PHSDSBC

Public Health and Social Development Sectoral Bargaining Council

JURISDICTIONAL RULING

Commissioner: **Asnath Sedibane**

Case No: **PSHS997-24/25**

Date of ruling: **12 June 2025**

In the matter between:

PSA obo Mvemve Harrington Hlophe Applicant

and

Department of Health– Mpumalanga Respondent

DETAILS OF HEARING AND REPRESENTATION

1. The arbitration hearing was scheduled before me at the offices of the Department of Health - Mpumalanga in Mbombela on 27 May 2025. The applicant was in attendance, and he was represented by Mr. Flip van der Walt, an official of the Public Service Association (PSA). The respondent was represented by Mr. Jerry Mnisi, an official of the respondent.

POINT IN LIMINE

2. The respondent raised a point in limine that the Bargaining Council lacked the jurisdiction to arbitrate the dispute since the applicant failed to exhaust internal processes before declaring the dispute. It was agreed between the parties and the Panelist that the respondent would make written submission on the

point in limine and send them to the applicant and the council by 03 June 2025, the applicant would respond to the point in limine in writing by 06 June 2025, and the respondent would have a right of reply and may file the reply by 09 June 2025. I would then issue my ruling within fourteen (14) days from the last date for submissions.

ISSUE TO BE DECIDED

3. I am required to determine whether the PHSDBC has the requisite jurisdiction to arbitrate the dispute for unfair labour practice relating to promotion.

THE PARTIES' SUBMISSIONS

The Respondent's submissions on the point in limine

4. The respondent submitted that the PHSDSBC lacks jurisdiction to arbitrate the dispute because the applicant has prematurely declared the dispute of unfair labour practice relating to promotion, and the applicant has further failed to file a condonation application with the referral.

5. The respondent submitted that the applicant is employed by the State, despite him working in a different department, and was therefore required, based on the applicable collective agreement (PSCBC Resolution 14 of 2002), to lodge a formal grievance and exhaust the internal grievance procedure before declaring this dispute.

6. The respondent submitted that the grievance procedure is peremptory in terms of exhausting internal processes and the applicant had an obligation to comply with it before approaching the bargaining council. It was also the contention of the respondent that the applicant failed to comply with the applicable time frames, as he became aware in late 2024 that interviews were conducted for the position he applied for, and he only declared the dispute for unfair labour practice relating to promotion in February 2025, without a condonation application.

The applicant's response to the point in limine

7. The applicant submitted that he was not required to apply for condonation as he only became aware that he has not been shortlisted for the position, on 03 December 2024. He referred the dispute on 13 February 2025. The referral was therefore filed within the 90-day prescribed period.

8. The applicant disputed that the case law referred to by the respondent was relevant to this case. The applicant contended that both cases referred to by the respondent dealt with compliance with internal procedures in unfair dismissal disputes. It was further the contention of the applicant that there is no case law directing the applicant to first exhaust internal processes before declaring an unfair labour practice dispute.

The respondent's reply:

9. The respondent reiterated that the bargaining council lacks jurisdiction to arbitrate the dispute because the applicant has failed to exhaust internal grievance procedures, which is peremptory. The respondent emphasized that the two decided cases it referred to in the heads of arguments are authority for the requirement for an employee to first exhaust internal processes before declaring a dispute with external bodies.

ANALYSIS OF SUBMISSIONS

10. Rule 22(1) of the Council's Rules provides as follows-

"If during the arbitration proceedings it appears that jurisdictional issues have not been determined, the panellist must require the party that raises the jurisdictional point to prove that the Council does not have the jurisdiction to arbitrate the dispute."

11. The respondent has contended that the PHSDSBC lacks the requisite jurisdiction to arbitrate the dispute because the applicant did not lodge an internal grievance before declaring the dispute, and the applicant has also not filed an application for condonation for the late referral of the dispute. The applicant has submitted that there was no need for an application for condonation as the referral was filed within ninety

(90) days of him being aware of the act or omission constituting unfair labour practice, and there was no requirement for him to first lodge an internal grievance before declaring the dispute.

12. According to the respondent's submission, the grievance procedure for the Public Service (The PSCBC Resolution 14 of 2002) prescribes that employees of the State must first exhaust the internal grievance procedures before approaching the bargaining council for relief. The respondent referred to two cases (**City of Johannesburg Metropolitan Municipality v SAMWU obo Matsheka and others (JR 214/2016** and **Madondo v Safety and Security Sectoral Bargaining Council and Others (D305/2013) [2015] ZALCD 9**), as authority for its contention.

