



ARBITRATION AWARD

Panelist: PHEEHA DANIEL SEOPELA
Case No.: GPBC549-2021
Date of Award: 20 October 2021

In the ARBITRATION between:

PSA OBO LM SEABI ----- APPLICANT
(Union / Applicant)

and

DEPARTMENT OF AGRICULTURE & RURAL DEVELOPMENT – LIMPOPO PROVINCE- RESPONDENT

Union/Applicant's representative: MR MIKE MKHIZEI
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DETAILS OF HEARING AND REPRESENTATION:

[1] This matter was heard as arbitration on the 11th of June 2021, 28, 29 of June 2021 and was finalized on the 30th of June 2021 at 09h00 at the offices of the Department of Roads and Transport and Public Safety in Polokwane, Limpopo Province. Both parties were in attendance. The applicant, Ms. Manama Lucy Seabi was represented by Mr Mike Mkhize of PSA (trade union). The respondent, Department of Agriculture & Rural Development- Limpopo Province was represented by Mr ME Malatjie. The proceedings were digitally recorded. Pre-arbitration meeting was conducted on the 11th of June 2021. The parties submitted written heads of arguments and such were considered in this award. I deem it fit to repeat the minutes of pre-arbitration for easy reference as most of the issues are common cause.

Minutes of pre-arbitration meeting conducted on the 11th of June 2021 are as follows:

[2] Issues which are not in dispute

- [2.1] The applicant was employed on the 01st of February 2014.
- [2.2] She was employed as a Chief Financial Officer at the time of the dismissal.
- [2.3] The applicant was earning R89 937-13 per month at the time of the dismissal.
- [2.4] She was dismissed on the 31st of March 2021.
- [2.5] The applicant was charged as per pages 1-4 of bundle B.
- [2.6] The applicant was charged with six counts of misconduct.
- [2.7] The applicant was found guilty on charges number 01 and alternative to charge number 01, charge number 03 and its alternative and was found guilty on the main charges in relation to charges number 04&05.
- [2.8] The existence of a dismissal is not in dispute.
- [2.9] The applicant was suspended on the 28th of August 2019.
- [2.10] She was appointed as Senior Manager under Supply Chain Management unit on the 30th of January 2014.
- [2.11] She was appointed as Acting CFO on the 11th of June 2015.
- [2.12] The applicant was first appointed as Acting CFO on the 13th of January 2015 as per page 94 of bundle B.
- [2.13] The applicant was appointed as CFO on the 30th of October 2015.
- [2.14] The list of bid specification community was sent to Ms Tshilidzi Manyanga by Mr Mike Chauke for the attention of the applicant.
- [2.15] Ms Tshilidzi Manyanga prepared letters of appointment of members of bid specification community which needed to be approved by the applicant.
- [2.16] The list was sent to the applicant with components were each officials is stationed.
- [2.17] The applicant approved the list by signing it.
- [2.18] The bid specification committee met and concluded tender specification which was sent to the HOD for final approval which was indeed approved by the HOD.
- [2.19] A letter of confirming service provider, L-Khaya Consulting was approved by the HOD.

- [2.20] The bid was from SITA contract and the bidders are registered with SITA database.
- [2.21] Pages 71-72 of bundle B is an offer of acceptance to L-Khaya Consulting (Pty) Ltd, the service provider and it was approved by HOD.
- [2.22] Page 68 of bundle A is a notice of restriction issued to L-Khaya Consulting (Pty) Ltd signed by Labuschagne on behalf of the HOD on the 12th of April 2016.
- [2.23] pages 96-99 of bundle B is the request for the approval of retraction of approval of a bid which was approved by the HOD on the 25th of February 2015.
- [2.24] Pages 104-105 of bundle B is a supply chain management request for legal opinion from legal services regarding the appointment of L-Khaya Consulting (Pty) Ltd dated the 05th of February 2015.
- [2.25] Pages 106-109 is the approval of restriction to restrict L-Khaya from participating in the business with the state as per the recommendation of Restriction Committee which was signed by Labuschagne on the 12th of April 2016.
- [2.26] legal opinion is as per pages 110-115 of bundle B dated the 09th of February 2015.
- [2.27] Pages 116-138 of bundle B is the Risk report and there is no reference to the applicant on it and it is dated the 31st of October 2019.
- [2.28] Bid Specification Committee contained at pages 90-91 of bundle B has a list of bid specification members sent by Chauke to Tshilidzi for the applicant to consider.
- [2.29] Bid Evaluation Committee (BEC) report to the Bid Adjudication Committee (BAC) for the approval by the HOD dated 29th of October 2014.
- [2.30] The respondent did not suffer any financial loss hence she was not charged in this regard.
- [2.31] The HOD was never suspended or charge for approving requests submitted for the tender in question.
- [2.32] The tender was re-advertised and Ikado cc t/a IT Master was a successful bidder in terms of the second advert.
- [2.33] None of members of bid adjudication members was charged except the applicant.
- [2.34] Members of BSC and BEC were appointed by the applicant.
- [2.35] The restriction committee set after the tender was awarded in keeping with re-advertisement of the tender on the 15th of February 2016.
- [2.36] The HOD approved notice for restriction of L-Khaya on a letter dated the 12th of April 2016 in which the service provider was told that the restriction will stand on 01st of April 2016 and it was to end on the 31st of March 2018.
- [2.37] Page 103 of bundle A is a recommendation from restriction committee which was approved.
- [2.38] The HOD informed the National Treasury of the restriction of L-Khaya as per page 107 of A dated the 16th of February 2016.
- [2.39] The applicant was the chairperson of BAC and members did not declare their interest. The meeting was conducted on the 05th of June 2015 before L-Khaya wa restricted.
- [2.40] The applicant issued an instruction that a criminal case be opened against L-Khaya on the 03rd of October 2016.

