

ARITRATION AWARD

Commissioner: **Mohubedu Simon Rantho**

Case No: **PSHS127-21/22**

Date of award: **1 June 2022**

In the matter between:

PSA obo Kenneth Nkadimeng

Applicant

and

Department of Health- Limpopo

Respondent

DETAILS OF HEARING AND REPRESENTATION

1. The arbitration herein was conducted on the following dates and times: - 7th September 2021; 3rd – 5th November 2021; 24th – 26th January 2022; 23rd – 25th March 2022 and 19th May 2022. At all material times, the proceedings took place at 18th College Street in Polokwane except on the 7th September 2021. On this date the proceedings took place at F. W. Knobel Hospital at Moletji, Limpopo Province. Furthermore, at all material times the proceedings were scheduled to commence at 09h00.
2. Both parties attended the proceedings. On the 7th September 2021 Mrs. Patricia Maenetja appeared for the respondent in her capacity as the deputy director – labour relations. On the 3rd November 2021 onwards Mr. Moses Ramafhasi appeared for the respondent in his capacity as the labour relations practitioner. On the other hand, Ms. Patricia Matlhadiisa appeared for the applicant in her capacity as the official of PSA.

3. The applicant referred an unfair dismissal dispute in terms of Section 191 of the **Labour Relations Act of 1995**. On the 7th September 2021 Ms. Clementine Mogotsi interpreted the proceedings from English to Sepedi back and forth. On the 3rd November 2021 onwards Mr. Daniel Abel Jiyane interpreted the proceedings from English to Sepedi back and forth.
4. The proceedings herein were both manually and digitally recorded.

ISSUES TO BE DETERMINED

5. I must determine whether or not the dismissal of the applicant was both procedurally and substantively unfair. If I find that the dismissal was procedurally and/or substantively unfair, I must determine an appropriate relief.

BACKGROUND TO THE DISPUTE

6. The applicant referred an unfair dismissal dispute against the respondent. The applicant was employed as the senior accountant – budget and revenue. He was earning a salary of R32270.19 per month. He was employed on the 1st November 2009. He was dismissed on the 19th April 2021.
7. The applicant challenges both the procedural and the substantive fairness of the dismissal. As far as the procedural fairness is concerned, he disputes the following: -
 - 7.1 the employer did not finalized the appeal hearing within thirty (30) days as provided for in terms Clause 8.8 of the **Disciplinary Code and Procedures for the Public Service [Resolution 1 of 2003]**. Nonetheless, the employer did not allow the applicant to resume duties after the expiry of this period.
8. As far as the substantive fairness is concerned, he disputes the contravention of the rule. Wherefore, he asking for reinstatement with full back pay and without a loss of benefits.
9. On the other hand, according to the respondent the dismissal was both procedurally and substantively fair. The respondent contends that the applicant has contravened the rules in that he

is guilty of both counts of misconduct. Wherefore, the respondent is asking for the dismissal of the case.

10. Parties submitted bundles of documents. Parties disputed neither the forms nor contents thereof. I ruled that the onus of proof is on the respondent. Furthermore, I ruled that the respondent has a duty to begin.

11. The respondent charged the applicant with the following offences:

11.1 Charge 1: INCITEMENT

"You are charged with misconduct of incitement in that on or about the **05th of June 2020**, or any date incidental thereto, at or near – WF Knobel Hospital, You incited Cleaning Staff/Ward Attendants not to obey lawful and reasonable instruction from Management, whilst you knew or ought to have known that it was unlawful to do so (sic)."

11.2 ALTERNATIVE TO CHARGE 01: GROSS INSOLENCENCE

"You are charged with misconduct of GROSS INSOLENCENCE in that on or about the **05th of June 2020**, or any date incidental thereto, at or near – WF Knobel Hospital, You told Cleaning Staff/Ward Attendants not to Clean as instructed by Management, whilst you knew or ought to have known that it was unlawful to do so (sic)."

12. The respondent convicted the applicant of both charges and dismissed him from the employment.

SURVEY OF EVIDENCE AND ARGUMENTS

RESPONDENT'S CASE

13. **Mr. Seputule Eligift Mphahlele** testified under oath as follows:

14. He is employed as the chief executive officer of FW Knobel Hospital. He is the accounting officer and he is overseeing the hospital. He knows the applicant. In March 2020 in response to Covid-19 pandemic, the National Department of Health developed guidelines to combat Covid-19. Eventually, they formed Covid-19 rapid response teams to respond to challenges caused by Covid-19. Generally,

the Covid-19 rapid response team was generally composed of the management of the hospital and the organised labour. The team had undergone training and it was ready.

