



Panellist/s: Caroline Hlongwane

Case No.: GPBC1470/2020

Date of Award: 30 August 2021

In the ARBITRATION between:

PSA obo Koketso Lekalakala

(Applicant)

and

Department of Sport, Arts, Culture & Recreation

(Respondent)

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ARBITRATION AWARD

Details of hearing and representation:

1. This is an arbitration award in terms of section 138(7) of the Labour Relations Act 66 of 1995 (“the LRA”), as amended. The applicant, Ms Koketso Lekalakala referred an alleged unfair dismissal dispute in terms of section 191(1) & 191(5)(a) of the Labour Relations Act 66 of 1995 (“LRA”) to the General Public Service Sector Bargaining Council (“the Council”) on 11 November 2020.
2. The dispute was scheduled for arbitration before me at the respondent’s premises in Johannesburg on the following dates: on 20 January 2021, 10 March 2021, 06 & 07 May 2021, 25 & 26 May 2021, 08 & 09 June 2021, and virtually on 02 July 2021, 10 and 11 August 2021. Unfortunately, the proceedings did not proceed on the following dates:
 - 2.1. 20 January 2021 because the respondent requested postponement on the basis that its witnesses were not available.
 - 2.2. 06 & 07 May 2021 because the respondent’s representative, Advocate Gloria Phajane had flu like symptoms and could not attend the hearing.
 - 2.3. 08 & 09 June 2021 because the respondent’s representative, Advocate Gloria Phajane was sick and booked off until 09 June 2021.
3. The applicant was part of the proceedings and was represented by Mr. Bradley Benson; PSA union official and Advocate Gloria Phajane instructed by the office of the State Attorney- Johannesburg, represented the respondent. The proceedings were digitally recorded, and the recordings were sent to the Council.

Issue to be decided:

4. I am required to determine whether dismissal of the applicant by the respondent was procedurally and substantively fair.
5. In the event that I find in favor of the applicant, the applicant sought reinstatement.

Background to the matter:

6. The applicant was employed by the respondent as a Director: Supply Chain Management from May 2019 until her dismissal on 30 October 2020. Upon the respondent suspecting allegations of misconduct, the applicant was charged with six counts of misconduct and subjected to an internal disciplinary hearing. The respondent decided to terminate the applicant's services after the said hearing had been conducted.
7. At the time of dismissal, the applicant earned R72 495.09 per month.
8. As a result of the applicant's dissatisfaction with the outcome, she referred an alleged unfair dismissal dispute to the General Public Service Sector Bargaining Council ("GPSSBC"). The dispute was conciliated, and it remained unresolved, a certificate of non-resolution was issued and is contained in the Council's file. The applicant requested that the dispute be resolved through arbitration.

Survey of evidence and argument:

9. At the commencement of the process, the parties submitted bundle of documents respectively marked as the respondent's and applicant's bundle and the contents thereof were purported to represent what they were.
10. The respondent called three witnesses to prove its case. The applicant relied in her own evidence. At the end of the proceedings, the parties requested to submit closing arguments in writing by 17 August 2021 which they duly complied.

Respondent's case

11. The respondent called three witnesses, i.e. **Mr Nkosinathi Masondo**, **Mrs Mokgadi Rasivhetshela** and **Mr Omphihletsu Mafora** and their evidence is summarised below as follows:
12. **Mr Nkosinathi Masondo** testified under oath that he is employed as a Counter Intelligent Investigator for the State Security Agency ("SSA") for the Gauteng Province. The SSA is the custodian of state security majors. He has been employed for close to 6 years and his duties include fraud, corruption, and malpractice investigations; advising government departments on how to improve their security. The departments are required to liaise with the SSA when it comes to security related issues and the SSA then screen the

appointed service provider. They also deal with threat and risk assessment to mitigate risk within departments.

13. He stated that regarding the appointment of a service provider in question the SSA was not consulted from the inception of the project. Normally, before a tender is advertised, the SSA is supposed to be informed.
14. During the investigation they found that the deliverables as specified in the terms of reference were not complied with. They found that the 8 cameras were of poor quality and less than what has been specified under clause 4.3. They did not find the covert cameras and the service provider failed to show them where they are. Underground floor, they found 3 cameras which were not specified under the scope of work. On the 7th floor, they did not find anything while the scope of work suggested that there were supposed to be cameras installed; they even requested the Head Office to assist with the inspection and people from the Head Office also did not find anything. On the 8th floor, they found 5 cameras and 3 dome cameras on the 4th floor where the CFO and Directors sits. The service provider deviated from the terms of reference and there was no approval for the deviation. There was also no alignment to the scope of work on the project. The Head Office equated the amount of work done to have been equivalent to +/- R80 000.00 instead of the R343 220.00 paid by the department.
15. They interviewed the applicant regarding this, and her response was that she was not involved in this project and did not know anything. The Request to purchase ("RLS01") was not approved or signed by the applicant and she said that it was the first time she saw the document when the witness showed it to her during the interview. He found this to be strange considering that this is the main document which should had been signed by the applicant as the Director for Supply Chain Management as it formed part of the tender documents.
16. At the completion of the installation of the whole system the service provider was supposed to do a handover training to three officials of the department on how the system works. During the investigation they found that no training was conducted and there was no single security official who knew how to operate the system. They also discovered that there was also a password given to the Director of facilities, however the password is incorrect and cannot be utilised for the management of the system, yet the department has already paid for the training. The system is currently ineffective. They also found that the service provider, Setima Mollo was paid a total amount of R343 220.00 which was inclusive of R18 000.00 for training.
17. The investigation further revealed that there were two companies, i.e. Zilosec Fire Protection ("Zilosec") and Setima Mollo Projects ("Setima Mollo") that were declared as winner for the tender on the same date. Zilosec was declared a winner despite quoting an amount which was higher than the amount stipulated on the tender