ISSUES WHICH ARE IN DISPUTE

The case of the respondent

[3] It is the case of the respondent that the dismissal of the applicant was substantively fair in that the applicant was guilty as charged. The charges levelled against the applicant warrant dismissal as a sanction.

The case of the applicant

[4] It is the case of the applicant that her dismissal was substantively unfair in that she did not commit any of the misconduct alleged by the respondent.

Number of witness

[5] The respondent is to call six witnesses and the applicant is on her own.

Exchange of bundles

[6] The applicant submitted bundle B which is comprises of 138 pages and the respondent submitted bundle A which is comprises of 246 pages.

ISSUE TO BE DECIDED:

[7] I must determine whether the dismissal of the applicant was unfair in terms of the substance only, and if so, I must determine the appropriate relief in terms of section 193 of the Act.

BACKGROUND TO THE MATTER:

[8] The applicant, Ms. Manana Lucy Seabi is the former employee of the respondent, Department of Agriculture and Rural Development in Limpopo Province. She was employed on the 01st of February 2014. She was employed as a Chief Financial Officer at the time of the dismissal. She was earning R89 937-13 (eighty nine thousand nine hundred and thirty seven rand thirteen cents) per month at the time of the dismissal. The applicant was dismissed on the 31st of March 2021. It is the case of the applicant that her dismissal was substantively unfair. It is the case of the respondent that the dismissal of the applicant was substantively fair. The applicant prayed for retrospective reinstatement.

SURVEY OF EVIDENCE AND ARGUMENTS:

The case of the respondent

The first witness of the respondent, Ms Tshilidzi Manyaga, the Deputy Director for Demand Management which is under Supply Chain Management testified under oath as follows:

This witness is to deal with alternative to charge number 3

[9] The appointment of Bid Specification Committee was approved by the applicant. She (Tshilidzi) received names from the unit and she prepared appointment letters based on names received from the unit concern for the approval of the applicant. The prepared appointment letters were taken to the applicant for approval. She was of the view that all names given to her were for the officials employed by the respondent. She thought that they were all employees of respondent as the list was coming from Chauke, the official of the respondent responsible for the unit in question. She realized later that Qwabaza of L-Khaya and Mwaroza were not employees of the respondent. She noticed that Qwabaza was not an employee of the respondent on the day he came to complete service level agreement. She noticed that Qwabaza was a member of Bid Specification Committee. She informed the person who was dealing with service level agreement that Qwabaza was a member of Bid Specification Committee and therefore an employee of the respondent. She

was surprised to see Qwabaza coming to complete service level agreement as she was of the view that she was an employee of the respondent as per the list provided to her by Chauke. She knew that Qwabaza was a member of Bid Specification Committee as she chaired Bid Specification Committee. Clause 7.4.4 at page 28 of bundle A provides that only employees and Officials of the institution must be members of Bid Specification Committee. Consultants are not allowed to be members of Bid Specification Committee as per clause 7.4.5 at page 28 of bundle A. There was no report written as Qwabaza was regarded as an employee. She became aware that Qwabaza was not an employee of the respondent after the tender was awarded to his company (L-Khaya) and she shared the information with Ms Nthabiseng Ledwaba, the person responsible for the preparation of Service level Agreement. She was informed by Contract Management unit that Qwabaza was not an employee of the respondent.

[10] The bid ACDP 14/10 went to Bid Specification Committee once. It is possible to hold Bid Specification Committee meeting and have appointment letters signed or approved later. She did not take the matter any further after she had informed Nthabiseng about the issue. The end User in the Bid in question was Mr Chauke and he is coming from GITO section. Mr Chauke gave her names of the employees to be appointed as members of Bid Specification Committee on the 27th of February 2014. She did not receive the names from the applicant. Both Qwabaza and Mrowaza were working as consultants under GITO section which was under Chauke. GITO means Government Information Technology. The applicant only signed the letters of appointment as the Head of Supply Chain management. She (Tshilidzi) prepared letters of appointment and the name of Qwabaza was there. She testified that the applicant did not misrepresent the respondent by signing appointment letters as she was doing her job. She (Tshilidzi) requested names of the people to serve on the Bid Specification Committee from Chauke as per page 95 of bundle B. She prepared pages 44 to 45 based on the names submitted to her by Mr Chauke.

