



ARBITRATION AWARD

Case Number: **PSHS89-23/24**

Commissioner: **Allan Kayne**

Date of award: **06 November 2023**

In the matter between:

PSA OBO PROF. MZUBANZI MABONGO

Applicant

and

DEPARTMENT OF HEALTH – GAUTENG

Respondent

DETAILS OF THE HEARING AND REPRESENTATION

1. The Public Servants Association ("the PSA") referred an unfair labour practice dispute on behalf of Prof. Mzubanzi Mabongo to the Public Health and Social Development Sectoral Bargaining Council ("the Council" or "the PHSDSBC") in terms of section 186(2)(b) of the Labour Relations Act, 66 of 1995 ("the LRA"). The arbitration hearing took place on 15 September 2023 and 20 October 2023 at the respondent's Regional Training Centre situated at the Kalafong Hospital in Atteridgeville. Parties filed written, closing arguments a week after the last sitting.
2. On each occasion, the applicant was present and represented by André Eagar, a PSA trade union official, while Herbert Leshaba represented the respondent.
3. Both parties submitted bundles of documents to be used during the arbitration proceedings. The proceedings were manually and digitally recorded, with the record being filed with the Council's administration.

4. This award is issued in terms of section 138(7) of the LRA, which requires a commissioner to provide brief reasons for his outcome.

BACKGROUND

5. The applicant is employed as the Head of Clinical Department¹: Maxillo-Fascial and Oral Surgery, based at the University of Pretoria's Oral Health Centre.
6. On 08 December 2021, the respondent preferred several charges of misconduct against the applicant and, on 25 March 2022, found him guilty of only the following charge:

That you are charged with misconduct in that on or about the 27th October 2021, you made threatening communication on U P Staff Group Chat directed at Dr Rabie, a communication which instill fear and threats to the life of another human being and or a colleague, and thereby committed an act of threatening a fellow employee. (sic)

7. The respondent sanctioned the applicant with a final written warning and two months unpaid suspension.
8. In an appeal outcome on 04 April 2023, the sanction was commuted to a final written warning valid for six months and one month's unpaid suspension, effective May 2023.
9. The applicant's basic monthly salary at the time of his suspension was R139,391.35.

ISSUE/S TO BE DECIDED

10. I must determine whether the respondent's decision to sanction the applicant with a final written warning and one month's unpaid suspension was fair and whether it constituted an unfair labour practice as contemplated in section 186(2)(b) of the LRA.
11. If the respondent's decision is found to be unfair, the applicant seeks that his final written warning be set aside and that he be reimbursed for the one-month's unpaid suspension.

SURVEY OF EVIDENCE AND ARGUMENT

12. The testimony led by the applicant is fully captured on the record of proceedings. What appears in this award is a concise summary of the evidence relevant and material to the issues in dispute that require determination. The fact that I have not captured all of it herein should not be misconstrued that I have not taken all the evidence presented into

¹ HOD

account. My findings are, accordingly, within the context of all the evidence tendered during the proceedings.

APPLICANT'S EVIDENCE

Prof. Mzubanzi Mabongo ("the applicant" or "Prof. Mabongo")

13. The applicant testified under oath that he received an anonymous email from one Anna Tally on 30 December 2020, indicating that he/she was a colleague who was concerned, having heard that another female employee was building a sexual harassment case against him based on inappropriate messages and recorded telephone calls. Anna Tally could not divulge his/her identity but hoped the issue could be resolved "*before it blows up*". Prof. Mabongo replied to the email, thanking Anna Tally for the forewarning, commenting that he did not have a clue regarding the allegations, to which the response was that Anna Tally had seen some of the inappropriate messages.
14. Nearly ten months later, on 18 October 2021, he received another email from Anna Tally reminding him about the previous one. Anna Tally advised that there were investigations into alleged sexual harassment by the applicant and that he/she was trying to obtain more information but was hoping that the applicant could resolve the matter. Anna Tally wrote that he/she also tried to get some information from the main complainant, Dr M², by pretending to support her, but had been unsuccessful. Irritated by the situation and wanting to know who was behind the anonymous emails of Anna Tally, the applicant replied on 26 October 2021 as follows:

to Anna

Your name appears more than twice in Dr M's affidavit.

You think you are smart. That is the problem with white supremacy.

I am going to deal with you. You have had your chance, and it failed.

Watch the space, you conspirator.

Although he had his suspicions about who might be behind the emails, he hoped that his response would force the sender to disclose more information or try and obtain the affidavit in question. He believed that there had been some dissatisfaction within the department, as he was the first black HOD, a situation which aggrieved some of the team. By advising the sender that he would deal with them, he planned to report the emails to Prof. Shangase, which he did, and to the South African Police Service

² Name redacted but is documented in the record of the proceedings.