advertisement. In realising the mistake, the department appointed the second company which is Setima Mollo. According to the policy, a second company on the evaluation sheet should have been considered instead of a new company, i.e. Setima Mollo which was not even on the evaluation sheet.

18. Setima Mollo according to the CIPC was registered in January 2019 and was appointed to be the preferred service provider in March 2019. Both companies were not in the security industry but were doing construction, despite this they were appointed for installation of cameras tender. They also found that both companies were using the same email address and are owned by people who seem to be the same family members. The investigation also found that Setima Mollo assisted the department to draft terms of reference which is conflict of interest. Furthermore, only one company, i.e. Zilosec was called in to do a site visit before the tender was awarded to them, therefore, there was no fair competition given to other companies.
19. Mr Masondo submitted that a company without a valid tax certificate cannot be awarded a tender. The applicant failed to put systems in place to prevent fruitless and wasteful expenditure caused by the project. The applicant was supposed to ensure that the policy was adhered to, if not, disciplinary steps should have been taken against those who did not adhere to the aforesaid policies.
20. During cross-examination Mr Masondo confirmed that he was not cross-examined by the applicant during the internal disciplinary hearing because the applicant on the date she was supposed to cross-examine him she requested that the proceedings be postponed on the basis that she had family issues to attend to. On the second arranged date, Mr Masondo was released by the chairperson to leave because the applicant did not come for the hearing.
21. He also stated that the Purchase order was issued before the evaluation of the service provider was done. He further confirmed that the applicant oversaw Supply Chain Management policies and that she reported to the Chief Financial Officer. The fact that the internal memorandum stated that Supply chain management process must follow; it put the applicant in the middle of the project. The applicant was a senior manager, and it was her responsibility to ensure that the process was followed; she was supposed to put laws and policies in place so that the department is protected from wasteful and fruitless expenditure. The applicant was there when the cameras were installed.
22. He confirmed that the people who were involved in the issuing of the tender were all seniors to the applicant; he however stated that they were not responsible for Supply Chain Management process. He submitted that the applicant did not do anything on her side and pleaded ignorance. She was supposed to raise the alarm to the MEC, if she did that, she would not have been implicated. He is the view that if she was not informed about the project, she should have asked what was happening. Due Supply Chain Management process is governed by a policy when it comes to tendering and the applicant's contract stated that she was the one

who should have known about the tender, put processes and procedures of what needed to happen in respect of the tender.

23. The applicant did not do what she was supposed to do, she relinquished her duties, and everything pointed to her inefficiencies. She failed in her duties by not doing anything. It was strange that her superiors and subordinates were involved, and she was not. She failed to put procedures and policies in her unit which led to even her subordinates by passing her. The applicant was supposed to play a role in this tender because it was her directorate, but she failed to play any role. None of the documents had her signature because she was not part of the process.
24. He stated that for finance to effect payment, Supply Chain Management processes should have been followed. Had the applicant ensured that the processes were followed, the department would not have paid the R18 000.00 before the officials who were supposed to be trained were trained. The applicant did not provide leadership directive; no legislative framework was followed. She did not enforce any policy; she did not raise any alarm that something was wrong when she saw cameras being installed.
25. He stated that omission to do something is also a commission. When people working under her did not follow processes, it still falls within her responsibility. The applicant could not delegate her responsibilities but could delegate her functions. They did not find any procurement processes that the applicant might have put in place. He believes that one can enforce compliance even if not aware of what is happening. He confirmed that they did not find any document suggesting that she was aware of the tender.
26. He disputed that the performance agreement was generic and argued that the applicant was more senior. He stated that the HOD, Chief Director as well as the CFO resigned and SSA did not find any answers before they left the respondent's employment.
27. **The second witness was Mrs Mokgadi Rasivhetshela** who testified under oath that she is currently employed as Deputy Director: Finance at the Gauteng Health Department since January 2021 She was previously employed by the respondent as an Assistant Director: Management Accounting and acting as Deputy Director in Financial Accounting. In Management Accounting her responsibility included managing the budget, budget compilation and confirm the budget before any procurement could commence. From 2019 she relinquished these responsibilities and moved fulltime to Financial Accounting in late 2019 doing the books and financial statements. At the time of the incident, she was working at Management Accounting. The department consisted of four programmes, and she was responsible for programme 1 and 4: Administration and Sports and Recreation. She is a professional Accountant and a member of South African Institute of Professional Accountants ("SAIPA").