The second witness of the respondent, Ms Magdeline Seja Raputu, the Assistant Director: Acquisition Management directorate under Supply Chain Management testified under oath as follows:

This witness is to testify about Charge one (main charge)

[11] She is tasked to facilitate tenders which are below R500 000-00 and quotations of R300 000-00 to R500 000-00 She is also rendering secretariat duties for Bid Adjudication Committee. Page 96 of bundle B is a submission for the retraction of appointment approval of the preferred bidder. She was summoned to the office of Ms Manyaga that they have awarded a tender to Khaya who was from GITO. She reported the matter to Ms Mathabatha RD who was responsible for evaluation and compilation of submission that the person who owns L-Khaya is the employee of the respondent. Ms Mathabatha told her that she checked on persal system and did not find Mr Qwabaza. The company was also not restricted after consulting with Treasury. She proceeded to report the matter to the applicant and the applicant advised her to draw the file from contract management unit. She was informed by Ms Nthabiseng Ledwaba that the file was already submitted to legal services for purposes of vetting service level agreement. She reported back to the applicant and the applicant told her to request it from legal service unit. She fetched it on her own. She perused the file together with the applicant and found that Qwabaza Khaya was a member of Bid Specification Committee and further that she worked under GITO. She was instructed by the applicant to write a letter of retraction and cancellation as the tender was not yet approved. She was further instructed by the applicant to issue re-advert and the withdrawal of appointment letter. The service provider was already issued with

appointment letter. She was informed by Tshilidzi that Khaya was working for the company which was doing consulting work under GITO. Qwabaza Khaya is the Director of L-Khaya. She went back to Mathabatha to write retraction letter but she did not write it as she was leaving the department to join Capricorn District. She then took the file to the Director's office and it was handed to the PA as she did not know the Director or acting Director by then. It was included in the agenda for Bid Adjudication meeting after retraction submission. The Bid adjudication committee approved retraction letter and it was recommended to the HOD. She was taking minutes during Bid Adjudication Committee meeting. Ms Seabi signed at page 209 of bundle A. Bid Adjudication meeting was in February 2015 as per page 171 of A and the minutes were signed in June 2015 as per page 209 of bundle A.

[12] The applicant was the chairperson of BAC. The re-advert was issued around March 2015. The same companies were invited as it was a SITA contract and there was no directive. She does not remember the role of the applicant in relation to second advert. Page 182 of bundle A was signed by the applicant. The applicant chaired Bid Adjudication Committee meeting as per page 46 of bundle A. She testified that the BAC would have notice the reason for the re-advert from the minutes of BAC when she was asked as to who was supposed to have informed the BAC about the reason for the advert. The instruction or restriction must come from contract management unit. She testified that she was unable to answer when she was asked as to who should have issued instruction to restrict L-Khaya. She confirmed a version put to her that the representative of the respondent never asked her if the applicant was grossly negligent. She couldn't say that the applicant was grossly negligent as she is not working with restrictions. She confirmed a version put to her that she is an irrelevant witness in relation to charge number one. She does not deal with restrictions.

The third witness of the respondent, Ms Patricia Ratshidi Matshabaphala, Deputy Director under Anti-Fraud and Corruption unit testified under oath as follows:

This witness is to deal with charges 1, 4 and 5

Charge one

[13] She received a request to investigate L-khaya. She approached the applicant for the details. She was informed that it was a Resolution taken at Cluster 4 Audit Committee. She assigned Mr Matsi to investigate the matter further. Page 81 of A is a request for approval to open criminal case against Qwabasa as it was found that Qwabaza, the Director of L-Khaya participated as a member of Bid Specification Committee. Qwabaza was working in the department as a consultant working for KTS Technology Solutions. He was not on the payroll of the respondent. Qwabaza bided for the tender ACDP 14/10. The tender was evaluated and adjudicated. The tender was awarded to L-khaya to the value of R1 196 544-00. She was informed by SAPS that Qwabaza was appointed by the applicant. It was further stated that the applicant was the chairperson of evaluation committee in the same tender. SAPS also informed them that there was restriction on the company in question. The appointment was withdrawn but the applicant participated in the re-advert and during the evaluation. The first advert was for four months and the second one was for three years. The applicant referred the matter for legal opinion after Cluster 4 stated that it should be a criminal case. The applicant knew measures on how to open the case. It was said that the applicant concealed information. The applicant was never implicated in the departmental investigation report. The applicant was arrested before Mr Chauke can be arrested. L-Khaya was restricted on the 10th of March 2016. The decision to restrict L-

Khaya was taken in March 2015. Page 49 of bundle B is a request for approval of tender ACDP 14/10 and it was adjudicated on the 25th of May 2015. It was the process to approve Inkado. L-Khaya was evaluated on the 25th of May 2015 and it was not supposed to have been evaluated. The applicant was aware of the circumstances surrounding L-Khaya but she kept quiet. The contract period was three years whereas the first advert was four months. The applicant signed as a chairperson as per page 64 of B. It is true that the companies which bided for the tender were all listed on SITA contract database. All the companies were from SITA database. The applicant did not act promptly after she was instructed to restrict L-Khaya. There was no instruction to restrict L-Khaya on the 25th of May 2015. The terms of reference were approved by the HOD, Maisela on the 09th of May 2014.

