



ARBITRATION AWARD

Panellist/s: P M NGAKO

Case No.: GPBC134/2019

Date of Award: 23 JULY 2021

In the ARBITRATION between:

PSA OBO E M MOSHABELE

(Union / Applicant)

And

DEPARTMENT OF AGRICULTURE, LAND REFORM AND RURAL DEVELOPMENT

(Respondent)

Union/Applicant's representative: ARCHIE SIGUDLA

Union/Applicant's address:

Telephone:

Telefax:

Respondent's representative: JOHN MASILELA

Respondent's address:

Telephone:

Telefax:

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION:

1.1 This matter was set down before me on the 24th of June 2021 at the offices of Department of Agriculture Land Reform & Rural Development, Jacob Mare Street Pretoria. Appearing before me was the applicant who was represented by Archie Sigudla an official from the Trade Union PSA. The Respondent was represented by John Masilela an employee in the employment of the respondent. A joint bundle was submitted by the parties; after conclusion of oral evidence parties agreed to submit written heads of arguments on the 1st of July 2021. The applicant requested extension which I granted.

ISSUE TO BE DECIDED:

- 2.1 According to pre-arb minutes, I am required to determine whether or not the conduct of the respondent constitutes unfair labour practice in terms of Section 186(2) (a) of the LRA;
- 2.2 Whether the relief sought by the applicant is justified under the circumstances.

BACKGROUND TO THE MATTER:

According to the pre-arb minutes the following facts are common cause:

- 3.1 That the employee is Director: Land Development support.
- 3.2 The employee earns a gross salary of R80 756.97.
- 3.3 The employee was put on a precautionary suspension on the 14 November 2018 and subsequently charged on the 22 February 2019.
- 3.4 The employee was charged after 60 days (37 days late).
- 3.5 The suspension was uplifted on the 28 October 2019 and the charges were withdrawn by the Department on the 19 March 2020

SURVEY OF EVIDENCE AND ARGUMENT:

APPLICANT'S CASE

- 3.1 Applicant **EDWIN MOSHABELE** after being duly sworn in testified on his own behalf as follows: he is employed by the respondent as Director: Land Development Support. He started working for the respondent in 2002 and when he was suspended he was reporting to Julius Mashapo who at the time of his suspension was on sick leave. It was his evidence he was called to the office of the Director General given a letter to give reasons why he should not be suspended, after his response he was suspended. According to the letter he received from the Director General the suspension was for his failure to declare four companies in which he was a director and according to the applicant he declared all these companies and they never traded since their establishment. The other allegation related bended funding grants which he never attended any of their meetings and its manual does not prohibit the participation of public servants. It was his evidence that as result of the suspension he suffered prejudice in that he applied for advertised post within the public service and was not called to an interview, while before his suspension he would be called to interviews. It was his evidence that the article that was published by Sunday world dated 17 November with headlines "Didiza department of rogue officials, in which the article said that the applicant had been suspended facing serious allegations over his involvement in the funding of his company and failing to disclose the directorship in companies he was a director.
- 3.2 Under cross examination he conceded that it was not the Minister who issued the press statement but the information came from sources within the respondent. He conceded that he shared information relating to allegations of his suspension with PSA; he insisted that the respondent should have issued a press release correcting the misrepresentation of this article. It was his evidence that when the respondent closes in December Senior Manager continue to work

RESPONDENT'S CASE

- 4.1 Applicant led the evidence of **JOHN MASILELA** who after being duly sworn he testified as follows: that at the time of this incident was acting director Labour Relations it was his

evidence that the applicant was suspended after being given audi letter why he should not be suspended . The HOD after applying his mind he suspended the applicant. the allegations was of a serious nature as they related to failure to disclose his directorship and funding by a company that applicant was a director in which he sat in the meeting committee from the Land Bank that allocated funding. It was his evidence that the delay was occasioned by the appointment of the investigating officer and after that Council and respondent went into compulsory closure during from 23rd of December came back 7th of January 2019. It was his evidence that the article was not published by the respondent and can't be liable for the prejudice applicant suffered as result of the article.

