



ARBITRATION AWARD

Panelist: Chance Khazamula
Case No.: GPBC1588/2019
Date of Award: 09 August 2021

In the ARBITRATION between:

PSA obo C Pilane
(Union / Applicant)

and

Department of Higher Education and Training
(Respondent)

Union/Applicant's representative: Mr A Sigudla – Union Official

Respondent's representative: Mr S Chamane - Official

AWARD

DETAILS OF HEARING AND REPRESENTATION

1. The matter was an unfair dismissal dispute referred to the General Public Service Sector Bargaining Council ("the Council") in terms of section 191(5))a) of the Labour Relations Act, 66 of 1999 ("the LRA"). The arbitration proceedings commenced on 23 October 2019 and proceeded on numerous days until 21 May 2021.
2. The parties signed pre-arbitration minutes on 23 October 2019. I further directed the Parties to submit pre-arbitration minutes on the Applicant's allegations of procedural unfairness however at the Parties did not comply with the direction. The Parties again submitted bundles of documents as evidence which were marked Bundle "A" for the Applicant and Bundle "R" for the Respondent. Parties further submitted written closing arguments.

ISSUE TO BE DECIDED

3. I have to determine whether the Applicant's dismissal by the Respondent was procedurally and substantively unfair or not. If I find that the Applicant's dismissal

was procedurally or substantively unfair or both, I must order appropriate relief.

The relief sought by the Applicant is reinstatement with back pay.¹

BACKGROUND TO THE ISSUE

4. The Applicant was employed by the Respondent on 25 February 1994 and on March 2013, was transferred from a position of a Director: Human Resource Management Administration to a position of a Director at the Human Resource Development Council Secretariat ("HRDC/the Secretariat").
5. The Applicant was charged in terms of Chapter 7 of the SMS Handbook, clause 2.7 thereof read with PSCBC Resolution 1 of 2003 (Disciplinary Code and Procedure for Public Service) with eight (8) allegations of misconduct² and she was found guilty and dismissed on charge 1, 4, 5 and 8. The Applicant following her dismissal referred a dispute of unfair dismissal to the Council. The Council thereafter appointed me to arbitrate the dispute.

Summary of Pre-Arbitration Minutes concluded on 23 October 2019

6. Parties agreed on the following;

Procedure

- 6.1. I must decide whether the Respondent failed to comply with the resolution in respect of the presiding officer's failure to communicate the outcome of the disciplinary hearing the outcome thereof or not.

¹ S193(1) (a) of the LRA

² Page 3 to 5 of Bundle A

Substance

- 6.2. *Charge 1*; it was a common cause that the report was submitted late after 11 September 2017. I must decide whether it was reasonable for the Applicant to submit a report on 11 September 2017 or not.
- 6.3. *Charge 4*; it was a common cause that the Applicant told Ms Ntombela that she will not attend the strategic meetings of the HRDC. I must decide whether the reasons for not attending the strategic meetings of the HRDC were valid or not.
- 6.4. *Charge 5*; it was a common cause that the Applicant failed to submit a budget for the proposed 2018 HRDC submit on 05 September 2017. I must decide whether the Applicant was negligent or not when she failed to submit a budget for the proposed 2018 HRDC summit.
- 6.5. *Charge 8*; I must decide whether the Applicant failed or refused to submit a performance agreement on 02 October 2017 or not.

SURVEY OF EVIDENCE AND ARGUMENT³

The Respondent's submission

7. *Charge 1*: The Respondent's 1st witness Brenda Ntombela ("Ntombela") testified that she was employed as a Head of HRDC Secretariat ("the HRDC Secretariat") and she was the Applicant's supervisor. Ntombela testified that she issued an instruction to the Applicant on 21 August 2017 to submit the Worker Education Committee Report⁴ ("WEC/WEC report") on or before 11 September 2017. The importance to submit the WEC report was that it had actions taken by the WEC

³ I have considered all evidence submitted before me. I however will refer to evidence relevant to the determination or to support any of the elements of fairness as required. This does not imply that in coming to a determination I failed to consider or ignored other evidence.

⁴ Page 19 to 21 of Bundle R

which had to be implemented including the Secretariat. The WEC report was submitted late on 15 September 2019 and she wrote on top of the cover page to indicate that the WEC report was late and there was no extension requested from the Applicant.

