per month. He was dismissed on 18 January 2021, and he referred the unfair dismissal dispute to the commission on 12 February 2021. On 08 March 2021 the matter was set down for a Con/Arb. Conciliation failed to resolve the dispute and a certificate of outcome was issued and arbitration continued immediately thereafter. Due to time constraints parties agreed to stand the matter down to 12 March 2021 at 14h00 but the matter could not be finalised. On 23 and 25 August 2021 the arbitration was set down and it was partly heard. On 11 October 2021 arbitration was set down and finalised.

### **SURVEY OF EVIDENCE AND ARGUMENTS**

#### **EMPLOYER'S CASE**

- [6] The Employer's version was adduced through the evidence of its two witnesses in the persons of Miss. Corlette Mamabolo its Human Resource manager and Mr. Mbobela Sotomela its Deputy manager facility management. In rebuttal the Employee gave evidence as the only witness in his case.
- [7] Miss. Corlette Mamabolo under oath testified that the South African Health Products Regulatory Authority (SAHPRA) was a public entity under the Department of Health. The accounting officer for SAHPRA was the chief executive officer (CEO). SAHPRA was established in 2018 with the understanding that it will use the policy of the National Department of Health in areas where its policy

was not yet in place. The policy of the National Department of Health on bundle B page 39 paragraph 7.3 (b) provides that **"the chairperson of the hearing must be appointed by the Employer and be an employee on a higher grade than the representative of the Employer."** Their understanding of the paragraph was that the Employer had the full authority to appoint the chairperson of the hearing. SAHPRA was established in 2018 so in terms of the resources of the organisation SAHPRA leaned on the National Department of Health or other entities under the National Department of Health to assist in areas where it was less resourced.

[8] The appointment of the chairperson to the hearing was with reference to that, where a labour specialist from the Council of Medical Aid schemes Mr. Thabiso Dekeda was appointed. His appointment was procedurally fair as he was a specialist, and he was an advocate and SAHPRA did not have one and his entity was under the National Department of Health. His appointment was endorsed by SAHPRAS' CEO, Dr. Boitumelo Semete who was an accounting authority.

[9] Bundle A pages 28 – 37 was the ten-pages report from the chairperson of the disciplinary hearing. The chairperson captured the evidence of the Employer very comprehensively. On page 30 he captured the Employee's cross examination. On page 31 he outlined the Employee's case. On pages 33 and 34 he took into consideration the closing argument of both parties. On page 35 the chairperson analysed the evidence of both parties, and he did not find the Employee guilty on charges 1 and 3. He gave reasons why he found the Employee guilty on charges 2 and 4. On page 36 the chairperson referred to case law similar to the case at hand. The chairperson concluded on page 37. This shows that the chairperson took into consideration the evidence led before he could arrive at his decision. So the allegation that the chairperson did not apply his mind is contrary to the notes on the bundle which show that he applied his mind.

[10] During cross examination the witness was asked what was her role in the disciplinary hearing, her answer was that she was an initiator. She was asked how was the chairperson appointed and she said his appointment was via the office of the Human Resource executive and the CEO. A request was done to the council of Medical Aid Schemes to seek assistance in chairing the disciplinary hearing through one of their specialists. She was asked if she knew the rank of the chairperson. She said they requested for a chairperson, and they were given the chairperson.

[11] She was referred to bundle B page 39 and asked if she checked if the chairperson was on a higher grade than her. Her answer was that she did not check. She was asked if the chairperson was an Employee of SAHPRA, she said no, but an Employee of the Council of Medical Aid Schemes. She

explained that since SAHPRA was established in 2018 there were serious Organisational operational constraints in the entity and hence, there was an agreement of using the National Department of Health and other entities' resources in areas where SAHPRA was incapacitated. It has been a common practice; this was not the first request from other entities. She highlighted that this was not mentioned in the policy of the National Department of Health but it was in the transfer agreement between SAHPRA and the National Department of Health which clearly stated that the National Department of Health would continue to assist SAHPRA in operational areas that have gaps until SAHPRA was fully capacitated.

[12] When she was asked if the Employee did not raise the issue concerning the appointment of the chairperson at the disciplinary hearing. She said the Employee asked for clarity and it was given, and he allowed the proceedings to continue. She was referred to page 15 paragraph 3 of bundle B and asked if she agreed that the Employee did not agree that the hearing should proceed but the chairperson ruled that he would continue with the proceedings, in response she conceded.

[13] When asked if the CCTV footage showed the Employee with the toners. She said that the CCTV footage showed the Employee with the Checkers trolley full of goods which were covered, the footage showed the Employee entering the building with an empty trolley and coming out of the building with the trolley full of goods and covered on top. The CCTV footage did not show toners but covered goods. When asked if she knew what were the covered goods? She said from the shapes it looked like boxes, it was covered so she would not know.