13. The applicant has referred a dispute for unfair labour practice relating to promotion, in terms of section 186(2)(a) of the Labour Relations Act 66 of 1995, which provides as follows:

'Unfair labour practice' *means any unfair conduct or omission that arises between an employer and an employee involving-*

(a) unfair conduct by an employer relating to the promotion, demotion (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee.

14. The applicant has not disputed that he is employed by the State and that he is bound the PSCBC Resolution 14 of 2002. The applicant has however submitted that he is not aware of any legislation or policy that directs that a grievance procedure must first be exhausted before a dispute for unfair labour practice is declared. The applicant has also argued that the cases that the respondent refers to as authority for exhaustion of internal process before declaring disputes are not relevant to the his case.

15. The PSCBC Resolution 14 of 2002 is a collective agreement which sets out rules of lodging and dealing with grievances in the Public Service. Point 1 of Section F of the Resolution provides that : "An employee **may** (my own emphasis) lodge a grievance with an employee designated to facilitate the resolution of grievances in the department". My understanding of this provision is that an employee has a choice to lodge an internal grievance within his/her employing department and that if he/she elects to do so, such grievance will be directed to an employee designated to deal with grievances in that department. There

is nothing in the wording of the provision that suggests that it is peremptory for aggrieved employees to lodge formal grievances.

16. Point 10 of Section F provides that an employee who complains of unfair labour practice **may** (my own emphasis) inform the executing authority in writing of his/her intention to utilize the dispute resolution mechanism provided for in the constitution of the PSCBC or the relevant sectoral council. Again, this is optional and not peremptory.

17. The respondent relied on two Labour court judgements in contending that it is mandatory for Public Servants to exhaust the internal grievance processes before using alternative dispute resolution mechanisms. It must be noted that the Labour Court per the decision of Judge Moshoana in **NTEU obo Moeketsi v CCMA and others (JR 1157/20) ZALCJHB 226** (handed down on 16 August 2022) questioned the correctness of the decision in the **City of Johannesburg Metropolitan Municipality v SAMWU ob Matsheka and others** *supra,* in as far as at deals with the lack of jurisdiction. With regards to **Madondo v SSSBC and others,** the Judge emphasized that the effect of having to exhaust internal remedies as provided for in the provisions of the collective agreement does not extinguish the applicant's right to proceed to the bargaining council to determine the alleged unfair dismissal, but it simply requires the employee to take a compulsory procedural step before doing so. It should be noted that **Madondo** is distinguishable as it relates to unfair dismissals and is based on a different collective agreement.

18. The judgement in **NTEU** in my view is the correct judgment on the issue of whether it is mandatory for employees to first exhaust internal procedures before utilizing external dispute resolution mechanisms. In *casu*, the applicant was not compelled to first lodge a grievance for the alleged unfair labour dispute relating to promotion before declaring the dispute with the relevant council. Section 186(2) (a) of the LRA defines unfair labour practice and section 191(1) of the same Act gives employees alleging unfair conduct by employers an opportunity to approach the CCMA or Bargaining Council with jurisdiction, to have the dispute resolved through conciliation or arbitration. There is nowhere in these provisions where employees are mandated to first exhaust internal grievance processes before declaring such disputes.

19. In terms of section 191(1)(b)(ii) of the LRA, an employee must within ninety (90) days of the act or omission which allegedly constitutes the unfair labour practice or, within ninety (90) days of becoming

aware of such act or omission, refer the dispute to the Commission or council with jurisdiction. The applicant has submitted that he became aware of the act or omission that constitutes alleged unfair labour practice on 03/12/2024 that interviews for the position had already been held. He declared the dispute on 13/02/2025 after his email enquiries to the respondent were not responded to. The referral was within ninety (90) days of him being made aware of the interviews. The applicant's referral has complied with the provisions of section 191(1)(b) (ii) of the LRA. The council has jurisdiction to arbitrate the dispute.

VIRTUAL ARBITRATION

20. The applicant has requested that the arbitration should proceed virtually since he is based in Pretoria and it will be costly for him to attend the process physically in Mpumalanga. The respondent despite having reservations about virtual proceedings, was not opposed to the arbitration being held virtually. I therefore direct that the council schedules the arbitration virtually.

RULING

21. The council has the requisite jurisdiction to arbitrate the dispute.

22. The council must reschedule the matter for arbitration, to be held virtually.

_____

Asnath Sedibane