8. *Charge 4:* Ntombela testified that strategic meetings were put in place so that the Head of the Secretariat and the Director discuss the Secretariat issues from the previous week and plan for the following week. She reported on issues from the strategic meeting which she attends with the Respondent's Director General and the Minister. On 31 July 2017, the Applicant wrote an email⁵ that she had requested an HR intervention and stated that she will not attend any strategy meeting with Ntombela until the matter was resolved. On 01 August 2017, she instructed the Applicant in writing⁶ that she expected the Applicant to attend the strategic meetings. The Applicant responded in writing stating that she had lodged a grievance against Ntombela and she did not think that they could continue with the meeting without them reaching common ground. Ntombela submitted that this was a month after the Applicant joined the HRDC Secretariat. The Applicant disrespected authority and the routine meeting attended by the Head of HRDC Secretariat and the Director.
9. *Charge 5:* Ntombela testified that the Applicant was responsible to handle the budget for the proposed 2018 HRDC summit ("the budget"). On 04 September 2017, she instructed the Applicant by email⁷ requesting her to submit the budget on 05 September 2017 before 14H00 because she needed to attach it to her submission she prepared for the Minister⁸ however she did not receive the budget

⁵ Page 22 of Bundle R (at the bottom)

⁶ Page 24 of Bundle R

⁷ Page 27 to 28 of Bundle R

⁸ The Executive Authority of the Respondent

by the deadline. Ntombela reminded the Applicant on 05 September 2017 to submit the budget on 06 September 2017. The Applicant responded on 06 September 2017 that she was still consulting and will forward the budget on Friday, 08 September 2017. On 10 September 2017, Ntombela responded⁹ to the Applicant's email and stated that she wrote emails late because she attended the meetings during the day and she could only respond to emails in the afternoon. She submitted that she normally communicated with the Applicant via e-mails and SMS members were required to be available 24 hours of the day. She could not remember the IT systems being offline and the Applicant could have contacted her if the IT systems were offline. She stated that she had already worked on the submission to the Minister and she was waiting for the Applicant's prepared budget to submit to the Minister. She gave an extension to the Applicant to submit the budget on 06 September 2017. After she did not get the budget from the Applicant she did it on her own and submitted it to the Minister because she was respecting authority.

10. Charge 8: Ntombela testified that the Applicant on 02 October 2017, refused to submit a performance agreement ("the PA") and detailed the importance of signing the PA. She wrote to Moferefere Dlamini¹⁰ ("Moferefere") after the Applicant declined all her calendar invites. She responded to the Applicant because the quarter was about the end. The Applicant's conduct was undermining authority, disrespectful and refusing to take instruction.

The Applicant's submission

⁹ Page 29 of Bundle R

¹⁰ Page 30 of Bundle R

11. *Charge 1:* The Applicant submitted that she was never involved with the WEC and the WEC members were not willing to talk with the Secretariat because of the prevailing conditions. Ntombela did not give her the information she requested about the WEC during the 2nd strategy meeting. She was shocked when Ntombela requested a report from her. She later went to Mokubung who was a Program Manager responsible for the WEC to request assistance. Mokubung said the WEC members were raising the issues against Ntombela and Ntombela should have been the one who responded. Ntombela instructed Mokubung to assist with the report and gave her pointers and she was not given a deadline. The Applicant was given a deadline to submit on 11 September 2017. She requested Mokubung to submit a report on 11 September 2017 to her. Ntombela said the report must be submitted directly to her electronically and a hard copy to Ntombela's office which Mokubung did. At the time, the Applicant and Ntombela were not on speaking terms because she made a mockery of her in front of the junior employees on 10 and 24 July 2017. The way she spoke to her showed that Ntombela had a lot of animosity against her. The Applicant lodged a grievance against Ntombela on 27 July 2017¹¹. The Applicant submitted that the WEC report was submitted on time by Mokubung as per Ntombela's instruction although it was returned. She saw the report on 12 September 2017 after it was rejected.
12. *Charge 4:* The Applicant testified that she responded to Ntombela's letter¹² which she expected her to attend strategy meetings. In her response, she challenged the reasons for the meeting and stated the conduct of Ntombela's conduct towards her. The meeting could not continue without them reaching common ground¹³. After she submitted her letter she received an email invite that was not

¹¹ Page 43 of Bundle A

¹² Page 24 of Bundle R

¹³ Page 25 of Bundle R, paragraph 2 & 3

responding to the issues she raised but requesting her presence at the strategic meeting.