[14] It was a bogus tender as the applicant was supposed to have questioned why the first advert was for four months but the second advert was for three years. The department follow legal processes in cancelling contracts because they have serious financial implications. She did not enquire as to when the instruction was issued to restrict L Khaya because it was not part of her interest. She does not even know the person who instructed the applicant to restrict L-Khaya. She testified that the applicant was the Director in Supply Chain Management in 2015. The applicant was acting as CFO from January 2015 but she didn't relinquish her duties as the Director Supply Chain Management. Makhubedu LK was acting as Senior Manager under Supply Chain Management in February 2015 as per page 98 of bundle B. Legal opinion was sorted by Makhubedu, the Acting Senior Manager under Supply Chain Management on the 05th of February 2015 as per pages 104 to 105 of bundle B. Makhubedu was the acting Senior Manager Supply Chain Management as per page 64 of bundle B. the notice of restriction is dated 12th of April 2016 as per page 68 of bundle B. page 68 of bundle B was unauthorised by Khoza EM. The applicant signed restriction order restricting L-Khaya from doing the business with the state as CFO as per page 109 of bundle B and Makhubedu signed as Acting Director Supply Chain Management as per page 108 of bundle B. Makhubedu was the acting Director Supply Chain Management as of March 2016.

Charge number four

[15] The applicant brought the name of the respondent into disrepute as she was arrested at 67&69 Biccard Street, which is the Head office of the respondent. It is because of her position and the arrest that she brought the name of the respondent into disrepute. Police don't make appointment to arrest a person. She brought the name of the respondent into disrepute because of media publication.

Charge number five

[16] The applicant appointed Bid Specification Committee. The applicant participated in the second advert without disclosing her knowledge of L-Khaya. The applicant evaluated L-Khaya and the company obtained position two. Pages 95-96 of bundle B is appointment letter issued on the 10th of June 2015. Page 107 of B is the confirmation of restriction to restrict L-Khaya from trading with the state dated 16th of March 2016. There was no restriction order issued against L-Khaya at the time Ikhado was appointed. Cluster 4 instructed the applicant to restrict L-Khaya. She testified that the applicant was aware when it was put to her that charge number five says that restriction was already issued. The HOD was never charged. The applicant opted for a legal opinion instead of instituting criminal charges against L-Khaya. There was nothing wrong in seeking legal opinion.

The fourth witness of the respondent, Mr Douw Gerbrand Wessels, Chief Engineer testified under oath as follows:

[17] Page 109 of bundle A is his statement. He was requested by Jacob to write statement as he was a member of Bid Specification Committee. He couldn't remember the company which was awarded the tender.

The fifth witness of the respondent, Ms Maggie Mononyane, State Accountant under Advertisement of Bid unit testified under oath as follows:

[18] Page 128 of bundle A is her statement. She was requested by Mr Matsi to write the statement as she was in Advertisement of Bid unit. She issued re-advert in tender ACDP 14/10. She took part in the evaluation of the tender in question. The companies came with files as it was a close bid under SITA contracts. She was told that there was cancellation and restriction in relation to L-Khaya at the time of re-advert. The tender was re-advertised because Qwabaza did not disclose that he was a member of L-Khaya. L-Khaya. L-Khaya was re-invited as it was on SITA Contract list and it was not restricted. She does not know who is responsible for issuing of restrictions on companies. The applicant did not commit any offence in relation to charge number one. She testified during re-examination that she cannot say that the applicant was not guilty as she does not know the processes of restricting a company.

The case of the applicant

The applicant, Ms Lucy Manana Seabi testified under oath as follows:

Charge number one

[19] She was employed as Acting Chief Financial Officer during May 2015. She was appointed as Acting CFO as per pages 93&94 of bundle B. Page 93 of B is acting appointment from the month of July 2015 to the Month of December 2015. Page 94 of bundle B is acting appointment from the 13th of January 2015. Makhubedu was appointed to act as Director: Supply Chain Management after she was appointed to act as CFO. Pages 104-105 of bundle B is a request for legal opinion dated the 05th of February 2015. She was the acting CFO at the time a request was made for legal opinion. The person who made a request for legal opinion was the acting Director: Supply Chain Management, LK Makhubedu. Makhubedu was responsible for Supply Chain Management after she was appointed as Acting CFO on the 13th of January 2015. Page 96 of bundle B dated is the retraction letter and Makhubedu signed as the Acting Director: Supply Chain Management. The witnesses of the respondent did not say that she was grossly negligent in their evidence. She was incorrectly found guilty of charge number one as she was the Acting CFO and that she was no longer responsible for Supply Chain Management as Makhubedu was the Acting Director: Supply Chain Management. She relinquished her duties as Director: Supply Chain Management after she was appointed as Acting CFO on the 13th of January 2015 and Makhubedu was appointed in her position on acting capacity.