28. She explained that if there is a need for a particular service, the end user who is a person requiring the service will write a memo that seeks approval based on the amount, certain approval would end up at the HOD. Once the memo has been signed and has been approved it goes to accounting and seeks budget confirmation and budget will be approved and they will complete the budget certificate which ascertain that there is budget. Once the budget has been approved, then RLS01 will be done which will still go back to Management Accounting which will then commit funds which once committed cannot be reallocated to something else; after funds commitment it goes to Supply Chain Management, which will do a requisition, capturing until when Purchase Order is issued, and services has been delivered. Supply Chain Management consisted of the Director who was the applicant at the time; there was no Deputy Director, Assistant Director (Thembi Molefe), and the juniors would follow under. The most senior person at the time of the incident was the applicant. She does not know if the applicant was involved although process wise, she should have been.
29. She found that the request for camera installation as stated in the internal memo lacked justification for the services required since there was no police report, or a case reported to justify the need for this kind of services; there were already existing cameras on all entrances and exits. She confirmed that the internal memo was done by the Chief Director who is responsible for managing people whilst it should had been done by the end user who is the Director: Security. The memo referred to physical security personnel which was not an item to buy or install. The item and financial implications were contrary to one another. There was further a missing concept because the department does not own Surrey House building, they have leased it; so, for anything that happens to that building must be done with owners' approval. They were supposed to receive approval from the owners first or permission through the office of the Premier since there were allegations of vandalism.
30. She also confirmed that the item description on the internal memo and Terms of Reference was different and was not the same as the one approved by the HOD. Although the item was well classified on the certificate, the budget used was for the items stated on the memo. The item stipulated on the certificate was approved with no budget. The checklist was not signed and approved yet procurement went ahead and issued the Purchase Order in March 2019.
31. She corroborated the evidence given by the first witness regarding lack of justification for the appointment of Setima Mollo that was not in the evaluation form or second on the score sheet. Supply Chain Management has a duty to explain how the tender awarded outside the procurement process approved. She only got involved at payment stage because someone was struggling to make payment. Treasury was involved and by passed the system for Setima Mollo to be paid. The respondent had to correct this because it was going to affect their books. She confirmed that Sibusiso Zondo came to her to do journal correction and she

requested roll-over of below R500 000.00 from Treasury to increase the respondent's budget. Treasury asked questions that led to her investigating only to find that there were cameras installed in the building they did not own; she then engaged the Facility Director and the CFO; submissions were made to Treasury without her, and the roll-over was granted.

32. Under cross-examination she confirmed that she was not cross-examined by the applicant on the date she testified at the disciplinary hearing because the representative requested postponement. On the second date when she was supposed to go to the hearing, she was informed that the applicant was sick and sent a sicknote. She does not know if the hearing continued on the second date of the hearing. She also confirmed that she did not know whether the tender was advertised. She also confirmed that the manager approved the budget with the flaws. Her unit confirmed through the RLS02 that goods were delivered and made payment.
33. She further stated that the applicant was entrusted by the respondent to know what her juniors were doing, and it would be strange for her to not know what her juniors were doing, however she would not have picked up what her juniors were doing if they hid it from her. She also stated that the Director must first take steps to ensure that things that are not supposed to happen do not happen and when she discovers that things happened under her watch she must report. She however confirmed that the applicant could not have reported something she did not know. There is nothing according to all the documents presented to her suggesting that the applicant was aware of the tender. She is of the view that the tender should not have necessitated the applicant's dismissal and that the disciplinary procedure should have followed the steps of transgressions, for example, written warning.
34. During re-examination she stated that other things could have happened leading to the applicant's dismissal therefore her feelings that the applicant should not have been dismissed do not matter. She also confirmed that some senior employees were also charged, for example, the CFO who later left the respondent's employment although she does not know whether the Chief Financial Officer ("CFO") was dismissed or resigned.
35. The third witness was **Mr Omphihletsu Mafora** who testified under oath that he is employed by the respondent as an Acting CFO effectively from 03 October 2019. When he joined the respondent, the applicant was already on suspension. He stated that the Director of Supply Chain Management job description includes but not limited to managing tenders, Request for Quotations ("RFQs"), Asset management in the department, procurement of goods and services and assets of the state. The Director takes responsibility for anything that happens in the directorate because her responsibility is to create

systems. The applicant directly reported to the CFO and he is of the view that he would not be able to work with someone who is ignorant.