[14] It was put to the witness that besides the Employee's duty as a senior administrator clerk he was also collecting waste paper at SAHPRA. Her answer was that she heard about it and he had no authority to do so. She only became aware about him collecting waste paper just before his case when he told her. It was put to her that the Employee would testify that he was collecting waste paper, using Checkers trolley and blue cloth bags. Her response was that she could not comment on the Employee's waste paper collection because waste paper would be the property of the company and for him to take it out of the building he would need permission. So she cannot comment on whether he was allowed or not. A trolley full of goods would need permission regardless of that being a waste. She was asked if she agreed with the chairperson's report and that of Mr. Bredell. Her answer was that she did not agree that there was a contradiction, though the chairperson was talking about the master key and Mr. Bredell was talking about the absence of a master key. They both talked of a tool which might have been used to open the store-room.

- [15] When asked if a key or a master key was found in possession of the Employee? Her answer was that the process did not unfold or the searching was not done. SAHPRA left the issue of searching the Employee as that was not within its territory hence, a police case was opened. The police case was still on going, they could not wait for the criminal case to be finalised before disciplining him hence, the disciplinary hearing proceeded. The criminal case was opened on 02 February 2021 as it was recorded on page 58 of bundle A. She cannot comment on the delay of the Employer to open the case at the police. However, SAHPRA engaged on other Organisational processes and that contributed in the opening of the case at the tail-end. When asked if she was aware that the police case was opened after the Employee was dismissed as the Employee was dismissed on 18 January 2021 while the case was opened on 02 February 2021. She said she was aware of the date.
- [16] The second witness Mr. Mbobela Sotozela under oath testified that the dispute of the Employee started on Monday 02 November 2020 when Mr. Danny Bredell reported to him that there was a missing printer toner from his store room. The witness asked Mr. Danny Bredell as to when was the toner delivered and Mr. Bredell said it was delivered on 29 October 2020. The witness checked from the access control system to find out who accessed the building during the week-end from Friday 30 October 2020 to Monday 02 November 2020, between 17h:00 after work and 06h:00 AM. The system revealed that only two employees visited the office on that week-end and they were Mr. Tebogo Ramasangwana and the Employee.
- [17] The system showed the Employee accessing the building at 06h:24 AM that Saturday 31 October 2020. He entered the building from the basement and he went straight to the fifth floor. He stood about plus minus thirty minutes before exiting the fifth floor to the second floor. While on the other side the system showed Mr. Tebogo Ramasangwana who only went to the third floor, so the witness did not investigate further on him. (Mr. Tebogo Ramasangwana). The system showed the Employee existing the second floor at 07h: 57 AM on the same day (31 October 2020) with nothing in his hands, but when he entered the building he was having something which seemed like a laptop bag. On the same day (31 October 2020) at 08h:16 the Employee came back to the building pushing an empty Checkers trolley. The Employee was seen at 08h:24 AM the same day pushing the same trolley full with goods covered by something blue.
- [18] The Employee in terms of his work he was stationed on the second floor. The witness was asking himself as to what the Employee was doing on the fifth floor on Saturday where there was nobody at the building. The witness's assumption and conclusion was that the material covered in a blue cloth were the same toners which went missing. The witness could not access the fifth floor CCTV footage

as it was no longer available. The witness was rock-solid that the Employee did not have the responsibility of collecting waste paper and did not think that there was waste paper before they moved to the Loftus Park. In case there was waste paper a handyman and the cleaners were there to take care of it.

[19] During cross examination Mr. Sotomela stated that in his position he would look after the building and that included the storage of toners. He looked after the storage of toners by issuing a key to one person and that person was Mr. Danny Bredell. All individuals had no access to the spare keys excluding him and Mr. Danny Bredell. He testified that he never witnessed the theft, but he was apprised of it by Mr. Danny Bredell and he saw it on the CCTV footage where he saw the Employee removing unauthorised items from the building. Looking at bundle B page 28, it was the witness's report which he wrote as he was asked to investigate the incident. According to his report he only obtained a verbal statement from Mr. Danny Bredell. He did not ask the Employee for a statement as he thought it was confidential and he did not see a need to take a statement from the Employee as everybody was a suspect.

[20] It was the witness's evidence that the door lock of the store-room was changed on 02 November 2020 after the first incident. This was corroborated by Mr. Danny Bredell statement on page 27 of bundle B where he stated that on 29 October 2020 the lock sets were changed but the witness maintained that the lock sets were changed on 02 November 2020 not 29 October 2020 because from 26 to 30 October 2020 Mr. Danny Bredell never reported any incident to the witness, he only did so on 02 November 2020. When asked if he knew what was the Employee doing on the fifth floor? He said at the time he did not know, but after watching the CCTV footage he found out that he was there to remove items unauthorised. When asked if he knew what the Employee removed from the fifth floor? His answer was that he knew he removed what was missing.

[21] The Employee was seen leaving the building with items covered with a blue cloth. His conclusion was that the Employee removed the toners with a blue cover. Toners were delivered on Friday (30 October 2020) hence, he concluded that the Employee was the one who removed the toners. He conceded that the Employee did not have a spare key, but the fact that there was no break in, his assumption was that the Employee had a master key because even after they have changed the lock sets he still had access. The witness conceded that the Employee was not found with a master key, however he had a master key before 31 October 2020 because even on the second incident on 07 November 2020 after the lock sets were changed he had access. Asked why he did not search the Employee, he

said the incident happened on 31 October 2020 so even if he searched the Employee he would not have found any key as the incident happened previously.