15. On the 1st June 2020 the hospital experienced its first Covid-19 positive case. He was on leave and he was called at about 18h0. Then he was informed about the case. Thereupon, he called both the acting chief executive officer and the clinical manager. He consulted the district executive officer. Eventually, he advised the Covid-19 Rapid Response Team, the acting chief executive officer and the clinical manager what to do the following day.
16. They agreed that they should hold the management meeting. Thereafter, Covid-19 rapid response team meeting should follow to address the challenge. The following day, 2nd June 2020, at about 12h00 he received a call from the Senior Clinical Manager informing him that the management meeting had been disrupted by the applicant and the other Covid-19 Rapid Response Team members. They were demanding answers about what they were faced with. Moreover, they were demanding that he must cut his leave short and return to work to attend to the challenges.
17. On the 2nd June 2020 both meetings failed. On the 3rd June 2020 he returned to work. His aim was to return the outpatient department (OPD) to operation since it was closed. He requested a meeting with the cleaners and the ward attendants at the entrance of the OPD. Three union officials attended the meeting, namely, Messrs. Mooka, Shandlale and Nkadimeng (the applicant). Messrs. Mooka and Shandlale approached him. They accused him of meeting with their members in their absence as their representatives. Meanwhile the applicant was a bit far away.
18. In response, he said he does not need their permission to meet the employees. If the employees were in need of their representatives, they would raise the issue themselves. Ultimately, they walked out of the meeting but remained within sight - not far away from where the meeting was taking place. The meeting continued in their absence. The employees indicated that they wanted the OPD to be fumigated before they could enter and clean. Thereupon, he indicated that that is not in terms of the Covid-19 Guidelines [Covid-19 Disease: Infection Prevention and Control Guidelines]. There and then, the senior clinical manager surfaced. He said fumigation is for pest control and not provided for in terms of Covid-19 Guidelines.
19. The employees indicated that they understand and then they requested to meet their supervisors in the absence of the management. Indeed, that meeting took place. Pending feedback from the said

meeting he went to the OPD with the following people: - Messrs. Chokoe, Makgahlela, Dr. Netshilonga and others. While there, Dr. Manamela from the district office arrived. He gave Dr. Manamela a brief regarding the events of the day. There and then, Mr. Sekwaila arrived with feedback from the meeting with the cleaners and the ward attendants. Amongst others, they have asked for the following: - new mobs, mob squeezers, N95 masks, hand gloves, boots and goggles.

20. Notwithstanding that, they perceived their demands to be unreasonable they undertook to procure same on the advice of Dr. Manamela. They had arranged to meet the following day (4th June 2020) as Covid-19 Rapid Response Team with Dr. Manamela. Mr. Sekwaila attended the meeting. Dr. Manamela presided over the meeting proceedings. The following trade unions represented organised labour: PSA and NEHAWU. The applicant represented PSA whereas Messrs. Mooka and Shandlale represented NEHAWU.
21. In the same meeting, it was indicated that fumigation is not provided for in the Covid-19 Guidelines. This was after one of the union officials raised the issue. While the meeting was in progress the applicant demanded that it should adjourn. He indicated that there was fumigation that was taking place at Van Velden Hospital and that they should conduct a fact-finding exercise. Eventually, that allegation was confirmed. His superiors from the provincial office indicated that they were not aware of the fumigation that was taking place at Van Velden Hospital. Thereupon, they undertook to deal with the situation since it was not catered for in the National Guidelines. The meeting resumed and it was reported that that fumigation was not in terms of the guidelines.
22. Thereupon, the trade unions demanded that if fumigation is not provided for in terms of the Covid-19 Guidelines the respondent (the Department of Health - Limpopo) must respond in writing and withdraw the use of fumigation. In response, they said they could not withdraw something, which was never contained in the guidelines. Furthermore, they indicated that it was the municipality, which fumigated at Van Velden Hospital.
23. Meanwhile Dr. Manamela received sms. He (Mr. Mphahlele) read same to the meeting whereby it was indicated that fumigation is not allowed in combating Covid-19. The applicant said they should applaud the department in this regard. The meeting proceeded the chairperson indicated that when the equipment arrive, they should work together with the ward attendants to clean up the OPD. The meeting ended up on that note.

24. On the 5th June 2020 in the morning he went to Pietersburg Hospital to ask for the equipment that were not delivered and he was given same. On return to F. W. Knobel Hospital, he invited the Covid-19 Rapid Response Team by sms to meet at the Casualty ward. Therein he informed them that they have received the equipment and that they should assist the ward attendants to clean up the OPD. Thereupon, the applicant responded that no one should go there and perform decontamination of the OPD. Moreover, Mr. Mooka said whomever, goes there will be going there at his own risk.
25. Consequently, he felt undermined by these two union officials. He felt they are were challenging his lawful instruction. He picked up the mob squeezer and the trolley and left for the OPD. Only few employees followed him - about four or five. Thereupon, he realized that the employees were intimidated by the utterances of both Mr. Mooka and the applicant.
26. He asked Mr. Sekwaila about Ms. Mabala, the supervisor of the cleaners, Mr. Sekwaila told him that she remained behind. Mr. Sekwaila went to call Ms. Mabala. Ms. Mabala said she was intimidated and she had to listen to the trade union. Consequently, the planned decontamination of the OPD that day failed. As a result, he requested Mr. Sekwaila to find people who will be willing to work overtime to cleanse the OPD. Eventually, he approved the overtime for those employees.
27. Eventually, he instituted the disciplinary proceedings against both Mr. Mooka and the applicant. On the 8th June 2020 [Monday] he issued them with the suspension letters. The respondent incurred costs for overtime. If cleansing was done on the 5th June 2020 no overtime would have been paid. Besides, the employees who worked overtime were senior managers. Consequently, a lot of money has been paid for overtime. The OPD was closed for six days.
28. This affected the hospital since patients were consulted in the Casualty ward. Moreover, they opened dummy files because files remained kept in the OPD. They did not have the medical history of the patients. Mr. Sekwaila is the human resource officer. The ward attendants and the cleaners reports to him.
29. Previously he had a good working relationship with the applicant until PSA refused to have bilateral meetings with him. At some point, the applicant would walk pass his office singing derogatory songs. Moreover, the applicant used to talk ill about him in the social media. Towards the disciplinary enquiry, the applicant intimidated him. Consequently, he felt very much unsafe.