36. Under cross-examination he confirmed that payment is done by the Finance Directorate, but the initiation of payment is done by Supply Chain Management. He confirmed that during the internal disciplinary hearing, he was cross-examined by the applicant.

Applicant's case

37. The applicant was the only witness for her own case, and she testified under oath that on the first day of the hearing she did not have a representative because her representative had other commitments. She then requested that the hearing be postponed but the chairperson refused; she then requested that her colleague be allowed to sit as an observer. In the afternoon she requested that instead of cross-examining the witness who was on the stand, she be allowed to cross-examine him on the second day because she did not make arrangements for her child as she thought that the hearing was going to be postponed or her request for postponement would be granted.
38. On the second day of the hearing, she woke up very ill and she sent an email to Nakedi who is the Deputy Director: Labour Relations and the employer representative (initiator), Mr Albert Mkhonza to inform them that she was going to consult with the doctor. She was diagnosed with hypertension and was given medication and booked off; the follow up consultation was on a Friday. She immediately scanned and emailed a sicknote to the HOD and Nakedi as she was unable to go to the hearing. Nakedi acknowledged receipt and informed her that he would inform the chairperson and the chairperson would use his discretion regarding the acceptance of the medical certificate. She never heard anything from the respondent regarding another date of the hearing, and the next communication she received from the respondent was when she received her dismissal letter.
39. She did not play any role in the transaction in question, the first time she heard about it was when the SSA was conducting the investigation. The investigators showed her documents regarding the transaction. The tender was not advertised in any media. The installation of cameras in their building is not supposed to be a procurement issue because the building is rented, and the installation of the cameras were supposed to be taken care of by the landlord. She takes instructions from her superiors, but she does not know everything they are doing unless if they are giving her instructions. Thembi Molefe was an acting Deputy Director and her direct report. On 25 September 2019 the CFO Ms Lutchman asked her to printout the Central Supplier Database ("CSD") report for Zilosec and Setima Mollo. CSD is a live report which shows the date, time and who ran the report. She never made any payment to Setima Mollo and she did not rectify anything.

40. Under cross-examination she stated that she was supposed to be represented by Mr Sigundla Archie but he was not available and requested her to ask for postponement. She could not remember the reasons given by the chairperson when denying her request for postponement. She cross-examined the first witness only. She disputed that she received any phone call from the respondent asking her whereabouts on the second date of the hearing. She thought she needed to communicate with Nakedi as the main person in Labour Relations and Mr Alfred Mkhonza who was part of the disciplinary hearing. She disputed that installation of cameras was a procurement issue and submitted that it was a facility issue. When it was put to her that the respondent would argue that her version of the installation of cameras being the facility issue rather than procurement was not put to the respondent's witnesses, she stated that her version was dealt with by the respondent's second witness.

Respondent's argument

41. Advocate Phajane on behalf of the respondent argued that the applicant raised versions and defences for the first time in her own evidence, without them having been tested against any of the respondent's witnesses, to afford them an opportunity to respond to it. As such, the versions and defences resorted to by the applicant for the first time during her evidence, and which were not tested against any of the respondent's witnesses falls to be rejected on that basis alone. In respect of the applicant's versions not placed to specific respondent's witnesses under cross-examination that concern them directly, and on which their evidence may be challenged, it should be taken that the applicant accepted their account.

42. The respondent's version regarding the charges that there were failures on the applicant's part to ensure a duty of care in relation to her duties as Director: Supply Chain Management directorate, to ensure compliance with process and procedures for acquiring assets and inventory, compliance with the Fruitless and Wasteful Expenditure and Supply Chain Management policies. The responsibility in relation to Supply Chain Management resided with the applicant as Director: Supply Chain Management and even if the services were acquired by someone else and/or her subordinates, she ought to have reasonably known about it in the performance of her duties, and she had the ultimate accountability in respect of it.

43. The applicant's Performance agreement and job profile further service to reinforce that procurement of services in her area of responsibility. She was responsible for all the steps in the process of procuring services, not just for those of her choosing as pointed out by the respondent's second witness. The applicant's defence is that she was not involved and does not know.

