



GENERAL PUBLIC SERVICE  
SECTOR BARGAINING COUNCIL

# Arbitration Award

Case Number: GPBC 32/2022

Commissioner: Mmeli Danisa

Date of Award: 18 April 2022

In the **ARBITRATION** between

**PSA obo S Mashaba**

(Union/Applicant)

and

**Gauteng Department of Community Safety**

(Respondent)

**Union/Employee's representative:** **Yolanda Ralawe**

Union/Applicant's address:

Telephone:

E-mail:

**Employer's representative:** **Zandile Mbatha**

Respondent's address:

Telephone:

E-mail:

## **DETAILS OF HEARING AND REPRESENTATION**

- 1 This is the matter in the Arbitration into the alleged unfair labour practice, referred in terms of section 186(2) (b) of the Labour Relations Act 66 of 1995 (LRA).
- 2 The hearing was conducted remotely on 08 April 2022.
- 3 The Applicant, Mr. **Samuel Mashaba**, was present and represented byhas Yolanda Ralawe, official from PSA, while the Respondent, **Gauteng Department of Community Safety**, was represented by Ms. Zandile Mbatha (**“Zandile”**), ER Employee.
- 4 The Applicant submitted a bundle of documents marked A1 with pages 1-37, the Respondent did not submit a bundle. The proceedings were digitally recorded, and handwritten notes were taken. The parties agreed to submit their closing arguments by 14 March 2022. The Applicant requested an extension due to loadshedding complications and submitted their closing arguments on 18 April 2022. The Respondent did not submit any closing arguments.

## **POINT IN LIMINE/ PRE-LIMINARY ISSUES**

- 5 The Respondent requested for the Arbitration to be done on paper.
- 6 I allowed both the parties to make their representations on the issue.
- 7 In **SASSA v NEHAWU obo Punzi and others (C 233/14) [2015] ZALCCT 35; (2015) 36 ILJ 2345 (LC)** (handed down on 30 April 2015) the Court held that

Commissioners and Arbitrators should not condone an agreement between parties that no oral evidence be led unless such a stated case has been agreed, and on which they may draw legal conclusions. Although parties may regard submitting documents and argument as a fast way of resolving a dispute on the day of arbitration, it in fact renders the award issued susceptible to review.

- 8 In ***Department of Correctional Services v The GPSSBC and others (JR 625/17) [2018] ZALCJHB 415*** (handed down on 29 November 2018) it was held in the absence of oral evidence, there must be a stated case, absence of which, there is no arbitration. An award issued without hearing evidence is a nullity and it is susceptible to review. *The award was set aside.*
- 9 As a result of the above I found that no stated case has been agreed on which there are legal conclusions for, therefore it would be unjustified to prolong the Arbitration and to have it on paper as it would be necessary to have viva voce evidence.

### **ISSUE TO BE DECIDED**

- 10 As confirmed on record, the issues I am required to decide is whether or not the Applicant's suspension from work by the Respondent on the 03 August 2021 to date constitutes an Unfair Labour Practice in terms of section 186 (2)(b) of the LRA, as amended. The Applicant alleges that he has been suspended for 8 months which is beyond the Respondent's policy prescripts, without any formal charges and disciplinary action following. I am to determine the appropriate relief if I find that the actions of the Respondent were unfair and constituted an unfair labour practice.

- 11 The relief sought by the Applicant is that the suspension from work be uplifted and he be allowed to go back to work, charges are dropped, and that the Applicant is compensated for the psychological effects the suspension has had on him.
- 12 The Respondent's representative submitted that there is no unfairness, and that no unfair labour practice was committed by the Respondent. The Respondent believes that the suspension period is fair bearing in mind the complexity of the matter, they advise that the investigation is still unfolding and at the final stages and that the Applicant has not been prejudiced as he has been suspended with full pay.
- 13 The Respondent requested that no relief should be awarded to the Applicant and that the Applicant must remain suspended up until they have finalized the internal process which is at the final stages.
- 14 At the commencement of the arbitration hearing, I assisted the parties, and we narrowed the issues as follows:
  - 11.1 I have to determine whether or not the Respondent followed a fair process in terms of the third pre-cautionary suspension period of the Applicant in regard to the Respondents policy;
    - 11.1.1 First period: 03 August 2021 – 03 October 2021 (Provided via a suspension notice)
    - 11.1.2 Second period: 19 October 2021 – 19 December 2021 (Provided via a ruling)
    - 11.1.3 Third period: 20 December 2021 to date (not communicated)

- 12 I have to determine whether or not the Respondent acted fairly with regards to the Third suspension period and whether compensation is relevant as a remedy to alleged unfair labour practice.