30. The WhatsApp messages reads as follows (sic):-

30.1 "Let's meet on the 3, 4 and 5 November same venue guy's wafawafa Maud my friend trust me this will be the end of our sufferings, trauma, harassment & embarrassment by the alleged irregular appointment CEO of Knobel Hospital together with his cabal (Sekwaila, Chokoe, Makgahlela, Kobo etc.)."

30.2 "November 3, 4, 5 bakoni hle modimo e ba le nna, bay o nyela thwii ka modimo."

30.3 "11 & 12 November 2021 we going to bury CEO ya W. F Knobel Hospital he has no way to run."

30.4 "November is do or die CEO & ur friends, I don't care enough is enough, u had ur time now things have turned around ur going to feel the hit more than u do now."

30.5 "Maud my fiend please tell DDG Dombo, HoD Mhlongo, DEM letshokoghla & MEC Ramathuba that I have everything single documentary evidence."

31. Owing to the threats, he laid the criminal charges against the applicant.

32. **Mr. Vincent Moloka Sekwaila** testified under oath as follows:

33. On the 1st and 2nd June 2020, he was on duty. His leave commenced on the 1st to 4th June 2020. On the 2nd June 2020 at about 16h00 Ms. Mabala called him. She advised him of Covid-19 positive case in the OPD and that the OPD has since been closed. Furthermore, she indicated that she could not handle the situation on her own. Then she requested him as her senior to return to work to help her. He acceded to her request. Eventually, he reported on the 3rd June 2020.

34. Mr. Mphahlele summoned him to a meeting with the ward attendants and the cleaners. He found Mr. Mphahlele at the OPD with the ward attendants and the cleaners. Mr. Mphahlele indicated that the OPD was closed and that there is a need to disinfect it. Furthermore, he said he discussed with the ward attendants and the cleaners. He indicated that they had no problem except that they requested new personal protective equipment [PPE] and some other equipment. Furthermore, he indicated that

they want a private meeting with him and Ms. Mabala as their seniors. The said meeting was held in his office [Mr. Sekwaila's office].

35. Therein they indicated that they want to give a list of their demands so that he can present them to Mr. Mphahlele. They demanded the following: - mobs, mob squeezers, gowns, trolleys, gloves, visors/goggles, N95 masks and gumboots. Thereupon, he told them that in terms of the job description ward attendants cleanse the OPD whereas the cleaners cleanse the offices and the administration block. However, whenever a need arise they would help one another as they used to and in the light of the situation and shortage of the staff.
36. The ward attendants and the cleaners felt that the old equipment might have been contaminated and some of it worn out. Afterwards the cleaners indicated that they would not clean the OPD since it is not their job. They agreed with the ward attendants that as soon as the PPE has been provided they would cleanse the OPD.
37. Eventually, he went back to both Mr. Mphahlele and Dr. Manamela to present a list of demands. Mr. Mphahlele read a list of demands in that meeting. Furthermore, he indicated that he would submit that list. Subsequently, it was indicated that some of the PPE are not available and that they will be procured. He indicated that N95 masks are available nonetheless, they should not be used in terms of the Covid-19 Guidelines. Dr. Manamela indicated that N95 masks might be used if there is a surplus.
38. On the 4th June 2020 Mr. Mphahlele invited them to Covid-19 meeting through WhatsApp. The same meeting was presided over by Dr. Manamela of the district office. The said meeting was about the presentation of the list of demands of the ward attendants and the cleaners. Dr. Manamela indicated that even if the N95 masks are not provided for in the Guidelines they should give it to the cleaners to clean. Furthermore, the ward attendants were informed that the other PPE has been sourced and that they were awaiting delivery.
39. In general, organised labour indicated that they do not have any problems. Moreover, they proposed that before cleansing can take place the OPD must be fumigated. Thereupon, Mr. Mphahlele and Dr. Manamela indicated that in terms of Covid-19 Guidelines fumigation is not catered for. The meeting was for the Covid-19 Rapid Response Team. The trade unions are represented therein. The applicant was part of the team.