Applicant's argument

44. Mr Benson on behalf of the applicant argued that the hearing was concluded without the applicant and the applicant was not afforded an opportunity to get representation, she was expected to go through the whole process alone. The chairperson of the internal hearing had nothing to lose by offering her a postponement to get representation. The internal memo for the tender was drafted, recommended, and approved by the applicant's seniors and although according to the memo Supply Chain Management process was recommended, the applicant as the Director: Supply Chain Management was not informed.
45. Mr. Masondo claimed that the tender was advertised, while he failed to substantiate his claim. When asked to show from the performance agreement where it states that applicant must know what her seniors are up to, and he failed. He admitted that the applicant did not rectify any tender as per charge one, as much as he testified that there is nothing wrong with directors of a company being married or having one email address. On charge 2, he testified that the applicant has not transgressed any of these laws and has not been charged for that yet charge two speaks of 'FINANCE COMMUNIQUE 2/2018'. It was established via Mr. Masondo that this circular is directed to the end-user and not supply chain. No evidence was led that suggested that the applicant has transgressed this circular. On charge 3, Mr. Masondo admitted that the end user was responsible for this function, and further admitted that the applicant is not the end-user. Charge 4 is a duplicate/multiplication of charges since this amount is part of the R343 220.00 that was paid. Mr. Masondo admitted that this was paid as one, and that there was no separate payment. The witness admitted that it was finance that paid all amounts, and that the applicant does not work at finance. On charge 6, he admitted that indeed the applicant played no role and had no knowledge of the tender. One can only enforce policy, when I am aware that the policy is being ignored.
46. The second witness just like the first witness conceded that the applicant was not involved in this tender; she testified that this tender was not in any newspaper and conceded that things was not done normally with this tender. It was her office that rectified these documents to get it paid, while they were aware that from the memo things was not normal.

Analysis of evidence and argument:

47. Section 138(7) of the LRA provides that the commissioner must issue an award with brief reasons. In making this determination I record that whilst the summary hereinabove records the essence of each party's case, I have had regard to the entire evidence and arguments presented during the hearing.

48. In terms of section 192(2) of the Labour Relations Act No. 66 of 1995, as amended (the Act), the onus rests on the employer, in this case the respondent, to prove that the applicant not only committed the alleged infractions, but the dismissal was an appropriate sanction effected after a fair procedure had been followed.
49. In the quest to discharge the onus, the respondent relied on the evidence of Mr. Masondo, Mrs Rasivhetshela and Mr Mafora as summarized above. I will address the procedural aspect of the applicant's dismissal first because an employer must follow a fair procedure before dismissing the employee. Item 4 of Schedule 8 sets out the following requirements for procedural fairness to be met:
- (1) "Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee. After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision".
50. The applicant's procedural challenge was that she was not given an opportunity to cross-examine some of the respondent's witnesses and that the hearing continued and was concluded without her despite reported being ill and sent the sick note. The basis of this challenge, as evidence would show, was premised solely on the allegation that the chairperson continued with the hearing on the second date of the hearing regardless of the applicant being sick. The applicant allegedly sent a sicknote to one Nakedi Makgobola ("Nakedi") who is in the respondent's Labour Relations unit and upon receiving it he apparently informed the applicant that he would give the sick note to the chairperson who would use his discretion on whether or not to accept it. The first witness, Mr Masondo, testified that he was present when the chairperson attempted on numerous occasions to get hold of the applicant without success. He further disputed that the applicant attached her sicknote while the second respondent, Mrs Rasivhetshela testified that she was informed that the applicant sent a sicknote on the second date of the hearing and for that reason she was not cross-examined by the applicant and/or her representative. The applicant's version was that she did not receive any call from the chairperson or anyone from the respondent checking her whereabouts. The applicant also did not submit the correspondence wherein Nakedi confirmed receipt of her sicknote, there was however an email without an attachment addressed to Nakedi on 06 October 2021 at 10h37 from the applicant stating that she was sick. Neither the chairperson, nor Nakedi was called by the respondent to testify regarding this.
51. It is generally unfair for an employer to conduct a disciplinary hearing in the absence of the accused employee. However, there are exceptions to this general rule. I will not address myself to the rest of the exceptions but one;

that is, if the employer, despite his attempt to find an employee through either his last known address or even contact telephone number, cannot locate the employee, then the employer would be permitted to proceed with a disciplinary hearing in the absence of the accused employee. As indicated above, the applicant was aware that an inquiry was taking place but decided not to attend on the second date of the hearing because she was allegedly ill. The chairperson allegedly attempted to contact her, but she did not answer her phone. I find this to be sufficient attempt by the respondent to find the applicant.