13. *Charge 5;* The Applicant submitted she did not fail to submit the budget on 04 September 2016. On 06 September 2017, after 16H00, she found an email dated 04 September 2017. On 05 September 2017, the IT systems were offline and they could not send or receive emails and Ntombela was aware of that. She requested an extension to submit the budget on 08 September 2017¹⁴ after she noticed that Ntombela sent an email which could not see because the systems were offline. There was no response to her email and she assumed that Ntombela was okay. Paragraph 3 of the email did not address her request in paragraph 2. Ntombela informed her that she submitted the budget and she was off-site on 07 September 2017. The Applicant stated that on 08 September 2019, around 07H55 her PA said she should call Ntombela on her mobile number. Ntombela indicated that there are corrections to be made on the document which was discussed the previous night with the Exco Chairperson and she took the instruction to make the corrections. After that Ntombela told her not to worry because the document was already submitted to the Minister. The Applicant did not get the report after she asked for it.

14. *Charge 8;* The Applicant submitted that she did not sign the PA after she was reinstated. She did not fail to submit the PA because she was not asked to submit the PA but she was asked to come for the performance appraisal. She was not sure what period of the appraisal was for hence she stated that she will not attend. She did not think it was necessary to attend because there were missing periods which she was not appraised and that needed to be dealt with first. The charge was for the PA and the email referred to Director's performance appraisal.

¹⁴ Page 29 of Bundle R, paragraph 2

15. The Applicant's 2nd witness Olwethu Nyewe ("Nyewe") testified Mpondomse was her line manager after he was appointed as a Director at HRDC Secretariat. Deputy Directors were called Program Managers. The Applicant joined the HRDC Secretariat in July following the resignation of Mpondomse. Nyewe was aware of the meetings held at Ntombela's office and she attended those meetings because of her invitation as a Program Manager responsible for planning, monitoring and evaluation by Ntombela's office. The meetings were held almost every two weeks to discuss projects for which they were responsible. She had to report on her responsibilities in those meetings.
16. Nyewe testified that she attended the 1st meeting after she was requested to do a handover to the Applicant. After Mpondomse left the HRDC Secretariat she was told that she will be acting as a Director and she was waiting for her formal appointment as an acting Director. Mpondomse did a handover to her on what he was doing and she prepared a page with a list of activities that were done in the office of a Director and provided that as a handover to the Applicant in the presence of Ntombela. Concerning the WEC conference, a booking fee of R500k was paid for the conference which did not materialise. The conference was organised by the Program Manager who reported to Mpondomse and she did not have the details.
17. Nyewe stated that there were two meetings, one with Ntombela and the Director and the other where all Program Manager will attend. The weekly strategic meetings were planned on a calendar invite. Ntombela presented the HRDC Secretariat reports to Exco after the Program Managers had collectively compiled a report and handed it to the Director. Nyewe worked with the WEC Program

Manager and Ntombela to produce the WEC report¹⁵ in September 2017. She was uncertain if she attended the meeting of 23 August 2017 where challenges were raised however she was involved in the development of the WEC report. Nyewe described the working relationship between the Applicant and Ntombela as a professional relationship.

18. During the 2nd meeting, there was an emotional turmoil between Ntombela and the Applicant which should have been controlled. There was unprofessionalism in the meeting and after the 2nd meeting she noticed that there were meetings which Program Managers attended but the Applicant would not attend and they would report to the work of the HRDC Secretariat in her absence. This affected them because Pilane was available but did not attend the meeting and when they ask her she would say that she was not aware. This created confusion because there were activities that will be performed which Pilane would not be aware of. When she had to submit something to Pilane for approval, she would refuse because she was not aware and she would not take instruction from a junior employee.
19. The Applicant's 3rd witness Mike Tau ("Tau") testified that he was the Chairperson of the WEC. Tau submitted that there was a lack of communication between the WEC and the HRDC secretariat and Ntombela became hostile to the WEC members. The WEC wrote a letter to Exco Chairperson citing lack of support and the matter was taken to Exco. The Exco decided that the matter should be taken outside for his mediation. The R500k issue was tabled and the WEC members stated that they did not decide on the issue. They were never told that Pilane had taken over from Mpondomse. Tau stated that Ntombela was not an

¹⁵ Page 19 to 21 of Bundle R

approachable person and she did not attend the conference because she felt that she was undermined.