[20] L-Khaya Consulting was restricted to trade with the state on the 12th of April 2016. L-Khaya was not restricted on the 25th of May 2015. She was receiving acting allowance for Acting as CFO but she was paid as Director: Supply Chain Management after she was appointed as CFO. She was receiving difference in salaries between the salary of a

Director and the salary of CFO. She was paid separately in January 2015 but the salary was made one going forward.

Her answers to the main charge cover the alternative charge to charge number one.

Charge number three

[21] Mr Chauke MT is the author of the email dated the 26th of February 2014 as per page 95 of bundle B and the email was addressed to Tshilidzi and Ntsileni. The email dated 27th of February 2014 was written by Ms Tshilidzi Manyaga as per page 95 of bundle B and it was directed to Mr Mike Chauke. Mr Mike Chauke was the Director of GITO (government information technology). Mike Chauke nominated members of Bid Specification Committee and then sent the names to Tshilidzi. She did not know any of the officials nominated on the list. She did not know officials employed under GITO as she had been with the respondent for 28 days at the time Mr Chauke nominated members of Bid specification Committee. She was appointed as Senior Manager/ Director: Supply Chain Management on the 01st of February 2014 as per pages 10-13 of bundle B. Page 44 of bundle B was written by Tshilidzi. It is the appointment of Fransis Mwaroza as a member of Bid Specification Committee. She signed the appointment which was presented to her for approval by Tshilidzi and she (Tshilidzi) had received names from Mr Chauke. Page 45 of bundle B is the appointment of Qwabaza Khaya as a member of Bid Specification Committee. She signed the appointment. None of the witnesses of the respondent testified that she committed fraud by signing appointment letters for Khaya and Mwaroza. She did not commit an act of gross misrepresentation.

[22] She appointed Qwabaza Khaya because she signed appointment letter which was prepared by Tshilidzi as per pages 16-17 of bundle A. She also signed page 18 of bundle A which is an appointment of Fransis Mwaroza as per appointment letter prepared by Tshilidzi as per the nomination made by Mr Chauke. She appointed them as employees employed under GITO. She was informed later that Mwaroza and Khaya were not employees of the respondent. She became aware that Mwaroza and Khaya were not employees of the respondent after she was informed by Rapudu. She was not the Director under supply chain Management when the tender was re-advertised. The re-advert was done by the Acting Senior Manager: Supply Chain Management, Makhubedu. Makhubedu wrote to legal services asking for legal opinion. Makhubedu signed retraction letter as the Director of Supply Chain Management. Makhubedu was also responsible for the re-advert of the tender. Makhubedu was reporting to her. There was nothing wrong with the terms of reference except that Qwabaza previously participated as a member of Bid Specification Committee.

Her answers to charge number three cover also alternative charge to charge number three

Charge number four

[23] She did not invite police officers to come and arrest her at the workplace. She did not bring the name of the respondent into disrepute. She did not call the police to arrange for her arrest. She was arrested on the 07th of February 2019 by the Hawks.

Charge number five

[24] Page 161 of bundle A is the minutes of Bid Evaluation Committee meeting for the 25th of May 2015. Makhubedu was acting as a Director: Supply Chain Management on the 25th of May 2015. She was the action CFO on the 25th of May 2015. They met for the purposes of re-evaluation. She did not take part in the meeting of the 25th of May 2015. She did not fail to declare anything as she was not even part of the meeting in question. She informed the Accounting Officer and the Acting Senior Manager: Supply Chain Management about the conduct of Qwabaza. She reported the matter to the Accounting Officer hence there was retraction and also cancellation of the appointment of L-Khaya. She also informed Makhubedu about the conduct of Qwabaza hence Makhubedu also requested legal opinion from legal services. She did not attend Bid Evaluation Meeting.

ANALYSIS OF EVIDENCE AND ARGUMENTS:

[25] This dispute was referred in terms of Section 191 of the Labour Relations Act 66 of 1995 as amended. Section 192 (1) of the Labour Relations Act 66 of 1995 provides that in every dismissal dispute the employee must establish the existence of a dismissal. The existence of a dismissal is not in dispute in this case. Section 192 (2) of the Act provides that the employer must prove the fairness of a dismissal. The applicant was found guilty on charge number one and also on alternative charge to charge number one. He was further found guilty on charge number three and also alternative charge to charge number three. She was further found guilty only on main charges with regard to charges four and five. The applicant denied having committed any act of misconduct. The applicant denied all charges levelled against her. It is the case of the respondent that the applicant is guilty as charged.