40. The trade unions indicated that at Van Velden Hospital fumigation is taking place because they had a Covid-19 positive case. The meeting was adjourned. Both Mr. Mphahlele and Dr. Manamela conducted a fact-finding exercise. The allegation was confirmed. It was indicated that fumigation was conducted with the support of the municipality. The head of department indicated that he was not aware of the fumigation that was taking place at Van Velden Hospital.
41. Meanwhile Mr. Mphahlele received sms from the head of department that fumigation is not allowed in terms of the guidelines. Thereupon, the trade union requested that the fact that fumigation is not allowed should be put in writing. Dr. Manamela was of a view that such letter is not necessary since fumigation is not catered for in the Covid-19 Disease: Infection Prevention and Control Guidelines [IPC Guidelines]. Mr. Mphahlele read out the sms from the head of department about fumigation in the meeting. At the end of the meeting Dr. Manamela requested them that as soon as the PPE is received the Covid-19 Rapid Response Team should assist the ward attendants with cleansing the OPD.
42. On the 5th June 2020 in the morning Mr. Mphahlele issued a message to the WhatsApp group requesting them to meet at about 10h00 with the members of Covid-19 Rapid Response Team and some of the managers. Mr. Mphahlele called through the landline that he should inform Ms. Mabala and the ward attendants that the PPE has been delivered. Furthermore, he requested that they should attend the meeting. Ms. Mabala indicated that there is a shortage and that only the following people were available: Mmes. Mokwele, Moutlana and Sepirwa. Thereupon, he requested her to come along with them to the meeting since Mr. Mphahlele wants to have a word with them.
43. On arriving in the OPD Mr. Mphahlele informed them that the PPE has been delivered. He requested them to assist the ward attendants in cleansing the OPD. On the departure of Mr. Mphahlele the applicant said no one should proceed to the OPD until the letter stating that fumigation is not allowed is presented. Thereupon, Mr. Mooka said whoever goes to the OPD would be doing so at his own risk and that the union would not represent them. Thereafter, none of the Covid-19 Rapid Response Team members and the employees followed Mr. Mphahlele. Mr. Mooka categorically told Ms. Mabala and him that they should not go into OPD and that they will represent them as the union [NEHAWU] should anything happen.

44. In his capacity as head of the section, he followed Mr. Mphahlele. Meanwhile Ms. Mabala remained behind. On arrival in the OPD Mr. Mphahlele asked him about Ms. Mabala. Moreover, he asked him to call her to give reasons why she could not assist. She came and indicated that the pronouncements by Mr. Mooka and the applicant made her not to come.

45. Having realised the shortage of capacity and the amount of work to be done Mr. Mphahlele resolved to discontinue with the work that day. Besides, he indicated that he would seek overtime from the district office and some further advices regarding the situation that was prevailing. On the 5th June 2020 the OPD was not yet cleansed and it still remained closed. Ultimately, it was decontaminated on the 6th June 2020 [Saturday]. Pertaining to the WhatsApp messages issued by the applicant he is of a view that there would be a hearing on the date in question and that the applicant had planned something about them. He had just a normal working relationship with the applicant.

46. **Mr. Noko Eugene Ramodike** testified under oath as follows:

47. He is employed as the deputy director – labour relations. He is based in the provincial office. He has the following responsibilities: - dispute and grievance management; misconduct and strikes management and any other function as delegated by the director. In the absence of the director he assumes the role of the secretariat in the appeal proceedings.

48. In terms of the resolutions, appeal should be finalised with thirty (30) days. If this is impossible and the employee is on precautionary suspension, he must resume duties on the expiry of thirty days pending the appeal outcome. After the expiry of thirty days an employee would attempt to return to work and if he is prevented, he would lodge an unfair labour practice dispute. That is unfair suspension.

APPLICANT'S CASE

49. **Mr. Kenneth Makoko Nkadimeng** testified under oath as follows:

50. In June 2020 he was chairperson of the PSA branch in the hospital. Amongst others, he was the secretary of the organised labour in the hospital. He disputes all the allegations against him.