ANALYSIS OF EVIDENCE AND ARGUMENT¹⁶

20. It is not difficult to conclude that the relationship between Ntombela and the Applicant was difficult from the moment the Applicant returned to work following her reinstatement from an unfair dismissal dispute. It was a common cause that the Applicant returned to work Ntombela when Ntombela was on leave and also the Applicant held a view that Ntombela did not want to work with her following Ntombela's testimony at the Applicant's unfair dismissal arbitration proceedings. In this arbitration proceedings, the Applicant based her evidence on Ntombela's relationship with employees and stakeholders. The Applicant attempted to discredit the character of Ntombela when she testified about the R500k which was termed fruitless and wasteful expenditure however such evidence was not relevant to the issues which I had to determine. The Parties at the commencement of the arbitration proceedings agreed on the issues to be determined and therefore I cannot go over and above those issues which I have to determine. This does not mean that I have considered all the evidence before me.

Charge 1: whether it was reasonable for the Applicant to submit a report on 11 September 2017 or not

21. It was a common cause that the report was submitted late and therefore I will not make a finding in that regard. What I need to determine is whether it was reasonable for the Applicant to submit a report on 11 September 2017. Ntombela

¹⁶ I have considered all evidence submitted before me. I however will refer to evidence relevant to the determination or to support any of the elements of fairness as required. This does not imply that in coming to a determination I failed to consider or ignored other evidence.

testified that she instructed the Applicant to submit a report on 21 August 2017 and the deadline was on 11 September 2017. The Applicant testified that she was shocked by Ntombela's instruction because she did not have information or background about the WEC issues. In cross-examination, the Applicant submitted that she did not consult Mokubung because she was invited by the Chairperson of Exco and she hoped to hear a lot about the WEC but the discussion was about Ntombela. The WEC report was drafted by Mokubung because she did not get the information and the background about the WEC. Ntombela requested the report from her knowing that she would not be able to do it. The Applicant delegated Mokubung to provide a WEC report. The norm was that Program Managers submitted the report to Ntombela.

22. It was not a disputed fact that Ntombela only instructed the Applicant to submit the report and the deadline was on 11 September 2017. In cross-examination, the Applicant submitted that Mokubung became aware of the submission deadline because of her disclosure to Mokubung which proves that the instruction was directed to the Applicant. It also proves that the Applicant had a relevant resource with relevant information to produce the report as requested by Ntombela. If the Applicant had intended to know the information and the background of the WEC she could have consulted Mokubung about it however she opted not to do so despite delegating the responsibility of drafting the report to her. If the meeting she attended did not provide the information she requested, she could have gone back to Mokubung to request information and background about the WEC issues if she was going to do the report herself.
23. The Applicant submitted that she requested Mokubung to submit the report to her on or before 11 September 2017 but Mokubung indicated during the discussions

with her that Ntombela instructed her to provide the report to her as well. She did not engage with Ntombela because it was the norm. It may be that the personal relationship between the Applicant and Ntombela was not the best however this did not preclude the Applicant to engage Ntombela using other platforms such as an email if engaging Ntombela face to face would have been a challenge. Nothing prevented the Applicant to submit a report herself as instructed using the relevant processes to submit documents. I find that the Applicant's reasons not to submit the report were not plausible and there was no valid reason for the Applicant to submit a report. The Applicant had available resources at her disposal and it was a fact that she utilised those resources. The fact that the Applicant delegated the responsibility to her junior provides evidence that she did not regard the instruction as unlawful or unreasonable. If the Applicant had a problem with the instruction, it would have been expected from and based on her seniority to challenge it but she did not do so. I, therefore, find that the Applicant's reasons for not submit the WEC report are not plausible and or unreasonable.