- [22] It was put to the witness that the Employee was going to testify that on 31 October 2020 he accessed the building to collect waste paper. His answer was that there was no waste paper, even if there was, it was not the Employee's responsibility to clean-up as the handyman and cleaners were there to take care of such. When asked if he knew that the Employee was collecting waste paper? His response was no, the only time the Employee volunteered to remove waste paper was at the relocation stage. Cleaners were there to clean any waste and during the year 2020 there was no waste paper. When asked why would he employ a handyman if there was no waste paper? He said collecting waste paper was one of the functions of a handyman in case there was waste paper.

### EMPLOYEE'S CASE

- [23] The Employee Mr. Klaas Mngile under oath testified to the effect that he was employed on 03 December 2010 as senior administration clerk, his job entails screening documents delivered by pharmaceutical companies and after screening he would allocate the same documents to different units within SAHPRA. According to page 13 of bundle B he faced four charges at the internal hearing, of which he was found guilty on charges 2 and 4. Page 38 of bundle B paragraph 6 (read on record) He was asked if his manager was appointed to chair the inquiry. His answer was no; the initiator was Miss Corriet Mamabolo. When asked if he thinks that the Employer did comply with paragraph 6. Page 39 B paragraph 7.3. B (read on record). He testified that the chairperson at the hearing was Mr. Thabiso Deketa, he was not an employee of SAHPRA and he did not know Thabiso's seniority to Miss Corriet Mamabolo. The issue of the appointment of the chairperson of the hearing was raised at the hearing as recorded on page 25 of bundle B (read on record). The chairperson ruled in favour of the proviso to proceed with the hearing. The proviso was not provided to the Employee and the chairperson was not appointed in terms of the disciplinary policy.

- [24] Page 73 of bundle A the agreement (memorandum of understanding "MOU") was signed by SAHPRA and National Department of Health, the chairperson was from the Council for Medical Aid Schemes and the council was not a signatory to the agreement "MOU". On page 56 of bundle A they are not mentioning any other institutions. The chairperson was not appointed according to the disciplinary code therefore he did not apply his mind to the case, because he set aside some of the issues raised at the internal hearing. Looking at bundle A page 15 the chairperson having considered that there was a proviso, he made a decision to proceed chairing the hearing. It was the chairperson's responsibility to



make sure that all the codes including the proviso were in place, but he ruled that he would proceed instead.

[25] Referred to page 34 of bundle A, the witness was asked if a master key was found in his possession? He said no and there was no witness who gave such evidence at the internal hearing. When asked if he was found in possession of the toners, he said no, besides his duty as a senior administration clerk he was also helping the organisation in removing and disposing waste papers. He has been doing this since 2012 while still at Civitas building, normally he would put the waste paper at the storage room during the week and during the week-end he would come and remove it from the build after having parked it. He would go to different units or he would be called by different employees from different units requesting him to supply them with the blue bags or they would want him to come and collect the blue bag which would be already full. All employees knew him and the purpose of the blue bags. Since these were medical documents one volume was about four meters.

[26] Employees would put the documents into the bags without first dismantling them. He would then dismantle the volumes and put them into the bags and put it in the store-room which was allocated to him, when they relocate to Loftus Park building in August 2019 as he volunteered then to work with Mr Sotomela assisting him with relocation. As they were removing documents, they found that some of the documents were still in use highlighted with the note (active document). He reported to Mr. Sotomela about the active documents and Mr. Sotomela told him to mark all active documents 512 store-room and the relocation team would take the active documents to the store-room and that was how it was allocated to him on fifth floor. However, the store-room was not only allocated to him as there were other active documents from other units. After the relocation was done he continued to use the store-room 512 on fifth floor and the second one was on the second floor.

[27] The charge does not mention what he removed from the building, he confirmed that he was at the workplace on 31 October 2020 and he was there to fetch waste paper to dispose, he went to the fifth floor 512 store-room and dismantled the documents put them in the bags and took them to second floor store room, where he continued to dismantle some of the documents and put them in the bags. When he was done, he went to Checkers to fetch a trolley as the new unit had locked up all trollies so he did not have trollies at the workplace. He came back and load the waste paper and left the building. When asked if he did have access to the keys or the store-room where the toners were kept? He said no and on the day, he did not remove any toners from SAHPRA building. He did not know anything about the stolen toners. He was not responsible for the safe keeping of the toners. He was not aware of any witness who testified to the effect that he had stolen the toners.