52. It is important to emphasise the rationale for a hearing. The hearing is conducted with the view of establishing whether the infractions that the employer suspects against the employee hold true or not. To establish the allegations, the employee must be afforded an opportunity to answer to such allegations. This opportunity is one of the most important principles of the rules of natural justice. Having stated that, the rationale for the respondent to hold a hearing is nothing other than allowing the applicant an opportunity to state a case in response or rebuttal of the allegations, this means that the respondent merely must afford the applicant a platform within which to respond to the charges.
53. Undisputed evidence was led that the respondent had indeed created the platform wherein the applicant could defend herself against the allegations levelled against her. The only issue was that she could not proceed on the second date of the hearing because she was allegedly ill. The crucial question is whether her absence from the hearing was, in the circumstances of this case, justified. The applicant alleges that she sent a medical certificate to Nakedi, while there has been contradictory evidence by the respondent's witnesses on whether or not the chairperson was notified about the medical certificate, what is clearer and what I find to be acceptable is that the applicant sent an email to Nakedi informing him that she was ill and would not be attending the hearing on the second date. Mr Masondo's evidence was that he did not believe that the applicant was sick, and it is not my intention to dwell on his beliefs. What was further not disputed was the fact that on the first date of the hearing, the applicant attempted to request for postponement due to the unavailability of her representative which was not granted; the applicant continued with the hearing by herself and requested for adjournment before she could cross-examine the respondent's witnesses because she did not make arrangements for her child since she thought that the hearing was not going to continue without her representative; this request was granted by the chairperson just after 17h00 as per the respondent's first witness.
54. While it is within the chairperson's prerogative whether or not to grant postponement based on a medical certificate, there seems to have been an assumption that the applicant was trying to frustrate the process by her non-attendance on the second date of the hearing. The respondent's argument was that the applicant's representative should have attended the hearing on behalf of the applicant and argued

postponement on her behalf. I understand that many employers have been previously frustrated by the presentation of medical certificates to avoid attendance at disciplinary hearings; I am however, of the view that the applicant in this case could have been genuinely sick on the day in question. The applicant showed interest in the first date of the hearing by representing herself after postponement was refused. I do not agree with the respondent's argument that the applicant ought to have sent her representative to request postponement on her behalf since she started the hearing without the representative; I am not sure what role or for what purpose would the representative play when the hearing was already halfway through. If the respondent recognised the need for the applicant to be represented on the second date of the hearing, such recognition should have been highly considered on the first date of the hearing when the applicant requested postponement which was refused. It cannot be correct to assume that the applicant still had a representative on the second date of the hearing. The applicant attended the hearing, represented herself and cross-examined one of the respondent's witnesses on the first date of hearing, when she was unable to attend on the second date of the hearing, she sent an email to Nakedi. Having said that, I am of the view that the applicant wanted to state her case if an opportunity was presented to her, and it cannot be correct that she abandoned the hearing on the second date. I therefore, find that although the respondent created a platform for the applicant, the decision to proceed and conclude with the hearing without her on the second date of the hearing, especially after she participated on the first date of the hearing was procedurally unfair.

55. I now turn to the substantive aspect of the case. In deciding whether to dismiss an employee the employer must take Item 7 of Schedule 8 of the Code of Good Practice of the Labour relations Act into consideration. An oversimplified summary of Item 7 of Schedule 8 would be that the employer may dismiss an employee for a fair reason after following a fair procedure. Schedule 8 further prescribe that "any person who is determining whether a dismissal for misconduct is unfair should consider-

- (a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and
- (b) if a rule or standard was contravened, whether or not-
 - (i) the rule was a valid or reasonable rule or standard;
 - (ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
 - (iii) the rule or standard has been consistently applied by the employer; and
 - (iv) dismissal was an appropriate sanction for the contravention of the rule or standard".

56. The applicant was charged with six counts of misconduct and although my intention is not to repeat them as verbatim, I have summarised them as follows:

- Allegation 1: It is alleged that the applicant committed an act of gross misconduct in that during the period February to March 2019 as Director Supply Chain Management, notwithstanding the available facts which she knew or ought to have reasonably known in the performance of her fiduciary duties, she failed to exercise her “duty of care” which resulted in the following:
 - The award of a contract in the amount of R394 703.00 to Zilosec Fire Protection which was not administratively responsive to the Central Supplier Database (CSD) and did not have a valid Tax Clearance Certificate.
 - The rectifying of a wrong award to Zilosec by awarding the contract to Setima Mollo Projects to a tune of R343 220.00 when both Setima Mollo and Zilosec shared the same email address, physical addresses and the directors were married to each other.
- Allegation 2: It is alleged that the applicant committed an act of gross misconduct in that during the period February to March 2019 she failed to ensure compliance in terms of internal memo dated 12 April 2018, FINANCE COMMUNIQUE 2/2018, process and procedure for acquiring assets and inventory.
 - A contract to the amount of R343 220.00 was awarded to Setima Mollo which had not submitted a proposal.
 - The cameras installed on the 4th floor instead of the 7th floor by Setima Mollo are not in full compliance with the specifications, scope of work and deliverables contained in the terms of reference.
 - The invoice from Setima Mollo Project, RLSO2 from the end user submitted to account payment for R343 220.00 to Setima Mollo were without asset verification.
- Allegation 3: It is alleged that the applicant committed an act of misconduct in that she failed to ensure that the State Security Agency (SSA) inspect the supply, installation and operation of the equipment before payment was made.
- Allegation 4: It is alleged that the applicant committed an act of misconduct by allowing a payment in the amount of R18 000.00 (eighteen thousand rand) to Setima Mollo Project for training and developing security personnel in the operation of installed camera system when they did not render those services.
- Allegation 5: It is alleged that the applicant committed an unlawful act in that during the year 2019 and/or financial year 2019/2020, knowingly and/or ought to have known due to the nature of her position and her area of responsibility at the respondent that Financial legislative compliance, systems and control falls within her purview. As such she had to ensure that all material times that the organ of state procure goods and services using a system that is fair equitable, transparent, competitive and cost effective. She failed to put effective systems, policies and measures within the respondent to ensure that there is no fruitless and wasteful expenditure within the respondent. She nevertheless allowed the irregular and unlawful appointment and payment of Setima Mollo Project.
- Allegation 6: It is alleged that committed an unlawful act in that she allowed the irregular and unlawful appointment of Setima Mollo Project with a blank/unsigned RLS01 checklist; when she should and/or ought