[26] This case is characterized by numerous issues which are not in dispute hence I deemed it fit to state them in this award. The evidence of Mr Douw Vessels is of no consequence as he was only called to confirm that he was a member of Bid Specification Committee (BSC) in tender ACDP 14/10. There is no dispute about the fact that he was a member of Bid Specification Committee. The use of BSC in this award is refers to Bid Specification Committee. The use of SCM in this award is refers to Supply Chain Management. The use of BAC in this award is refers to Bid Adjudication Committee. The use of BEC in this award is refers to Bid Evaluation Committee. The use of CFO in this award is refers to Chief Financial Officer. The use of GITO refers to Government Information Technology.

[27] It is common cause that the applicant was appointed as the Acting CFO on the 13th of January 2015 and that she acted as such until she was appointed as the CFO on the 30th of October 2015 as per pages 5-9 of bundle B. It is also common cause the applicant was employed by the respondent as Senior Manager/ Director under SCM on the 01st of February 2014 as per pages 10-13 of bundle B. It is common cause further that Tshilizdi received an email from Mr Chauke, the Director of GITO about tender ACDP 14/10 on the 26th of February 2014 as per page 95 of bundle B. Tshilizdi asked Mr Chauke to give her names of the people to sit on BSC. Mr Chauke gave Tshilizdi names of the people to sit on the BSC as Chauke TM, Qwabaza Khaya, Makhadzi Kone and Fransis Mwaroza asper page 95 of bundle B. It is common cause furthermore that the Tshilizdi prepared appointment letters to be signed by the applicant based on a list provided to her by Mr TM Chauke, The director of GITO. The applicant signed appointment letters appearing at pages 44 and 45 of bundle B. L-Khaya was restricted to trade with the state on the 19th of March 2016. There was no restriction on L-Khaya Consulting Pty Ltd on the 25th of May 2015 where the decision was taken to award the tender to Ikhado during BEC. I am going

to deal with charges levelled against the applicant separately in the subsequent paragraphs.

Charge number one (Main charge)

You are charged with gross dishonesty in that on or about the 25th of May 2015, at or near offices of the Department of Agriculture and Rural Development while you were a Director for SCM, you failed to ensure that L-Khaya Consulting (Pty) Ltd is restricted to compete in the bidding of strategic ICT under SITA contract no: 1183 ACDP 14/10 while you knew that it was supposed to be restricted to bid. Your Conduct is in violation of Chapter 7 of the SMS Hand Book.

[28] The respondent called Ms Magdeline Raputu and Ms patricia Matshabaphala and Ms Mononyane to deal with charge number one. Ms Matshabaphala testified that an instruction was issued to the applicant to restrict L-Khaya Consulting (Pty) Ltd and that the applicant did not act on the instruction. Ms Matshabaphala further testified that Cluster 4 Audit instructed the applicant to open a criminal case against Qwabaza of L-Khaya and that the applicant opted to seek legal opinion from legal services instead of opening a criminal case against Qwabaza. It should be noted that Qwabaza is the Director of L-Khaya, the company which was awarded tender ACDP 14/10 and further that he was nominated by Chauke to form part of BSC. It is common cause that Qwabaza was appointed as a member of BSC on the 28th of February 2014. It is the evidence of the applicant that she was Acting as CFO during the period, 25th of May 2015 and that it was not her responsibility as the respondent appointed Makhubedu LK as the Acting Senior Manager under SCM. The evidence of Ms Matshabaphala that the applicant did not relinquish her responsibilities as Director under SCM is misleading because the respondent appointed Makhubedu to act as Director under SCM. I accept the evidence of the applicant that she was not playing a role of Acting CFO in conjunction with the role of Director under SCM. Makhubedu was appointed in an acting capacity as Director under SCM and the applicant was acting as CFO.

[29] Ms Matshabaphala deliberately gave misleading evidence by testifying that the applicant opted to seek legal opinion when she was instructed to open a criminal case. It has become apparent that Makhubedu was the one who requested legal opinion as per pages 104-105 of bundle B on the 05th of February 2015. The applicant played a pivotal role in having the withdrawal of the appointment of L-Khaya Consulting (PTY) Ltd. The cancellation and retraction were initiatives of the applicant even though she did not write retraction letter and withdrawal letter. It is the evidence of Ms Raputu that she reported the matter to the applicant after she was informed by Tshilidzi that a tendered was awarded to an employee of the respondent as at the time they did not know that Qwabaza was not an employee of the respondent. Ms Raputu testified that she reported the matter further to Mathabatha who told her that Qwabaza was not an employee of the respondent as his name was not appearing on the persal.