- [28] He was referred to Pages 8-13 of bundle A and he testified that these were pictures for 31 October 2020 incident. On page 8 it was him entering SAHPRA building from the main entrance on the ground floor, page 9 was him entering the building from basement. Page 10 he was leaving the building with the trolley with waste paper. Page 11 it was him exiting the building from the ground floor. Page 12 it was him standing by the lift, page 13 was him pulling the checkers trolley with waste paper. He testified that he was not carrying any box and in all the pictures (see pages 8-13 of bundle A) there were no boxes.
- [29] It was his testimony that he was not given an opportunity to respond to the investigation report. Mr. Sotomela never came to him to take a statement. Mr. Sotomela concluded that he (Employee) had a master key, but he did not have any and he was never asked of any master key that he might have had. When asked why would Mr. Sotomela and the chairperson say he had a master key? His response was that he might not know why they were saying so. Page 27 of bundle B (Mr. Bredell's statement) the facility manager in this statement confirmed that there was no one with the master key. On 07 November 2020 he collected waste paper from the fifth floor and second floor put it in the blue bag and he then left the premises. From 30 October 2020 there was waste paper to collect. The reason he thinks he was unfairly dismissed was that he did not steal anything from the company. During his hearing SAHPRA did not follow procedure. He proffered retrospective reinstatement.
- [30] During cross examination he said he was coerced to proceed with the disciplinary hearing in a sense that he raised some issues related to the appointment of the chairperson but after looking into the issues the chairperson continued with the hearing. The appointment of the chairperson who was not an employee by SAHPRA came as a shock to him. He was prejudiced as he was not comfortable to answer some of the questions of the chairperson. He did not raise it at that stage that he was not comfortable to answer the chairperson's questions. He was given the opportunity to state his case, but the chairperson highlighted that he would not consider the statement when he made his final judgement. The chairperson said this, and he did not object it. He was given an opportunity to give his mitigation statement and he was also given an opportunity to appeal, and he appealed. He did not agree to the statement that all these steps that he agreed on was to make sure that his rights were honored.
- [31] As an Employee, he was not aware of any prior arrangements that SAHPRA had with other entities about the support that it received regarding other operational challenges, maybe if SAHPRA made other Employees aware by providing the "MOU" he would have been aware not to know of the "MOU" at his hearing. The prejudice he suffered for proceeding with the hearing as it was set up, was on the basis

that his manager was not aware about the whole situation. If she was, she would have called him and discussed the dispute. However, he did not have evidence that his manager was not aware.

[32] The store-room was verbally allocated to him by the facilitator manager and it was not only allocated to him alone. It was put to him that he was collecting waste paper from the store-room where there were active documents. He answered that the documents which he put at the store-room were active until such time where it was said to him that such documents were no longer active and he could collect them. It was put to him that he was sorting out documents without supervision. He said there was no way he could be supervised as he was the only one collecting waste paper. He was aware that the removal of waste paper was for the facility manager and the facility manager was also aware that he was collecting waste paper.

[33] He volunteered at the time of the relocation hence, he said if the facility manager (Mr. Sotomela) was not happy he would have stopped him. There was waste paper from CIVITAS building to Loftus Park, there was no way that when he found active paper at VISITAS building he would destroy it at that stage, he had to take it to Loftus Park and when employees were back they would be the ones who would tell him that the documents were not active any more as it might have been replaced by either a CD or USB that would be the time the document become inactive and they would usually call him.

[34] He testified that he did not see it as a coincidence that on both days in questions being 31 October and 07 November 2020 on Mondays there were missing toners. The reason he collected waste paper on week-ends was that they did not have a problem with him collecting waste paper, their problem was when he did that during working hours hence, he said to himself that he would collect it during week-end. It was not for the purpose that he would be doing this where nobody would see him, because during the week he would be taking the same to the store-room where everybody saw him. He disputed that in the blue bag there were corners of the boxes, what was inside the bag were documents.

[35] When asked if he resigned during the period. He said he sent his resignation to the initiator as his manager but it was not considered as it was not signed by his manager, she sent the resignation back to him saying that he must remove his manager's name and put Mr. Mthakathi's name, he did not know him nor his position. He did send the resignation on the date the notice of the hearing was sent to him (10 December 2020) as recorded on page 21 of bundle A. Looking at page 22 of the same bundle he wrote an email to his manager Miss. Corlette Mamabolo at the time he was not aware that they had send him the notice to the hearing. His manager rejected his resignation on page 21 of the same bundle on the basis that it was not signed. Referred to page 23 of the same bundle the Employee withdraw his

resignation and the reason of the withdrawal was after he became aware that they have sent him a notice of a disciplinary hearing and he also served Mr. Mthakathi. Page 48 of the same bundle, he was the one who wrote this email and the reason was that in all his emails which he served to his manager he never received any response, and due to the frustration he thought of writing this email to protect his benefits.

- [36] Page 27 of bundle B the outcome of the disciplinary hearing was forwarded to the Employee, read together with page 42 bundle B (notice to appeal). You send a resignation on 18 January 2021 after the appeal outcome. He said he did not, looking at the page the institution implemented the resignation which he withdrew. The hearing continued and the resignation was withdrawn, and he was expecting something in black and white. Explaining page 48B of bundle B. He said this was not a resignation but a document which was used when one was resigning. When asked if it was not his intention for the Employer to terminate him through resignation, not the outcome of the disciplinary hearing? He said he did not have any comment as it was his intention, but it was not done.