### **BACKGROUND TO THE DISPUTE**

- 13 The Applicant was employed by the Respondent for 19 years and was a level 10 Traffic officer: Chief Provinces Inspector, on his suspension date (03 August 2021). The Applicant earned an annual gross salary of R540 000, which equates to monthly gross salary of R45 000.
- 14 The Respondent precautionarily suspended the Applicant for allegations that, on or about the 09<sup>th</sup> of July 2021 the Applicant was arrested on the allegation of dealing with drugs and defeating the ends of justice as per the schedule 5 offence. Such allegations are serious and seen as bringing the image of the Department into disrepute.
- 15 The first suspension period was for 2 months and was intended to ensure that an investigation was done, and formal charges could be brought if applicable. The first suspension period lapsed on 04 October 2021 and hearing was held whereby a new suspension period of a further two months was issued which would lapse on 20 December 2021.
- 16 The Applicant has remained suspended to date without knowledge of when the investigation process will end and or the formal charges will be levelled against him.
- 17 The issue remains whether or not the Respondent acted fairly with regards to the Third suspension period and the appropriate remedies applicable if they acted unfairly.

## **SURVEY OF EVIDENCE AND ARGUMENTS**

- 18 I am not going to give an exhaustive survey of all the evidence and arguments led during the arbitration hearing. What follows is a concise summary of evidence relevant to my findings only.

## **THE APPLICANT'S CASE**

- 19 The Applicant was the only witness who testified and he did so after taking the oath.

- 20 **Samuel Mashaba** ("Applicant"), in his sworn evidence testified as follows:

- 20.1 He was employed in Department of Gauteng Community Safety since 2003 as the Chief provincial safety in the south (Vereeniging) unit as the regional head.
- 20.2 He was placed on cautionary suspension from 03 August 2021 and his suspension was for 60 calendar days (in accordance with **clause 7.2 C of the resolution** of disciplinary code and procedures found on page 17 of the bundle) and lapsed on 02 October 2021.
- 20.3 The department did not contact him after the suspension period lapsed and he called his supervisor who said he would ask the relevant people and the supervisor responded after seeking clarity to state that he had to write to the department seeking clarity on the suspension which he did. A letter was then written to him where he was summoned to a hearing to clarify matters with regards to the suspension.

- 20.4** The hearing took place on 15 October 2021 and a ruling was issued on 19 October 2021. Clause 21 of the Ruling (on page 14 of the bundle) extended the suspension for another 60 days which lapsed on 19 December 2021. The department has acted against its own policy in regard to the timelines of the suspension.
- 20.5** That he was innocent and partook in a drug bust which implicated high level officials and instead of being congratulated he was framed and subjected to a suspension.
- 20.6** That he co-operated with all departmental investigations and processes, and it is unfair that the department has treated him unfairly and outside its own policy prescripts.
- 20.7** That a private investigator interviewed him on the first week of January 2022, which means they had failed to internally find anything against him and a further 3 months have passed since the interview with the private investigator. The investigator had said the report he was compiling would be completed and submitted to the department by the end of January 2022.
- 20.8** That this entire process has affected his physical health as he was admitted to hospital and submitted a medical report from the doctor. He emphasised that he has suffered prejudice as a result and to merely state that he is not prejudiced base on retaining payment of his salary is an unreasonable view.
- 20.9** That he feels that he is being punished even though he is innocent and it's a personal attack and an abuse of power on the part of the Respondent.

**21 The Applicant** in his cross examination testified:

**21.1** That the investigation should end at some point, charges should be laid and there should be a disciplinary hearing if there is merit. So, in that particular respect the Applicant feels that the suspension has become punitive in nature even though he is being paid.

**21.2** That he continuously has to follow up on the Respondent in regard to the suspension periods and the unfairness thereof. They are happy to have a lengthy investigation that proceeds forever.

## **THE RESPONDENT'S CASE**

**22** The Respondent did not call any witnesses.

### **Applicant's summary of closing arguments.**

The Applicant's representative made the following arguments:

**23** The Applicant was suspended on 03 August 2021, suspension lapsed on 03 October 2021. After the Applicant made an enquiry on their return a hearing was held on 07 October 2021 where the suspension was extended for 60 days, and the Respondent failed to contact the Applicant or update him on the matter.