[30] Raputu testified that she went to Mathabatha to write cancellation letter, withdrawal letter and retraction letter but Mathabatha didn't write those letters as he was leaving to join Capricorn District. Ms Raputu testified that the applicant instructed her to draw the file from Contract management unit and that she was informed that it was sent to legal services for vetting purposes. It was the applicant who instructed Raputu to fetch the file regarding the tender in question from legal services. It is the evidence of Ms Raputu that the same companies were re-invited as it was a SITA contract and that the companies appear on the database of SITA and her evidence was corroborated by the evidence of

Tshilidzi that the names of the companies invited were on the database of SITA. Ms Mononyane issued the second advert according to her evidence. She testified further that reasons were given as to why there was a need to issue re-advert in tender number ACDP 14/10 and further that she participated in the BEC. Ms Mononyane in essence was aware of the circumstances relating to cancellation and withdrawal of the appointment of L-Khaya Consulting (Pty) Ltd but with her it was not an issue hence she was not subjected to any form of discipline. Ms Mononyane stated during cross examination that the applicant did nothing wrong but she changed her evidence during re-examination by saying that she was unable to say with certainty that the applicant was innocent as she does not understand restriction processes.

[31] It is my considered view that the applicant was incorrectly found guilty of charge number one as she was not Director under SCM as she was acting as CFO and that Makhubedu was acting as Director under SCM on the 25th of May 2015. Ms Raputu testified that restrictions should be done by contract management and she further testified that she was an irrelevant witness as she is not dealing with restrictions. Ms Raputu did not link the applicant to the allegation that she was grossly dishonest. The internal investigation report did not link the applicant to any improper conduct.

Alternative to charge number one

You are charged with misconduct in that on or about the 25th of May 2015, at or near the offices of the department of Agriculture and Rural development while you were a Director for Supply Chain Management, you performed poorly or inadequately for reasons other than incapacity in that you failed to ensure that L-Khaya Consulting (Pty) Ltd is restricted to compete in the bidding of strategic ICT plan under SITA contract no 1183 ACDP 14/10 while you knew that it was supposed to be restricted to bid. Your conduct is in violation of chapter 7 of the SMS Hand Book.

[32] It is perplexing that the Hawks arrested a person for an alleged poor work performance. There was no misconduct committed by the applicant as the applicant was not the Director of SCM on as of the 25th of May 2015 as she relinquished her duties as Director under SCM when she was appointed to act as CFO and Makhubedu appointed as acting Director SCM. The then Director, Makhubedu was aware of the issue of Qwabaza hence he was responsible for the writing of cancellation letter, retraction letter and even requesting legal opinion in dealing with the case of Qwabaza and L-Khaya Consulting (Pty) Ltd. Makhubedu was hence on on the issue of Qwabaza and it was never a secret matter. The applicant was incorrectly found guilty on the alternative charge to charge number one.

Charge number three

You are charged with fraud in that during the period of March 2014 while you were a director Supply Chain Management, you violated section 38 of the Public Finance Management Act 01 of 1999 and the Departmental Suply Chain Management Policy and Instrcution Note 11 in that you appointed Mr Mninikhaya Qwabaza, Mr MM Maboka and Fransis Mwaroza to be members of the Bid Specification Committee for tender ACDP 14/10 while they were not employees of the Department.

[33] I have not heard of Maboka MM as not been the employee of the respondent. The evidence was led to the effect that Mr Mwaroza and Qwabaza were not employees of the respondent but nothing was said about Maboka. It is common cause that the applicant appointed members of BSC for tender ACDP 14/10 on the 28th of February 2015. The

question is whether the applicant committed fraud by appointing people who were not employees of the respondent. It is the evidence of the applicant that she did not know that Qwabaza and Mwaroza were not employees of the respondent. It should be noted that the person who nominated the people in question was Mr TM Chauke, the Director of GITO. It is imperative to note further that the applicant was only 28 days when the appointments were done on the 28th of February 2014 as the applicant was employed on the 01st of February 2014. It is common cause that the applicant did not nominate Qwabaza and Mwaroza as members of BSC. The applicant was presented with prepared appointment letters for approval in the form of signature.

[34] Tshilidzi testified that she received names from Mr Chauke and that she prepared appointment letters. She testified that she gave the applicant letters for approval. It cannot be said that the applicant committed fraud as she did not know that Qwabaza and Mwaroza were not employees of the respondent. Tshilidzi testified that she informed Nthabiseng Ledwaba that Qwabaza was an employee of the respondent and that He was awarded the tender. According to Tshilidzi, Qwabaza was an employee of the respondent. It is the evidence of Ms Raputu that they became aware that Qwabaza was not an employee of the respondent after Mathabatha stated that Qwabaza is not appearing on the persal. Tshilidzi labored under the impression that Qwabaza and Mwaroza were working for the respondent and further that they were working under GITO section which turned to be incorrect as they were no employees. The evidence of Ms Matshabaphala that the applicant appointed Qwabaza and Mwaroza is not sufficient to warrant fraud. There is nothing in this case which support commission of fraud.

[35] No fraudulent activity was demonstrated by the respondent. The applicant innocently signed prepared appointment letters without knowing that Mr Chauke nominated people who were not employees of the respondent. It is my considered view that the applicant was incorrectly found guilty of charge number three as she did not act with fraudulent intention.