#### **ANALYSIS OF SUBMISSIONS AND ARGUMENT**

- [37] Section 192(1) of the Act provides that in any proceedings concerning any dismissal, the employee must establish the existence of the dismissal. In this case dismissal is common cause hence, subsection (2) of the same section kicks in, where the Employer bears onus to prove that the dismissal is substantively fair, the sanction meted out was appropriate. Whereas sections 188(1) and 192(2) of the Act, enjoins the Employer to prove that the Employee was dismissed for a fair reason relating to his conduct, capacity or the Employer's operational requirements and in accordance with a fair procedure.

- [38] Before analyzing the evidence led by both parties, it is imperative to look at the charges which led to the dismissal of the Employee. According to the evidence led by both parties, the Employee faced four charges but the chairperson found him guilty on two charges which were charges 2 and 4 and they read as follows:

2. On Saturday 31 October 2020 in the morning, you unlawfully removed items which belong to SAHPRA without authorization.

4. On Saturday 07 November 2020 in the morning, you unlawfully removed items which belong to SAHPRA without authorization.

#### **PROCEDURAL FAIRNESS.**

[39] Dealing with the procedural fairness of the Employee's dismissal, it is imperative to state that the Employee is disputing the procedural fairness of his dismissal on the basis that the chairperson of his hearing was not appointed in compliance with the policy of the institution. He based his procedural claim on the institution's policy recorded on page 39 of bundle B paragraph 7.3 (b) which provides that **"the chairperson of the hearing must be appointed by the Employer and be an employee on a higher grade than the representative of the Employer."** In defense of his claim he testified that the chairperson at the hearing was Mr. Thabiso Deketa and he was not an employee of SAHPRA and he did not know Thabiso's seniority to Miss Corlette Mamabolo (his manager).

[40] The issue of the appointment of the chairperson of the hearing was raised at the hearing but the chairperson ruled in favour of the proviso which was the agreement of understanding "MOU" on page 73 of bundle A signed by SAHPRA and National Department of Health, the chairperson was from the Council for Medical Aid Schemes and the council was not a signatory to the agreement "MOU" and the MOU did not mention any other institutions. The chairperson was not appointed according to the disciplinary code therefore he did not apply his mind to the case, because he set aside some of the issues raised at the internal hearing. It was the chairperson's responsibility to make sure that all the codes including the proviso were in place, but he ruled that he would proceed instead.

[41] He further testified that the appointment of the chairperson who was not an employee by SAHPRA came as a shock to him. He was prejudiced as he was not comfortable to answer some of the questions of the chairperson. He did not raise it at that stage that he was not comfortable to answer the chairperson's questions. He testified that the prejudice he suffered for proceeding with the hearing as it was set up was on the basis that his manager was not aware about the whole situation. If she was, she would have called him and discussed the dispute. However, he did not have evidence that his manager was not aware.

[42] The first witness of the Employer testified that SAHPRA was established in 2018 with the understanding that it will use the policy of the National Department of Health in areas where its policy was not yet in place. So, in terms of the resources of the organisation SAHPRA leaned on the National Department of Health or other entities under the National Department of Health to assist in areas where it was less resourced. The appointment of the chairperson to the hearing was with reference to that, where a labour specialist from the Council of Medical Aid schemes Mr. Thabiso Deketa was appointed. His appointment was procedurally fair as he was a specialist, and he was an advocate and SAHPRA did not have one and his entity was under the National Department of Health.

His appointment was endorsed by SAHPRS' CEO, Dr. Boitumelo Semete who was an accounting authority for SAHPRA.

[43] During cross examination she was asked if the chairperson was an Employee of SAHPRA, she said no, but an Employee of the Council of Medical Aid Schemes. She explained that since SAHPRA was established in 2018 there were serious Organisational operational constraints in the entity and hence, there was an agreement of using the National Department of Health and other entities' resources in areas where SAHPRA was incapacitated, it has been a common practice; this was not the first request from other entities. She highlighted that this was not mentioned in the policy of the National Department of Health but it was in the transfer agreement between SAHPRA and the National Department of Health which clearly stated that the National Department would continue to assist SAHPRA in operational areas that have gaps until SAHPRA was fully capacitated.

[44] A meticulous scrutiny of the evidence of both parties in this regard made it crystal clear that the chairperson was not appointed in line with the dictates of the policy on page 39 of bundle B paragraph 7.3 (b) as it was read on record. It is also clear that the Employee was not apprised of the "MOU" prior to his hearing, as the first witness of the Employer testified in support of the Employee's version that it was in the transfer agreement between the two entities. This being the elephant in the room, the vexed question is, how was the Employee prejudiced?

[45] The Employee's claim of prejudice suffered in this regard is vitiated by his evidence during his cross examination, where he testified that the appointment of the chairperson came as a shock to him and he was uncomfortable to answer some of the chairperson's questions. When asked if he raised it with the chairperson, he said not at that time. It was the Employee's evidence that because the chairperson was not appointed in terms of the policy, he therefore did not apply his mind to the case as he set aside some of the issues he raised.