to have known and ought to have investigated the purchase order generated by Thermba Ntombela and approved by Ben Nkuna without the approval of RLS01 checklist by the applicant or the CFO.

57. I must highlight that under normal circumstances, there would be common cause facts agreed to by the parties, however, in this case, despite my attempt to narrow down issues with the parties at the beginning of the process on the first date of hearing, the respondent's representative insisted on calling the first witness, therefore, what is about to follow will be referred to as established facts. The first established fact was that the applicant signed a Performance Agreement wherein she agreed that amongst other things, she would develop and maintain systems that ensure effective, efficient, economical, and transparent use of the resources of the department. The second established fact was that the applicant was a custodian of Supply Chain Management, meaning that everything related procurement within the respondent was her responsibility together with her team. Regarding the procurement of the goods that led to the applicant's dismissal, there was an internal memo drafted for the tender by the applicant's seniors, motivated, approved; the service provider was appointed, rendered services, and paid without the applicant's knowledge.
58. Regarding the substantive fairness of the dispute, I am of the view that most of the evidence presented by the parties is common cause in that the applicant was not involved in the awarding of the tender in question. It became transparent during the hearing that the applicant was charged and dismissed for omission rather than commission. The question that arises is whether the applicant could reasonably be expected to have been aware about the alleged tender despite being by passed by her superiors and her juniors. The respondent's first witness testified that the applicant informed them during the investigation that she was not aware of the contract, he is however, of the view that when cameras were installed in front of her office, she ought to have been aware and should have raised an alarm to the MEC as Director of Supply Chain Management. The respondent's second witness stated that she was shocked to learn about the contract since they were leasing the building and were not supposed to install anything without the owners' permission and when this question was raised with those who wrote the memo; they motivated that when the respondent moves out of the building, they would remove the cameras and that is why the budget was approved. The applicant testified that there was nothing appalling to her when she saw cameras being installed because she was under the impression that the owners were installing them as it was never a procurement issue but a facility issue. This is a clear indication that the applicant was not aware and could not have been reasonably expected to have been aware of the tender./ transaction since she was never involved. There was no evidence that the tender was published, the respondent's first witness testified that it was in the public domain but could not prove how it was advertised if it was. Having said that, I accordingly find that because the applicant was not aware and not involved, it is impossible for her to have contravened the rule as per Item 7(a) of Schedule 8 of the Code of Good Practice and

therefore not necessary to even deal with the questions outlined under Item 7(b) of Schedule 8 of the Code of Good Practice.

59. The respondent's representative argued that the applicant's version was not put to the respondent's witnesses. The version of the applicant was that installation of cameras was not part of procurement because the respondent is leasing the building. Although this version was not put to the respondent's witnesses, I do not think that it is implausible; it was not far removed from what has been stated by some of the respondent's witnesses, in fact, the respondent's second witness also testified about this specific issue. I therefore, find that although the applicant's version was not put on the first and the third witnesses of the respondent the second respondent's witness addressed it. I was impressed by the respondent's second witness; she was consistent with her evidence. I find her evidence to be more probable as she dealt with the issue of the tender in question and explained how everything was not done according to the required standard.
60. The respondent's first witness heavily relied on the applicant's Performance Agreement and repeatedly stated that the applicant had a fiduciary duty to ensure that the respondent is protected from wasteful and fruitless expenditure. Whilst I agree that the principle of fiduciary duty applies more strongly to senior employees, in the employment context, a fiduciary relationship will arise where the employee has some special access, discretion or power in relation to the employer's assets or affairs, making the employer vulnerable to abuse and necessitating a higher level of trust. This would be more applicable if the applicant was aware of what her seniors were doing and ignored their actions. In the present case, there was no persuasive evidence presented before me to prove that the applicant deliberately made the employer vulnerable.
61. In *Transnet Freight Rail v Transnet Bargaining Council and others* (2001 6 BLLR LC), it was stated that negligence can be defined as a failure to comply with the standard of care that would be exercised in the circumstances by a reasonable person. This was reiterated in the arbitration case of *Petrus Frederik Rautenbach v Cashbuild (Pty) Ltd* [FSBF2638-17], when it was restated that "negligence is the failure to comply with the standard of care that would be exercised in the circumstances by a reasonable person. Negligence can manifest in either acts or omissions". In the arbitration award of *NUMSA obo Motsedisi Julia Tsilo v Ngwako Holdings (Pty) Ltd* DRC/MINT 50247], it was emphasised that "The test for negligence was described by Driscoll C in the matter of *Nkosi v Nampak* (2010) 10 MEIBC at 8.14.1, as follows: The test for negligence is whether a reasonable person in the position of the employee would have foreseen the harm resulting from the act or omission, and would have taken steps to guard against that harm. The basis for the employee's culpability is not the act or omission itself, but rather the lack of