- 4.2 Under cross examination it was his evidence that the suspension of the applicant is governed by the SMS handbook. It was his evidence that they could not set the disciplinary proceeding just to apply for the postponement as he viewed this as malicious. It was his evidence that the allegations against the respondent were of a serious nature and were withdrawn by the DDG cooperate service because of the delay in instituting disciplinary proceeding against the applicant.

ANALYSIS OF EVIDENCE AND ARGUMENT:

- 5.1 It is common cause that the applicant is employed by the respondent as the member of the SMS and disciplinary proceedings against him are regulated by SMS Handbook Chapter 7. It is further common cause that the applicant was suspended after the respondent complied with the audi alteram rule. It is also common cause that the applicant was placed on a precautionary suspension on the 14th of November 2018 and was charged after 60 days (37 days late and the suspension was uplifted on the 28th of October 2019.
- 5.2 The respondent does not dispute that they failed to comply with the 60 days to institute disciplinary proceedings against the applicant but contend that there were justifiable reasons that occasioned the delay. That the investigation was complex that involved the Land Bank. It is the respondent's contention that they had a compulsory shutdown from 21 December 2018

to 3 January 2019. It is further the contention of the respondent that the definition of the court days, is referred to as the working day, in this regard the applicant counted the compulsory leave days statutory which he was not supposed to have counted. Calculating the days from the 14 of February 2018 to 22 February 2019 counts 48 days which is outside the 60 days statutory days. It also the respondent's contention they are not responsible for the article that was published by Sunday world which the applicant says he suffered prejudice as result of its contents. It is however the contention of the applicant that the applicant in terms of the SMS handbook the respondent should have set down the matter down before the chair and apply for postponement which the respondent contends it would have been malicious.

5.3 I do not agree with the respondent that days in which the respondent was on compulsory shutdown should be excluded when counting the days in terms of the SMS handbook. The days are calculated as normal calendar days not court days. I also don't agree with the respondent that it would have been malicious to set the matter down before the chair to enable it to continue with the investigation as the investigation was complex. Clause 2.7 (2) (c) of Chapter 7 of the SMS Handbook provides:

(c) if a member is suspended or transferred as precautionary measure, the employer must hold a disciplinary hearing within 60 days. The chair of the hearing must then decide on any further postponement"

The clause uses the word must which is peremptory failure to comply with this clause by the employer is in breach of the employees contract as the SMS handbook is part of the contract of employment for SMS members and as result the conduct of the employer if it does not comply it amounts to unfair labour practice. The procedure in clause (c) above is not different from a process in criminal proceedings where the prosecutor will apply for postponement before a magistrate or a judge pending the completion of the investigation. As result failure by the respondent to hold a disciplinary hearing within 60 days against the applicant is found to be on balance of probabilities unfair.

5.4 If an employee is on suspension with pay this ameliorates the prejudice that the employee suffers as result of the suspension. In the case of the applicant I am of the view that the prejudice that the applicant suffered as result of an article published by Sunday World dated 17 November 2019 respondent was not responsible for the article and also the suspension was uplifted on the 28th of October 2019 when the article was published the applicant's suspension had already been uplifted. As result I find the prejudice that applicant suffered was ameliorated by the fact that he was on suspension with pay. As result I have come to the following award

AWARD:

- 6.1 I find the respondent committed an unfair labour practice relating to suspension in terms of Section 186(2)(b) of the LRA when it failed to hold disciplinary hearing against the applicant within 60 days in terms Chapter 7 of SMS Handbook clause 2.7.(2)(c);
- 6.2 I find the applicant is not entitled to compensation as the prejudice that he suffered during the suspension was ameliorated by being paid during suspension;
- 6.3 There is no order as to costs.



Name: P M NGAKO
(GPSSBC) Arbitrator