[46] The other factor which add on his claim in terms of prejudice he suffered was because his manager was not aware of the whole situation though he did not have evidence to that effect. Besides issues already mentioned concerning his procedural challenge, the other elements of procedure were fine, with the exception of the Employee's allegation that the chairperson told him that he was not going to consider his evidence in his decision making. I will deal with this under the substantive fairness. Looking at all factors highlighted in paragraphs [39] to [45] above, I find the dismissal of the Employee procedurally fair.

## SUBSTANTIVE FAIRNESS.

- [47] Looking at the two charges, they are actually one charge for the offence which took place on two different days, being 31 October and 07 November 2020. In proving that the Employee committed the offense the Employer adduced evidence through its two witnesses. The second witness testified that the dispute of an Employee started on Monday 02 November 2020 when Mr. Danny Bredell reported to him that there was a missing printer toner from his store-room. He then checked from the access control system to find out who accessed the building during the week-end from Friday 30 October 2020 to Monday 02 November 2020, between 17h:00 after work and 06h:00 AM. The system revealed that only two employees visited the office on that week-end and they were Mr. Tebogo Ramasangwana and the Employee.
- [48] The system showed the Employee accessing the building at 06h:24 AM that Saturday 31 October 2020. He entered the building from the basement and he went straight to the fifth floor. He stood about plus minus thirty minutes before exiting the fifth floor to the second floor. The system showed the Employee exiting the second floor at 07h: 57 AM on the same day (31 October 2020) with nothing in his hands, but when he entered the building he was having something which seemed like a laptop bag. On the same day (31 October 2020) at 08h:16 the Employee came back to the building pushing an empty Checkers trolley. The Employee was seen at 08h:24 AM the same day pushing the same trolley full with goods covered by something blue.
- [49] The Employee in terms of his work he was stationed on the second floor. The witness was asking himself as to what was the Employee doing on the fifth floor on Saturday where there was nobody at the building. The witness's assumption and conclusion was that the material covered in a blue cloth were the same toners which were missing. The witness could not access the fifth floor CCTV footage as it was no longer available. The witness was rock-solid that the Employee did not have the responsibility of collecting waste paper and did not think that there was waste paper before they moved to the Loftus Park. In case there was waste paper a handyman and the cleaners were there to take care of it.
- [50] During cross examination Mr. Sotomela stated that in his position he would look after the building and that included the storage of toners. He looked after the storage of toners by issuing a key to one person and that person was Mr. Danny Bredell. He testified that All individuals had no access to the spare keys excluding him and Mr. Danny Bredell. According to his report he only obtained a verbal statement from Mr. Danny Bredell. He did not ask the Employee for a statement as he thought it was

confidential and he did not see a need to take a statement from the Employee as everybody was a suspect. When asked if he knew what was the Employee doing on the fifth floor? He said at the time he did not know, but after watching the CCTV footage he found out that he was there to remove items unauthorised. When asked if he knew what the Employee removed from the fifth floor? His answer was that he knew he removed what was missing.

[51] He testified that toners were delivered on Friday (30 October 2020) hence, he concluded that the Employee was the one who removed the toners. He however, conceded that the Employee did not have a spare key, but the fact that there was no break in, his assumption was that the Employee had a master key because even after they have changed the lock sets he still had access. The witness conceded that the Employee was not found with a master key, however he had a master key before 31 October 2020 because even on the second incident on 07 November 2020 after the lock sets were changed he had access. When asked if he knew that the Employee was collecting waste paper? His response was no, the only time the Employee volunteered to remove waste paper was at the relocation stage. Cleaners were there to clean any waste and during the year 2020 there was no waste paper. When asked why would he employ a handyman if there was no waste paper? He said collecting waste paper was one of the functions of a handyman in case there was waste paper.

[52] In rebuttal the Employee testified that the witness was asked if a master key was found in his possession? He said no and there was no witness who gave such evidence at the internal hearing. When asked if he was found in possession of the toners, he said no, besides his duty as a senior administration clerk he was also helping the organisation in removing and disposing waste papers. He has been doing this since 2012 while still at Civitas building; normally he would put the waste paper at the storage room during the week and during the week-end he would come and remove it from the build after having parked it. He would go to different units or he would be called by different Employees from different units requesting him to supply them with the blue bags or they would want him to come and collect the blue bag which would be already full. All Employees knew him and the purpose of the blue bags.

[53] He testified that he would then dismantle the volumes and put them into the bags and put it in the store-room which was allocated to him, when they relocate to Loftus Park building in August 2019 as he volunteered then to work with Mr Sotomela assisting him with relocation. As they were removing documents they found that some of the documents were still in use highlighted with the note (active document). He reported to Mr. Sotomela about the active documents and Mr. Sotomela told him to mark all active documents 512 store-room and the relocation team would take the active documents to the



store-room and that was how it was allocated to him on fifth floor. However, the store-room was not only allocated to him as there were other active documents from other units. After the relocation was done he continued to use the store-room 512 on fifth floor and the second one was on the second floor.