**24** The suspension has had an impact on the Applicants health and prevented him from acquiring certain benefits from the Respondent.

**25** If the Respondent was serious, they would have charged the Applicant as they are aware of the charges but 8 months later there are still no charges.

**26** As a result, the Respondent has failed to comply with **PSBC Resolution 1 of 2003**, specifically clause 7.2 which provides that;



*“If the employee is suspended or transferred as a precautionary measure, the employer must hold a disciplinary hearing with a month or 60 days, depending on the complexity of the matter and the length of the investigation. The chair of the hearing must decide on further postponement.”*

- 27 The **Minister of Public Service and Administration** (MPSA) has provided guidelines to be followed by government departments in suspensions. In paragraph 2 of the guidelines, precautionary suspension is defined as “*an interim measure imposed, not as a disciplinary sanction, but for reasons of orderly administration*”. From the outset, suspension is a holding operation and not a final decision.
- 28 Paragraph 3 of the suspension guidelines provides principles around the fact that the suspension must be, valid and for a fair reason, the period is to be reasonable and not exceed 60 days, reviewed on a regular basis, a balance between the interests of the employee and the disciplinary requirements of the employer, employee must be informed of all steps without delay, speedily and effectively finalized, employee must return to work after 60 days if, precautionary and not punitive.
- 29 The Respondent failed to adhere to the above guidelines, specifically the principle of the suspension not exceeding 60 days.
- 30 In **Duiker Mining LTD v CCMA and others (2003, 6 BLLR 550)** the labour court agreed that the bringing of disciplinary charges should not be delayed unnecessarily.

**Respondent’s summary of closing arguments.**

- 31 The Respondent’s representative did not submit any arguments.

## **ANALYSIS OF EVIDENCE AND ARGUMENT**

- 32 **Section 138 (7) of the Labour Relations Act 66 of 1995** requires an arbitrator to issue an award with brief reasons. What follows is a summary of evidence and arguments presented at the arbitration hearing.
- 33 Section 186 (2)(b) of the Labour Relation Act 66 of 1995, as amended provides that *“Unfair Labour Practice means any unfair act or omission that arises between an employer and an employee involving: - **the unfair suspension of an employee** or any unfair disciplinary action short of dismissal in respect of an employee”*.
- 34 Concerning the matter before me the onus rests with the Applicant to establish the unfair act or omission done by the Respondent that was why the Applicant led his evidence first in this arbitration hearing.
- 35 The Applicant challenged whether or not the Respondent followed a fair process in terms of clause 7.2 of the resolution of disciplinary code and procedures found on page 17 of the bundle.
- 36 Section 138(7) of the Labour Relation Act 66 of 1995, as amended provides that; *“within 14 days of the conclusion of the arbitration proceedings: - (a) the commissioner must issue an arbitration award with brief reasons, signed by that commissioner”*.
- 37 **Whether or not the Respondent followed a fair process in regard to the suspension period and whether the suspension is fair after lapse of time?**
- 38 There was one major argument made by the parties before me. The Respondent failed to dispel the Applicants version and evidence in regard to the unfairness of the suspension. The Respondent party ignored such and they were persistent in how serious and complicated the investigation was without explaining why there

was such a long delay, why they did not communicate with the Applicant or supply any justification for such.

- 39 There was no dispute with regards to the suspension hearing findings with regards to the duration of 60 days afforded to the Respondent to mount charges and conduct a hearing.
- 40 There was no explanation provided as reasons for non-communication with the Applicant for the continuation of the suspension and what grounds or authority such an extension was based on. Neither was there any clarity provided as to how much longer the investigation would take.
- 41 The onus of proof lay on the Applicant to prove on a balance of probabilities that his suspension was an unfair labour practice. I accept that the Applicant was able to sufficiently discharge such onus on a balance of probabilities.
- 42 This meant that the burden of proof therefore shifted on to the Respondent and the Respondent failed to provide an adequate defence or response to the Applicant's claim/s and thereby failed to show that the suspension was not an unfair labour practice.
- 43 In **POPCRU obo Masemola and others v Minister of Correctional Services (2010) 31 ILJ 412 (LC)** the Court held, relying on **Mogothle v Premier of the Northwest Province and others (2009) ILJ 605 (LC)** that *"Fairness requires the following before suspending an Employee pending an investigation or disciplinary action: a) First that the Employer has a justifiable reason to believe, prima facie at least, that the Employee has engaged in serious misconduct; b) Secondly, that there is some objectively justifiable reason to deny the Employee access to the workplace based on the integrity of pending investigation into the alleged misconduct or some other relevant factor that would place the investigation or the*