Charge 4; whether the Applicant's reasons for not attending the strategic meetings of the HRDC were valid or not.

24. The Applicant testified that she started working at the HRDC Secretariat on 03 July 2017. Her first meeting with Ntombela was on 10 July 2017, a day in which Ntombela returned to work. Evidence suggests that the 1st meeting did not start well and it appears that the Applicant was more interested in the R500k issue than other issues which were tabled in a report by Nyewe. This carried on in the 2nd meeting when the Applicant requested that the agenda be printed to the Program Managers which according to Nyewe created an emotional turmoil

between the Applicant and Ntombela. According to Nyewe it was not the first time the Program Managers attended the 2nd meeting and it appears that they did not have an issue regarding the agenda otherwise they would have raised it with Ntombela. Nyewe testified that Program Managers presented updates of their activities at these meetings.

25. The Applicant attended the meetings for the first time but she did not consider the meetings strategic because they were discussing the activities and not strategic issues. Nyewe and Ntombela testified about the importance of those meetings. Nyewe testified that they attended the meeting almost every two weeks and those meetings were planned on the calendar invite. In my view, the title of the meeting did not matter but what is being discussed in the meeting is important. It appears that the Applicant had a problem with the title of the meetings rather than the content of the meeting. How the Applicant described the meetings suggests that they were not important. It could be that she had a negative opinion about the meetings and had a problem with the conduct of Ntombela but nothing was stopping her from attending those meetings and still use appropriate channels to address the conduct of Ntombela. It was not up to the Applicant to decide the importance of those meetings.

26. The Applicant was within her rights to lodge a grievance.¹⁷ Ntombela advised the Applicant that she did not receive correspondence from the HR unit informing her that the Applicant should not attend the strategy meetings. Ntombela informed the Applicant on 01 August 2017 that she expected the Applicant to attend all the strategic meetings. The Applicant responded on 08 August 2017 stating that she will not attend the meeting reinforcing the decision she took unilaterally when she lodged a grievance.

¹⁷ Page 42 and 43 of Bundle A

27. The Applicant's duty was to support Ntombela as the head of the HRDC secretariat. The Applicant did not have the right to abdicate her duties on the basis that she lodged a grievance. She ought to have attended the meetings until the grievance was dealt with to its finality. I am not suggesting that the Applicant did not raise a legitimate grievance but that need to be tested through a process. Ntombela also had a right to respond to the allegations against her. The proposed solution remains the proposed solution and it did not mean that the outcome of the grievance will be in favour of the Applicant's proposed solutions. If the Applicant would not be satisfied with the outcome of the grievance or if the Respondent failed to deal with the grievance she would reserve a right to take the grievance further including referring the dispute to the GPSSBC *inter-alia* and still honour her contractual obligation to the Respondent. I, therefore, find that the reasons for the Applicant to attend the strategic meeting were not valid.

Charge 5; whether the Applicant was negligent or not when she failed to submit a budget for the proposed 2018 HRDC summit.

28. It was a common cause that the Applicant failed to submit a budget for the proposed 2018 HRDC submit on 05 September 2017. The Applicant submitted that the IT System were down and Ntombela in cross-examination submitted that she could recall if emails were not working. The Applicant further testified in cross-examination she saw Ntombela's e-mail on 06 September 2017 which was sent on 04 September 2017 at 16H11 and a reminder on 05 September 2017 at 20H21. Ntombela submitted in cross-examination that SMS¹⁸ members were needed to be available 24 hours and the Applicant was in a possession of a laptop. The Applicant responded to Ntombela's email at 10H20 that she was still busy with the

¹⁸ Senior Management Service

budget but the reason was that she was still consulting and she will forward it by 08 September 2017.