51. He neither told any cleaner nor any ward attendant not to clean on the alleged dates: 3rd, 4th and 5th June 2020. On the 2nd June 2020 at about 11h00 while in Polokwane on work related assignment he received a call from Ms. Madiba. The latter informed him of a Covid-19 positive case in the hospital. As a result, he was scared immediately he called the MEC for Health to no avail. Eventually, he requested a meeting between the Covid-19 Rapid Response Team and the Acting CEO, Ms. Moeti, about the allegations. That meeting took place at about 14h00. Amongst others, it was resolved in that meeting that the OPD be closed, and that the Casualty ward be used for the services of the OPD.
52. The following day - 3rd June 2020, Mr. Mphahlele met the cleaners and the ward attendants before the OPD. He was far away from them near his car. Messrs, Mooka, Shandlale and Ms. Modiba (all NEHAWU members) went closer to the place the meeting was taking place. Later during the course of the day at about 13h00 – 14h00 they received the message that they should be in the boardroom. Upon arrival, they found the following people: - Mr. Letshokgotlha (Capricorn district executive manager), Dr. Manamela (director hospital services), Ms. Moshwane (occupational health and safety) and Covid-19 Rapid Response Team members.
53. He sat near Mr. Mphahlele in the meeting. The latter called with his phone. He did not know the person he was calling. He said let meet next to Ms. Moeti's office and the others would follow. Thereupon, he went out and return shortly. There and then Mr. Shandlale called him out by cell phone. He went out and he found him with Messrs. Mooka and Ntsewa.
54. Hey told him that they were with the CEO and he told them as NEHAWU they should support everything raised by the district executive manager in the meeting and that they should stand against the applicant. They went into the meeting. Therein Mr. Letshokgotlha indicated that as the department they were no more fumigating. As Covid-19 Rapid Response Team, they informed them of the Covid-19 positive case in the hospital. The uniqueness thereof in that the person concerned is working with patients' files. Furthermore, that she was highly expectant and not wearing a mask.
55. They enquired from Mr. Letshokgotlha how are they going to disinfect the files since they say they are no more fumigating. Mr. Letshokgotlha apologised and mentioned that the management misled him. He said he was going to request somebody to help with fumigation the following day. The meeting was concluded peacefully on the note that fumigation will take place the following day.

56. On the 4th June 2020 they held Covid-19 Rapid Response Team meeting. It was presided over by Dr. Manamela. Mr. Phohotona from Polokwane Local Municipality also attended the meeting as a visitor. Dr. Manamela called Ms. Mabala to attend the meeting. They explained to Mr. Phohotona the circumstances regarding the Covid-19 case and that they wanted a way forward from him. In response he stressed that the OPD should be fumigated, more especially, the place where the files are kept. In response, the CEO disputed what Mr. Phohotona has said and indicated that fumigation was not provided for in the Guidelines.
57. They asked for the production of the guidelines. Besides, they indicated that on the 18th April 2020 the MEC for Health- Limpopo fumigated Pietersburg Hospital. Meanwhile he received an information that Van Velden Hospital was being fumigated. Thereupon, he requested the management to confirm it. The meeting was adjourned to conduct a fact-finding exercise.
58. Subsequently, Dr. Manamela confirmed that fumigation was taking place at Van Velden Hospital with the assistance of Greater Tzaneen Municipality. Thereupon, they requested the management to respond in writing if there would be fumigation. They asked for the letter in order to report to the union members with a concrete proof about fumigation. The respondent neither gave them the Covid-19 Disease: Infection Prevention and Control Guidelines [IPC Guidelines] nor taken them through its contents. Moreover, in terms of the departmental circular 15 of 2020, they should not accept any document pertaining to Covid-19 unless issued by Deputy Director General, Dr. M. Dombo. This demonstrates that they did not receive a document from Dr. Pillay.
59. In the meeting held on the 4th June 2020 the CEO read sms whereby it was indicated that fumigation is not allowed. They asked him about the origin of the sms and he said it was from his principals. They asked for something in writing in order to report to the employees.
60. On the 5th June 2020 he received meeting invitation through WhatsApp. They were requested to meet at the Casualty ward. There and then, the CEO surfaced with the vehicle carrying mobs, mob squeezers and trolleys. He told them as the Covid-19 Rapid Response Team members that the equipment they were waiting for has arrived and that they should go to the OPD to assist with the cleansing. When the CEO was leaving for the OPD he approached him. He asked for the letter to the effect that fumigation is not allowed. In response, Mr. Mphahlele told him that if he does not want to help he must just leave. Then the communication was between him and Mr. Mphahlele.

61. When he walked away Mr. Mooka emerged and spoke to Mr. Mphahlele. Mr. Mooka told Mr. Mphahlele that those people would enter the OPD at their own risk. On the 5th June 2020 he neither told cleaners nor ward attendants not to go and cleanse. He did not challenge any instruction of Mr. Mphahlele.
62. On the 8th June 2020 he was summoned to a meeting by Mr. Mphahlele. Therein he was given a suspension letter. Eventually, he was issued with a notice to attend a disciplinary enquiry on the 16th July 2020. The disciplinary hearing was scheduled for the 23rd July 2020. Subsequently, it was postponed for unknown reasons. Ultimately, the disciplinary enquiry took place on the 3rd August 2020.
63. On the 30th June 2020 Dr. Mhlongo [HOD] and Dr. Dombo [DDG], held a meeting with NEHAWU provincial and regional leadership at the hospital. The local Covid-19 Rapid Response Team members attended the same meeting. Messrs. Mooka and Ntsewa attended the same meeting. One of the members of the management recorded the proceedings and forwarded same to him. Thereupon, he realized that he would not succeed hence he requested a neutral chairperson.
64. He lodged an appeal against the sanction. The same was lodged within four days. He submitted it personally to the office of the MEC for Health. He received appeal outcome on the 19th April 2021. After a period of six months. In terms of the Disciplinary Code if ten days lapses before an employee was issued with an appeal outcome the employee must return to work. In terms of the subsequent Covid-19 Disease: Infection Prevention and Control Guidelines fumigation is allowed. Dr. Dombo [DDG] signed the same document. Moreover, the Provincial Department of Health issued circulars wherein the same document was attached. He was dismissed for speaking and requesting a document. There was an ulterior motive.
65. It is not true that he disrupted the meeting of the 2nd June 2020. Mr. Mphahlele misled this forum when he testified that the employees worked overtime on the 6th and 7th June 2020 because of him Mr. Mooka. The employees have been working overtime before the incident. There are two conflicting resolutions; one says fumigation is not allowed and the other says it is allowed.