care or diligence that accompanied the act or omission. To warrant dismissal, the negligence must be gross, that is, if the employee was persistently negligent or if the act or omission was particularly serious. Where the consequences of a single act or omission are particularly serious, or when an employee holds a position in which negligence on a single occasion may have disastrous consequences, dismissal may be justifiable on the first occasion”.

62. The Supreme Court of Appeal had the following to say about gross negligence in the case of *Transnet Ltd t/a Portnet v Owners of the MV Stella Tingas & Another* [2003 (2) Sa473 SCA], “it follows, I think, that to qualify as gross negligence the conduct in question must involve a departure from the standard of the reasonable person to such an extent that it may properly be categorised as extreme; it must demonstrate, where there is found to be conscious risk-taking, a complete obtuseness of mind or, where there is no conscious risk-taking, a total failure to take care”. In the final analysis, negligence can be viewed as ‘blameworthy poor work performance’, as there is proof, on a balance of probabilities, that the employee has tendered a quantity and/or quality of performance which is less than the employer can prove the employee is capable of.
63. Section 185 of the Labour Relations Act (LRA) 66 of 1995 as amended, stipulates that every employee has the right not to be unfairly dismissed or to be subjected to an unfair labour practice.
64. Section 188 of the Labour Relations Act 66 of 1995 (as amended), provides that an employee’s services should not be terminated unless the reason for such termination is fair and relates to conduct, capacity or operational requirements. Item 4 of schedule 8 also stipulates that the termination of services should not be effected without a fair procedure being followed. In this case the respondent continued with the hearing on the second date without the respondent despite her participating on the first date of the hearing alleging that she has abandoned the hearing because the chairperson allegedly was unable to get hold of her telephonically. I accept that the applicant sent an email at 10h37, while the hearing started at 09h00; this however would mean that at the time the applicant sent an email the hearing was still taking place.
65. I considered the provisions of schedule 8 of the Code of Good Practice: Dismissal. At item 2 the code provides that “a dismissal is unfair if it is not effected for a fair reason and in accordance with a fair procedure even if it complies with any notice period in a contract of employment or legislation governing employment. Whether or not a dismissal is effected for a fair reason is determined by the facts of the case, and the appropriateness of a dismissal as a penalty.

66. In the present case, the applicant did not know what was happening, her seniors wrote an internal memo, motivated why the installation of cameras was necessary and decided not to include the applicant in any form or manner. It has been established during the hearing that none of the documents presented were approved by the applicant. I have considered the reason presented for the dismissal and it is clear that the respondent did not have a fair reason for dismissing the applicant. It is evident that in effecting the dismissal of the applicant the respondent failed to comply with the requirement that dismissal should be for a fair reason.
67. I find in this regard that no evidence was tendered by the respondent that the applicant had breached any rule. For this reason, I find that dismissal was not an appropriate sanction and was unfair.
68. Considering the above, I therefore, determine that the respondent failed to discharge the onus in terms of section 192 (2) of the Act and that the applicant's dismissal was substantively unfair. The applicant asked for reinstatement should I find in her favour,

Finding

68. I am satisfied that the respondent dismissed the applicant for no just cause or reason.

Award:

69. The applicant's dismissal was both procedurally and substantively unfair.
70. The respondent, Department of Sports, Arts, Culture and Recreation is hereby ordered to reinstate the applicant, Koketso Lekalakala into its employ on terms and conditions no less favourable to her than those that governed the employment relationship immediately prior to her dismissal.
- 70.1. The reinstatement must be with back pay of 10 months equivalent to R724 950,90 (Seven Hundred and Twenty four Thousand Nine Hundred and Fifty Rand and Ninety Cents) less statutory deductions, i.e. from date of dismissal which is 30 October 2020 to date of the award calculated as follows:
- 70.2. $R72\,495,09 \text{ per month} \times 10 \text{ months} = R724\,950,90$
71. The re-instatement in paragraph 70 is effective from 13 September 2021 and the back pay must be effected on or before 30 September 2021.
72. The applicant must report for duty on 13 September 2021

A handwritten signature in black ink, appearing to read "Caroline Hlongwane".

Caroline Hlongwane
(Council Arbitrator)