*interests of the affected parties in jeopardy; and c) Thirdly and lastly, that the Employee is given the opportunity to state a case before the Employer makes a final decision to suspend the Employee”.*

44 Based on the evidence led and the above principle; I find that the Respondent had justifiable reasons to believe that they could initially suspend the Applicant. They followed their policies correctly but have been in violation of their own policy since the lapse of the extended suspension period (ending on 19 December 2021) provide by way of a ruling. There is currently no justification for the Applicant to remain suspended as there is no objectively justifiable reason to deny the Applicant access to the workplace based on any relevant factors that he would place the investigation or the interests of the affected parties in jeopardy. This is because too long a period has lapsed (from 03 August to date), the Applicant has fully co-operated, and the investigation is currently at the final stages being processed external (the Respondents version).

45 Based on the above I find that the suspension is unfair since 20 December 2021 and continues to be unfair as well as punitive for as long as it is prolonged.

**Whether or not the Applicant is entitled to compensation for the emotional and/ or physical suffering endured as a result of the unfair suspension?**

46 The onus to prove such suffering and prejudice was on the Applicant and it was on him to quantify the loss. He did not corroborate or substantiate on prejudice on monetary value suffered.

47 He conceded that he did not suffer any prejudice regarding the monetary value. He could not demonstrate any financial prejudice.

48 The Applicant did however show that he ended up being admitted to hospital due to the emotional strain and stress over the suspension, never ending investigation and allegations levelled against him.

49 In **Muller and Other v Chairman of the Ministers' Council House of Representatives and Others 1991 (12) ILJ 76 (C)**, it was held that the implications of being barred from going to work and pursuing one's chosen career, and of being seen by the community around one to be so barred, are not so immediately realized by the outside observer and appear, with respect, perhaps to have been underestimated.

50 There are indeed substantial social and personal implications. These considerations weigh as heavily in South Africa as they do in other countries. I have noted the argument of the applicant in this regard, and I am persuaded. It is my considered view that based on the above submissions that there was an element of prejudice suffered by the applicant to a certain extent.

51 In decide whether the infraction by the Respondent of exceeding the prescribed 60 days in the Resolution warrants that I order compensation or not. The courts have pronounced that the purpose of clause 2.7.(2) (c) of the Resolution is to address the problem of protracted suspensions which demoralises and unfairly prejudice the suspended employee, the intention of the said resolution was to curb the power of employers in the public service from using protracted suspensions to marginalise employees who have fallen out of favour and the

resultant detrimental impact, reputation, advancement of job security and fulfilment that would arise from the prolonged suspension.

52 I have taken note of the submissions and argument of the applicant in this regard. I cannot be convinced otherwise when I consider that with 60 days having expired and the Respondent has remained quiet with no updates to the Applicant nor has the Respondent provided a valid basis to why the suspension was has been so long, I see no reason why compensation should not be ordered.

53 I have considered the extent of the prejudice suffered by the Applicant extent, the nature of the unfair labour practice, the procedural flaw and the extent of the unfairness of the act.

54 I have considered also the fact that the applicant earned an income during the period of the prolonged suspension. I am also mindful of the fact that the absence of loss to an employee does not prevent an award of compensation. The aim is neither to punish the loser nor to enrich the victor, but to express the displeasure at the infraction. The courts have held that compensation is just a solatium.

## **AWARD**

I make the following award:

55 The **Gauteng Department of Community Safety**, the Respondent, of suspending **Mr. Samuel Mashaba**, the Applicant, is an unfair labour practice. There was therefore no justifiable reason for the suspension post the second 60-day renewal (from 19 December).

- 56 The Respondent must uplift the suspension and the Applicant, must report to work within 7 days of the date this award being issued.
- 57 The Respondent must pay the Applicant, *compensation equal to one months' wage of R45 000-00* (Forty-five thousand rands), less statutory deductions, by no later than 31 May 2022.
- 58 The Respondent must further note that the interest will accrue on the amount after 31 May 2022 in accordance with the provision of Section 143(2) of the LRA.
- 59 The Respondent must further note that this arbitration award is final and binding and can be enforced in terms of the provisions of section 143(1) of the LRA and further that it may be made an order of the Labour Court in terms of the provisions of section 158(1)(c) of the LRA.

Signature: \_\_\_\_\_



Commissioner: **Mmeli Danisa**

Sector: **Government**