66. He had a normal working relationship with Mr. Mphahlele. The words wafawafa means it is final since it is long that they have been waiting for this arbitration. It like a knock out stage in a game of football. He was speaking with reference to his trials and tribulations, which were nearing an end.
67. His wife was highly expectant the gynaecologist said she was going to deliver between the 3rd and the 5th November 2021. Meanwhile, she was ill and her middle finger was painful. When she uttered the words “ba tlo nyela; they will soil themselves” it was with reference to the culprits who bewitched his wife. Fortunately, his wife gave birth to a baby boy on the 5th November 2021. The arbitration for Mr. Mooka was scheduled for the 11th and 12th November 2021. The arbitration did not proceed on these dates. When he said they were going to bury the CEO of F. W. Knobel Hospital, he meant they are going to expose his lies before commissioner Isaiah Nyathi. Indeed, ultimately his lies were exposed before the commissioner. This was just a figurative speech. He amazed to hear that these constitutes an intimidation. When he said November is do or die ... this simply means that he was going to pull up his socks or roll up his sleeves. He referred to Maud as his friend because the HOD and the DDG use to relay the messages through to him.
68. He sent any intimidating messages neither to Mr. Mphahlele nor to Mr. Sekwaila. Mr. Sekwaila did not attend the meeting of the 5th June 2020. He is not even a member of the Covid-19 Rapid Response Team. During the arbitration, he testified that he attended the Covid-19 Rapid Response Team meeting whereas during the disciplinary enquiry he testified that he did not attend Covid-19 Rapid Response Team. He is not reliable. None of the 34 members of the Covid-19 Rapid Response Team were called to corroborate the evidence of Mr. Mphahlele.
69. **Ms. Raisibe Brenda Mojapelo** testified under oath as follows:
70. She was employed as cleaner in the hospital. From the 1st to the 5th June 2020 she was at work. About the 2nd and 3rd June 2020 around lunchtime Ms. Moeti called them and informed them of Covid-19 positive case in the hospital. Thereupon, she requested them to clean up the place. They were shocked. They enquired if they are required to cleanse the place the same day. She could not give them a response until they knocked off. Eventually, they had to attend to the issue of cleansing the following day.

71. On the 3rd June 2020 the CEO exclusively summoned the cleaners and the ward attendants to a meeting. The meeting was held at the Casualty ward. Therefrom they moved to the OPD. Beside the CEO the following officials attended the meeting: - Dr. Netshilonga and Mr. Makgahlela. Therein the CEO confirmed that the existence of Covid-19 positive case in the hospital. He requested them to go and cleanse the OPD. Thereupon, they enquired if the OPD was fumigated. His response was in the negative. Nonetheless, he told them to go and clean up the place.
72. As a result, there was a misunderstanding. Some of the employees were not content with the instruction. They demanded the reason why the OPD should not be fumigated as they were aware that Pietersburg Hospital was fumigated in the presence of the MEC for Health, Dr. Ramathuba. They requested time to deliberate on the issue and the CEO gave them only ten (10) minutes to do so. They held their meeting with Mr. Sekwaila and Ms. Mabala as their supervisors. Therein they wrote down their demands before they could go and cleanse up the place. Firstly, they wanted the place to be fumigated. Furthermore, they asked for the following: - personal protective equipment, new equipment including trolleys and mobs since they did not have them.
73. Thereafter, they returned to the OPD. Mr. Sekwaila presented their demands to Mr. Mphahlele. Since then, they waited for a response to no avail until they dispersed. The applicant herein did not attend that meeting.
74. **Mr. Tlou Meadows Mooka** testified under oath as follows:
75. From the 3rd to the 8th June 2020 he was on duty. On the 3rd June 2020 they had already learned of the existence of Covid-19 positive case in the hospital. On the same date they attended a meeting convened by the district executive manager [DEM]. The said meeting was about the Covid-19 positive case in the hospital. Prior to the meeting the CEO summoned the NEHAWU officials to a meeting. Therein he said they should support the management in the impending meeting convened by the district executive manager. He wanted them to stand against the PSA since there is a strong relationship between the department and NEHAWU.
76. In that meeting the agreement did not materialise because they wanted fumigation whereas the department was against fumigation. Consequently, he formed a view that the district officials were against the applicant as the sole representative of PSA. Ultimately, the district executive manager

undertook to bring them an expert from the municipality [Polokwane Local Municipality]. The meeting of the 3rd June 2020 ended up on this note.