[54] When asked why would Mr. Sotomela and the chairperson say he had a master key? His response was that he might not know why they were saying so. Page 27 of bundle B (Mr. Bredell's statement) the facility manager in this statement confirmed that there was no one with the master key. One 07 November 2020 he collected waste paper from the fifth floor and second floor put it in the blue bag and he then left the premises. The store-room was verbally allocated to him by the facilitator manager and it was not only allocated to him alone. It was put to him that he was sorting out documents without supervision. He said there was no way he could be supervised as he was the only one collecting waste paper. His answer was that he was aware that the removal of waste paper was for the facility manager and the facility manager was also aware that he was collecting waste paper.

[55] He volunteered at the time of the relocation hence he said if the facility manager (Mr. Sotomela) was not happy he would have stopped him. There was waste paper from CIVITAS building to Loftus Park, there was no way that when he found active paper at VISITAS building he would destroy it at that stage, he had to take it to Loftus Park and when employees were back they would be the ones who would tell him that the documents were not active any more as it might have been replaced by either a CD or USB that would be the time the document become inactive and they would usually call him.

[56] He testified that he did not see it as a coincident that on both days in questions being 31 October and 07 November 2020 on Mondays there were missing toners. The reason he collected waste paper on week-ends was that they did not have a problem with him collecting waste paper, their problem was when he did that during working hours hence he said to himself that he would collect it during week-end. It was not for the purpose that he would be doing this where nobody would see him, because during the week he would be taking the same to the store-room where everybody saw him. He disputed that in the blue bag there were corners of the boxes, what was inside the bag were documents.

[57] Taking a close look at the evidence adduced by both parties in paragraphs [47] to [56] above concerning the removal of goods in line with the two charges. The second witness of the Employer testified that the charge against the Employee was triggered by Mr. Danny Bredell's report to the facility manager Mr. Mbobela Sotomela of the missing printer toner. The Employer did not have strong evidence to rebut that the Employee was not collecting waste paper, versus the Employee's evidence that he had been collecting waste since 2012. This boosted the Employee's evidence when he testified

that he was taking waste paper to the store room 512 and the other one on the second floor, during the week, seen by other employees. In his own words he said "the reason he collected waste paper on week-ends was that they did not have a problem with him collecting waste paper, their problem was when he did that during working hours hence, he said to himself that he would collect it during week-end". The second witness of the Employer Mr. Mbobela Sotomela gave evidence but said nothing about this part of the evidence.

[58] I cannot conclude that the facility manager in the person of Mr. Mbobela Sotomela did not know that the Employee was collecting waste paper. I cannot frown at the Employee's evidence that he was allocated a store room 512, by the facility manager at the time of relocation. The time lag from the relocation time to the time of the incident (August 2019 to 31 October and 07 November 2020) was more than enough for the facility manager to stop the Employee from collecting waste paper if indeed he did not allow him. The Employer was aware that the Employee was collecting waste paper, the second witness's evidence to the effect that he was not aware that the Employee was collecting waste, on balance of probability it is farfetched, under wise he was not doing his work as a facility manager when looking at the time lag.

[59] The second witness is saying now that he was not aware that the Employee was collecting waste because he is running away from his responsibility. He should have been the first to know that the Employee was collecting waste paper and it was not allowed. The second person who should have known before the incident of 31 October and 07 November 2020 was Mr. Danny Bredell whom unfortunately the Employer opted not to call as a witness even though I asked the Employer to call him. Mr. Danny Bredell's evidence would have tilted the scale, without him giving evidence, reference to his statement did not assist the Employer's case as I attached little weight to his statement.

[60] The above being said, the Employer's case is rooted on the second witness Mr. Mbobela Sotomela's evidence who testified that toners were delivered on Friday (30 October 2020) hence, he concluded that the Employee was the one who removed the toners. He however, conceded that the Employee did not have a spare key, but the fact that there was no break in, his assumption was that the Employee had a master key because even after they have changed the lock sets he still had access. The witness conceded that the Employee was not found with a master key, however he had a master key before 31 October 2020 because even on the second incident on 07 November 2020 after the lock sets were changed he had access.

[61] When asked if he knew what was the Employee doing on the fifth floor? He said at the time he did not know, but after watching the CCTV footage he found out that he was there to remove items

unauthorised. When asked if he knew what the Employee removed from the fifth floor? His answer was that he knew he removed what was missing. The second witness assumed that the Employee removed what was missing, he did not see it either physical or via CCTV footage as he testified that the fifth floor footage was not available. So based on the second witness's assumption the Employee was dismissed. However, I do not concur with the Employee's evidence that the chairperson told him that he was not going to consider his evidence when making his decision, after looking at the chairperson's report.

- [62] Having considered the evidence above, the Employer did not justify the sanction on any source like the dictates of the policy of the institution, should an Employee be found guilty on a charge like this. So the fact remains is that the Employee was dismissed on the assumption of the second witness's evidence not the policy of the institution. I also considered carefully parties' mitigations and aggravating circumstances. Ignoring the issue of leave raised by the Employee in his mitigation as it was never an issue in dispute in this case. It is against this back ground that I found the dismissal of the Employee to be substantively unfair.