29. It is very difficult to accept the Applicant's version that the IT systems were offline without corroborating evidence. The Applicant did not provide supporting evidence that the IT systems were down except for her version. It was not a disputed fact that Ntombela was able to send an email to the Applicant on 05 September 2017 which suggest contrary evidence that there was nothing wrong with the e-mail. Further, the Applicant responded to Ntombela on 06 September 2017 at 10H20 and in her email response, she did not advise Ntombela that the reason she missed the deadline was IT-related instead the Applicant advised Ntombela that she was consulting which suggests being her main reason. I agree with Ntombela that the Applicant was not requesting an extension but she was informing Ntombela when she was going to forward the budget. It appears that the Applicant did not take due consideration the importance of the instruction and the deadline in that it had to be submitted to the Minister. The Applicant only made a call to Ntombela when she was advised by Ntombela's PA to call her on her cellphone. This, in my view again suggests that the Applicant did not have any intention to call Ntombela for whatever reason but that is not the case as Ntombela testified that they normally communicated through emails. Ntombela submitted in cross-examination that the Applicant called her at 7H55 on 08 September 2017 and that was when she informed the Applicant that the budget was submitted. I, therefore, find that the Applicant was negligent when she failed to submit a budget.

Charge 8; whether the Applicant failed or refused to submit a performance agreement on 02 October 2017 or not.

30. Ntombela in evidence in her evidence in chief testified that she wrote an email on 31 October 2017 to Moreferere informing him that she had not received the Applicant's PA despite several reminders. The Applicant declined all her calendar invites. In cross-examination, she testified that she did not have any documents to prove her version of several reminders and conceded that there was no proof of written instruction. She further conceded that there was a difference between a PA and a performance appraisal. There was no evidence to prove on the balance of probability that the Applicant failed or refuse to submit a performance agreement on 02 October 2017. There was no evidence of instruction issued to the Applicant to submit the PA on 02 October 2017. Ntombela's complaint to Mofereferere was on two folds (1) She has not received the Applicant's PA despite several reminders and (2) She could not appraise the Applicant because the Applicant declined all her calendar invites. The evidence led in this proceedings dealt with the performance appraisal and not the performance agreement that was to be submitted on 02 October 2017. I have further noted evidence on the requirements of the SMS handbook relating to the performance agreement but this was not the reason why the Applicant was charged. I find that the Respondent failed to prove on the balance of probability that the Applicant failed or refuse to submit the PA on 02 October 2017.

31. I took note that the Applicant's case was based on attacking the Ntombela's character and how she manages the relationship of stakeholders including employees. What should be noted is that the Applicant faced the allegations of misconduct and she was dismissed by the Respondent from those allegations. The character of Ntombela would be significant if the Applicant's dispute was that Ntombela made continued employment intolerable but it was not the case. The

dispute was about the allegations she faced and nothing else. I cannot ignore the fact that there were relationship difficulties between the Applicant and Ntombela however the responsibility of each role player within the employment context should not be undermined but respected. Both Ntombela and the Applicant were the Respondent's SMS members and the Respondent may suffer prejudice if both the Applicant and Ntombela did not discharge their responsibilities to the Respondent. The Respondent has processes to deal with the employment relationship difficulties and including situations where the rights of its employees are alleged to have been infringed upon. This process must have been fully complied with while the employees are discharging their responsibilities to the employer. I, therefore, find that the dismissal of the Applicant was substantively fair.

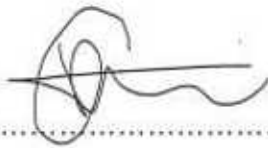
Procedural Unfairness of the dismissal

32. On 23 October 2019, I directed on record to the Parties to conclude the pre-arbitration conference which will form part of the arbitration proceeding because the Respondent was uncertain of the aspects of allegations of procedural unfairness. I have not received the signed pre-arbitration minutes during and or after the arbitration proceedings. It was only the Applicant that made submissions on procedural unfairness in the closing arguments and the Respondent did not make any submission in this regard. If I continue to proceed without allowing the Respondent and opportunity to make submissions it may prejudice the Respondent. I am therefore not in a position to make a finding on procedural unfairness. I however find that it would be in the interest of fairness to allow the Parties to submit heads of arguments so that I can make an appropriate finding in that regard.

AWARD

33. I, therefore, issue the following award;

- 32.1. The Parties are directed to comply with the direction issued on 23 October 2019 and submit signed pre-arbitration minutes together with heads of arguments within 14 days after the receipt of this award. I will therefore issue an award in respect of procedural unfairness allegations.
- 32.2. The Applicant's dismissal by the Respondent was substantively fair.
- 32.3. The Applicant's dismissal is upheld.
- 32.4. There is no order to cost.



CHANCE KHAZAMULA
(GPSSBC) Arbitrator