77. On the 4th June 2020 they held a meeting. Therein Mr. Phohotona was in attendance as the expert in fumigation. He saw that there was a need for fumigation whereas the management insisted that there is no need for fumigation since it was not provided for in terms of the departmental guidelines. They wanted to use biocide instead of fumigation. Consequently, the organised labour requested a directive from the department concerning fumigation. They wanted to know why both Van Velden and Pietersburg Hospitals were fumigated to the exclusion of F. W. Knobel Hospital. He did not attend the meeting convened by Mr. Mphahlele with the ward attendants, the cleaners and their supervisors.
78. On the 5th June 2020 an informal meeting took place at the Casualty ward. They found the CEO offloading the PPE and other equipment. He requested the following people to assist with the cleansing of the OPD: - the ward attendants, the cleaners, Covid-19 Rapid Response Team members. As the CEO was pushing a trolley to the OPD the applicant followed him. He is not privy to the conversation, which took place between them. Afterwards, he asked the CEO that if a person goes to the OPD to cleanse he would be going there at his own risk to which he responded in the affirmative and then he left the CEO behind. He is not privy to what happened in the OPD. The respondent did not provide them with a written directive pertaining to fumigation. Moreover, the employer was against anything PSA proposed.
79. Nobody was prevented from cleansing they just spoke about the risk. As the trade unions they are enjoined to advice their members accordingly. Mr. Sekwaila did not attend any of the meetings in question. Subsequently, he was suspended on the 8th June 2020. Upon receiving the suspension letter he took it to NEHAWU executive. Eventually, they held a meeting with the following officials: the head of department, deputy director general and the hospital management. The topic for discussion was their suspension. The applicant did not attend such meeting because he belongs to PSA. Therein the HOD undertook to reconcile the parties.
80. Afterwards there was another meeting convened by NEHAWU regional executive committee with all the suspended members. Therein they were told that they would be reinstated whereas the applicant and him will be dismissed. Indeed, eventually they were dismissed. That meeting took place before his disciplinary enquiry.

ANALYSIS OF EVIDENCE AND ARGUMENTS

AD ONUS OF PROOF

81. In this matter, the respondent bears the onus to prove, on a balance of probabilities, that the dismissal of the applicant was both procedurally and substantively fair in terms of Section 192(2) of the **Labour Relations Act of 1995**.

AD CLOSING ARGUMENTS

82. Parties requested to submit closing arguments in writing and they were given until the 26th May 2022 to submit same to the council. Both parties submitted their closing arguments on time.

83. I considered them in making a determination herein. In terms of case law if a party has submitted documents during a hearing and there was no objection thereto the arbitrator is entitled to rely on those documents [**University of the North v Nobrega & Another (1999) 20 ILJ 2117 (LC)**]. In this matter, both parties submitted bundles of documents. Parties disputed neither the forms nor the contents of the documents. Therefore, I will consider the same documents in making a determination herein.

AD PROCEDURAL FAIRNESS

84. As far as the procedural fairness is concerned, the respondent has no case to answer since this is falls under unfair labour practice sphere. Against this background, I find that the dismissal was procedurally fair.

AD SUBSTANTIVE FAIRNESS

85. Under cross-examination, Mr. Mphahlele conceded that Van Velden Hospital belongs to the respondent. Furthermore, he conceded under cross-examination that both Van Velden Hospital and Pietersburg Hospital were fumigated. Besides, Mr. Mphahlele repeatedly evaded the question about when the trade unions were given documentary proof to the effect that fumigation is not allowed. Therefore, I find that it is probable that the unions were not given the same document. The

respondent never called Ms. Mabala as a witness to corroborate the evidence that the union officials intimidated her not to go and cleanse the OPD. Therefore, I will treat her evidence as hearsay as such not admissible.

86. Under cross-examination, Mr. Sekwaila conceded that the applicant did not attend the meeting of 3rd June 2020 that the CEO held with the wards attendants and the cleaners. Furthermore, notwithstanding the fact that Mr. Sekwaila testified that he attended the meeting of the 4th June 2020 his name features nowhere in attendance register of the same meeting. Moreover, his name features nowhere under apologies in the minutes of the same meeting. Therefore, I find that he did not attend the same meeting. Mr. Sekwaila evaded the issue when it was put to him that he did not attend the meeting of the 4th June 2020. Furthermore, Mr. Sekwaila conceded that he did not attend the meeting of 3rd June 2020. Therefore, he cannot attest to the events of the said meeting.

87. Undisputed evidence has been led for the applicant that in terms of the departmental circular 15 of 2020, they should not accept any document pertaining to Covid-19 unless issued by Deputy Director General, Dr. M. Dombo. This demonstrates that they did not receive a document from Dr. Pillay.