## RELIEF

- [63] Section 193 (2) of the Act provides that:

~~"The Labour court or the arbitrator must require the employer to reinstate or re-employ the employee unless-~~

(a) The employee does not wish to be reinstated or re-employed;

(b) The circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;

(c) It is not reasonably practicable for the employer to reinstate or re-employ the employee or

(d) The dismissal is unfair only because the employer did not follow a fair procedure."

- [64] In terms of the section above, reinstatement is the primary remedy in a substantively unfair dismissal like this. The Employee proffered for retrospective reinstatement, but during cross examination the Employer referred the Employee to his resignation which was done on two separate occasions, on 10 December 2020 on the day the Employer served the Employee with the notice for the hearing. The second time was on 18 January 2021 after the appeal hearing outcome was released. The Employee was referred to pages 27 of bundle B and 48B of bundle B. When the Employee was asked if he resigned his answer was that he sent his resignation to the initiator as his manager, but it was not considered as it was not signed by his manager, she sent the resignation back to him saying that he

must remove his manager's name and put Mr. Mthakathi's name, he did not know him nor his position. He did send the resignation on 10 December 2020 and at that time he was not aware that the Employer had already sent him notice to the hearing.

[65] He was referred to page 23 of the bundle B and asked to explain what was the purpose of the email. He testified that he withdrew his resignation, and the reason of the withdrawal was after he became aware that they have sent him a notice of a disciplinary hearing and he also served Mr. Mthakathi. He was then referred to Page 48 of the same bundle and asked of the purpose of the email. He testified that he was the one who wrote the email, and the reason was that in all his emails which he served to his manager he never received any response, and due to the frustration he thought of writing this email to protect his benefits. He was referred to page 48B of bundle B and asked if it was not his intention to be terminated in terms of the resignation not the outcome of the appeal. He said he did not have any comment as it was his intention, but it was not done.

[66] Looking at the evidence of both parties as adduced above, it is imperative before analyzing the version of each party to look into what the Labour Appeal Court held in the case of **Pretoria Society for the Care of the Retarded V Loots (1997) 18 ILJ 981 (LAC)**

"The first test was whether, when resigning, there was no other motive for the resignation, in other words, the employee would have continued the employment relationship indefinitely had it not been for the employer's unacceptable conduct."

[67] There is no evidence to the effect that the Employer created an unbearable circumstance which pushed the Employee to resign. The Employee withdrew his first resignation and the Employer proceeded with the hearing. He testified that he wanted a written acceptance of his resignation from the Employer for it to be effective. There is no law which compels the Employer to accept the resignation for it to be effective. However, that was water under the bridge as the Employer proceeded with the hearing. His evidence that the reason he withdrew his resignation was because he was not aware that the Employer had already served him with the notice to the hearing, does not hold water with reference to his second resignation sent on 18 January 2021. It does not matter which angle you look at it; the bottom line is that the Employee resigned on 18 January 2021 after the appeal outcome confirmed the dismissal.

[68] Under the circumstance, though the act proffered reinstatement in a case where dismissal is found to be unfair and also in line with the prayers of the Employee in this case. I cannot retrospectively reinstate an Employee who resigned. Compensation is the only relief viable under the circumstances. Section 194(1) of the Act provides that:

"The compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for the dismissal was a fair reason relating to the employee's conduct or capacity or the employer's operational requirements or the employer did not follow a fair procedure, or both, must be just and equitable in all circumstances, but may not be more than the equivalent to 12 months remuneration calculated at the employee's rate of remuneration on the date of dismissal".

[69] The Employee was earning R13500.00 per month, to determine a quantum of his compensation, which is both just and equitable in terms of the provisions of section 194(1) of the Act. I considered *inter-alia* the following factors:

- (i) the dismissal is only substantively unfair.
- (ii) the time-lag between the dismissal date and the date arbitration was finalised.
- (iii) the Employee's current unemployment status.

[70] I discernably believe that 8 months compensation is just and equitable under the circumstances. The compensation must be calculated at the rate of the Employee's remuneration at the time of his dismissal, which is as follows:

**R13500.00 X 8 Months= R 108.000.00 (Hundred and Eight Thousand Rand Only).**

#### **AWARD**

[71] In the premise I make the following order:

[72] The Employee's dismissal is procedurally fair but substantively unfair.

[73] The Employer is ordered to pay the Employee an amount of **R108.000.00 (Hundred and Eight Thousand Rand Only).**

[74] The amount ordered in paragraph [73] above is payable on or before 05 November 2021.

[75] Payment of the amount referred to in paragraph [73] must be effected by paying the said amount into the Employee's bank account via EFT the details of which are known by the Employer.

- [76] Interest will accrue on the compensatory amount from the date payment becomes due, as mentioned in paragraph [74].
- [77] Should the Employer fail to comply with the deadline of implementing this award as ordered in paragraph [69], the Employee shall be entitled to approach the CCMA for its assistance in terms of the provisions of section 143 (5) of the Act, to have this award enforced.
- [78] Parties are advised of their right to review this award at the Labour court should a need arise, within six weeks from the date they became aware of the award.

Commissioner's signature:

CCMA Commissioner:

Sector



BUTHE MALUBANE

South African Health Products Regulatory Authority  
(SAHPRA)

**APPROVED**