Alternative charge to charge number three

You are charged with gross misrepresentation in that during the period of March 2014 while you were a Director Supply Chain Management, you violated section 38 of the Public Finance Management Act 01 of 1999 and the Departmental Supply Chain Management and Instruction Note 11 in that you appointed Mr Mninikhaya Qwabaza, Mr MM Maboka and Francis Mwaroza to be members of the Bid Specification Committee for tender ACDP 14/10 while they were not employees of the Department.

[36] As I have indicated on paragraph 35 supra that the applicant it cannot be said that the applicant committed a fraudulent activity under the circumstances of this case, the same applies to the charge of misrepresentation. Tshilidzi in her evidence testified that the applicant was only doing her job when she was asked if the applicant misrepresented the respondent. The applicant couldn't be expected to know that he was given letters of appointment to sign having people who were not employees of the respondent. It is my considered view that the applicant did not misrepresent the respondent as she did not know that Qwabaza and Mwaroza were not employees of the respondent.

Charge number four

You are charged with misconduct in that on or about the 07th of August 2019 you as a Chief Financial Officer while on duty you brought the name of the Department into disrepute in that you were arrested by the Hawks in the Department's premise.

[37] None of the charges levelled against the applicant was proven by the respondent. The applicant testified that she did not arrange with the police to arrest her. Ms Matshabaphala testified that the applicant brought the name of the respondent into disrepute as she was arrested at the head office and there was also media publication. The applicant did not call media or the police. The respondent was aware that the applicant was going to be arrested and the respondent was supposed to have arrange for the place of arrest other than the workplace. The respondent orchestrated the arrest of the applicant which was not warranted. It is my view that the Hawks unit and the respondent planned the arrest to be at the workplace in order to humiliate her. The respondent has failed dismally to show that the applicant brought the name of the respondent into disrepute.

Charge number five

You are charged with gross dishonesty in that on or about the 25th of May 2015, while on duty you never declared or disclosed that L-Khaya Consulting (Pty) was restricted due to the conduct of its Director, Mr Mninikhaya Qwabaza during the process of the tender number ACDP 14/10. Your conduct is in violation of chapter 7 of the SMS Hand Book.

[38] There is something very amazing about the manner in which the charges levelled against the applicant were architected, more so on charges number one and number five. On charge number one, the respondent is saying that the applicant knew that L-Khaya Consulting (Pty) Ltd was supposed to be restricted but on charge number five, the respondent alleged that the applicant did not disclose or declare that L-Khaya Consulting (Pty) Ltd was restricted. It is the evidence of the applicant that L-Khaya was not yet restricted on the 25th of May 2015. In fact, it is common cause that L-Khaya Consulting (Pty) Ltd was restricted on the 12th of April 2016 which is the date upon which the Accounting Officer approved the restriction. There was no restriction on L-Khaya prohibiting it to trade with the state on the 25th of May 2015. There are sharp contradictions between charge number one and charge number five which point to an obvious fishing expedition. The applicant was incorrectly found guilty on charge number five.

[39] I make a finding that the dismissal of the applicant was substantively unfair. The applicant prayed for retrospective reinstatement in this arbitration. I have no reason not to give the applicant her desired relief. I deem retrospective reinstatement to be fair and equitable under the circumstances of this case. The respondent failed dismally to prove fairness of a dismissal as required by section 192 (2) of the Act. The charges levelled against the applicant were unwarranted. It was not the duty of the applicant to restrict L-Khaya as of the 25th of May 2015 as she was acting as CFO after she was appointed on the 13th of January 2015. It was the duty of Makhubedu to process restriction as he was appointed as the acting Director under SCM. The Retraction letter was written by Makhubedu to show that he was hands on in relation to the case in question. Poor work performance was not proven as the applicant was not the Director of SCM as of the 25th of May 2015. Fraud was not proven as the applicant innocently signed appointment letters which were not prepared by her. The names of the appointed people were given to Tshilidzi by Mr Chauke. Mr Chauke knew what he was doing and his act can easily be regarded as fraud. There was no misrepresentation as the applicant honestly did not know that Qwabaza and Mwaroza were not working for the respondent. The applicant did not bring the name of the respondent into disrepute as she did not arrange for her arrest to

take place in the premises of the respondent. There was no restriction as of the 25th of May 2015 against L-Khaya for the respondent to make a claim that she did not disclose that L-Khaya was restricted as restriction was issued on the 12th of April 2016 which was more than ten months later.

Award

[40] The dismissal of the applicant was substantively unfair.

[41] The respondent, Department of Agriculture and Rural Development is ordered to reinstate the applicant, Ms Manana Lucy Seabi and to pay her back pay in the amount of R539 622-78 (five hundred and thirty six thousand six hundred and twenty two rand seventy eight cents) which is the equivalent of six months salaries, calculated at the applicant monthly income of R89 937-13 (eighty nine thousand nine hundred and thirty seven rand thirteen cents).

[42] The amount mentioned at paragraph 41 above is to be paid to the applicant, on or before the 30th November 2021.

[43] The applicant is to resume her duties on Monday, the 02nd of November 2021.



Name: PHEEHA DANIEL SEOPELA
(GPSSBC) Arbitrator