88. Furthermore, undisputed evidence has been led for the applicant that both Van Velden Hospital and Pietersburg Hospital were fumigated. Under cross-examination, the applicant testified that his duties as the PSA shop steward was to look after the interests of the members in general. Furthermore, he testified under cross-examination, that the union officials requested a written proof instead they were read **sms**. They wanted a tangible proof. It is therefore evident that the CEO overlooked the fact that the union representatives were acting in their capacities as the union officials and not in their personal capacities. If indeed fumigation was not permitted in terms of the Covid-19 Disease: Infection Prevention Guidelines [IPC Guidelines] why was it so difficult to avail a documentary proof to the union officials.

89. I find that the respondent was self-contradictory. Its words were not consistent with its actions. Notwithstanding that in terms of the IPC Guidelines fumigation was not permitted the respondent was able to fumigate Van Velden Hospital and Pietersburg Hospital. Besides, the political head of the department was at the forefront of the fumigation process at Pietersburg Hospital. The department was vacillating. It was not resolute in its position. This in itself created a confusion. I find that the employer was guilty of issuing out conflicting instructions. Hence, the union officials were within their

right to demand documentary proof pertaining to the respondent's position on fumigation. Besides, Covid-19 was a matter of life and death at that particular time since it was novel. It was something never experienced before. It was scary and deadly.

90. Furthermore, undisputed evidence has been led for the applicant that the applicant did not attend the meeting convened by the CEO on the 3rd June 2020 exclusively for the cleaners and the ward attendants. I find that if the applicant did not attend this meeting it could not be possible that he made the alleged threatening utterances in the same meeting.
91. Furthermore, undisputed evidence has been led for the applicant that nobody was prevented from cleansing they just spoke about the risk. Furthermore, undisputed evidence has been led for the applicant that as the trade union they are enjoined to advise their members accordingly. Furthermore, undisputed evidence has been led for the applicant that Mr. Sekwaila did not attend any of the meetings in question. Therefore, if Mr. Sekwaila did not attend any of the meeting he could not have heard the conversation between, Mr. Mphahlele, the employees [ward attendants and the cleaners] and the applicant.
92. Furthermore, undisputed evidence has been led for the applicant that prior to the meeting of the 3rd June 2020 the CEO summoned NEHAWU officials to a meeting. Therein he said they should support the management in the impending meeting convened by the district executive manager. He wanted them to stand against the PSA since there is a strong relationship between the department and NEHAWU. Furthermore, undisputed evidence has been led for the applicant that after they were suspended Mr. Mooka attended a meeting convened by NEHAWU regional executive committee with all the suspended members. Therein the employees were told that they will be reinstated to the exclusion of the applicant and him [Mr. Mooka].
93. Evidence has been led for the respondent that though previously Mr. Mphahlele [CEO] had a good working relationship with the applicant subsequently the relationship turned sour. This occurred after PSA refused to have bilateral meetings with him. Furthermore, evidence has been led for the respondent that at some point, the applicant would walk pass Mr. Mphahlele's office singing derogatory songs. Moreover, the applicant used to talk ill about Mr. Mphahlele in the social media. The fact that the relationship between Mr. Mphahlele and the applicant turned sour at some stage is a cause for concern. I find that his evidence points out to a conspiracy against the applicant. It is apparent that the employer wanted to get rid of the applicant at all cost.

94. Moreover, I find that the evidence led for the respondent herein did not implicate the applicant in any wrongdoing. Apparently, there was an ulterior motive behind the dismissal of the applicant. The reason thereof could be that he belonged to a wrong trade union, which does not have a relationship with the management of the hospital. The whole disciplinary enquiry was just a sham. Therefore, I find that the dismissal was substantively unfair.

AD RELIEF

95. Under the circumstances, I am inclined to grant the applicant his desire to be reinstated with full back pay and without a loss of benefits. In determining the back pay payable to the employee herein I applied the formula provided in terms of Section 35 of the **Basic Conditions of Employment Act** of 1997.

96. The employee was earning R32270.19 per month. The calculations are as follows: -
 $R32270.19 / 4.333$ (weeks in a month) = R7447.54 (salary per week) / 45 (hours) = R165.50 (salary per hour) x 9 (working hours per day) = R1489.50. Broadly, per week, the employee was earning R7447.54. Per hour, he was earning R165.50. Per day, he was earning R1489.50.

97. A salary that the respondent owes the applicant as back pay is for a period of thirteen [13] months and thirteen [13] days. That is R419512.47 [R32270.19 x 13 (months) = R419512.47] plus R19363.50 [R1489.50 x 13 (days) = R19363.50]. Therefore, the sum payable to the applicant as back pay is **R438875.97** [R419512.47 + R19363.50 = R438875.97].

AWARD

98. I hereby rule that the dismissal of the applicant was procedurally fair but substantively unfair.

99. I hereby order the respondent to reinstate the applicant with full back pay to the position, which he occupied effectively from the 19th April 2021 being the date of the dismissal.

100. The applicant must report for duty on the 13th June 2022.

101. I hereby order the respondent to pay the applicant the sum of **R438875.97** being an equivalent of his salary for a period of thirteen [13] months and thirteen [13] days as back pay not later than the 1st July 2022.



MOHUBEDU SIMON RANTHO