("SAPS"), who unfortunately declined to open a case because the sender could not be identified.

15. At 05h23 on 27 October 2021, Anna Tally responded, claiming he/she did not know what the applicant was referring to but that he/she was only trying to help him fix the situation. Anna Tally denied being a white person but confirmed being employed at the hospital, wishing the applicant only the best but noting he/she would stop assisting him.
16. At approximately 07h00 on 27 October 2021, Prof. Mabongo received a WhatsApp message from a subordinate, Dr Evan Rabie, which contained a screenshot of his previous evening's email under the banner "*Stupid Anonymous, you cons*", below which the sender of the screenshot had written, "*Your favourite is after you. He's convinced you are behind everything and also the emails.*" Dr Rabie's message to the applicant thereafter read:

I want to make it unequivocally clear. Although I had seen screenshots of the e-mail of you in plastics theater I had did not sent it NOR had I prior knowledge thereof. Be careful of making assumptions as you have. I will be reporting this. (sic)

All attempts by the applicant to trace the source of the screenshot and the Anna Tally emails proved unsuccessful.

17. The applicant presented a document entitled "Affidavit of Sexual Misconduct", dated 13 September 2021, addressed to the Office of the Dean of Health Sciences from Dr M, in which she noted her frustration regarding the investigation of her complaint against the applicant. Pertinently, she said that her initial complaint was forwarded by her senior, Dr Rabie, to Prof. Shangase, who, in turn, engaged Labour Relations. According to Prof. Mabongo, the entire ordeal resulted in him sinking into major depression, necessitating psychiatric and psychological interventions, evidenced by the medical certificates included in his bundle.
18. Correspondence between Dr Rabie and the Labour Relations Officer on 01 December 2021 set out the reasons why Dr Rabie believed the email from the applicant was aimed at him. By deductive reasoning, Dr Rabie concluded that given him being the only Caucasian person whose name appeared more than twice in Dr M's affidavit, the threats could only have been directed at him. The applicant challenged Dr Rabie's assertion that the concept of white supremacy was based solely on skin colour, as even Jewish people had been victims of white supremacists. His email response to Anna Tally had never been to instil fear or threaten the sender but to ensure that he/she was aware that

the applicant would be notifying Prof. Shangase, Mr Watson and the SAPS regarding what had transpired.

19. Prof. Mabongo denied any threatening conduct on his part to Anna Tally or that he did so on the staff WhatsApp group chat. Even the commuted sanction was inappropriate in the circumstances, and he sought both the warning and suspension to be withdrawn, with added compensation for the abuse he suffered at the hands of Anna Tally.
20. Under cross-examination, the applicant maintained that the whole incident formed part of a conspiracy against him, which he believed was based on him being the first black HOD. He reconfirmed that the only white person whose name was mentioned more than once in Dr M's affidavit was that of Dr Rabie but denied that his email of 26 October 2021 to Anna Tally was directed at Dr Rabie, as his response had never been restricted to a white person whose name appeared more than twice therein. His reasoning behind the reply was solely to ascertain if Anna Tally had access to the affidavit. He further denied that Dr Rabie was ever his favourite, adding that the reference to "favourite" was directed by Stupid Anonymous to Dr Rabie, referring to Prof. Mabongo. He confirmed only reporting the emails to Prof. Shangase in October 2021, as he had not taken the December 2020 correspondence seriously at the time. In his thinking, the applicant suspected that the sender of the Anna Tally emails was actually Dr M, never even contemplating it could be Dr Rabie. In fact, in one of the replies, Anna Tally comments that she is not a white person.
21. The applicant confirmed that, after he returned to the workplace, Dr Rabie stayed away from work, describing the employee's actions as having absconded. Dr Rabie's absence could not have been a result of the applicant's email, which was neither sent nor directed to him. His fear was born out of the anonymous message sent privately by somebody to Dr Rabie. Prof. Mabongo denied being against the later appointment of Dr Rabie as a Consultant, but rather that there were several questions he had wanted him to answer. However, Prof. Shangase excluded him from the selection panel.
22. Prof. Mabongo testified that he had been exonerated of the allegations of sexual harassment against Dr M, apart from the inappropriate use of an isiXhosa phrase, for which he was sanctioned in the form of a warning. He refuted the respondent's claims that white supremacy was solely race-based, referring to alternate definitions to show it was not.

RESPONDENT'S EVIDENCE

Dr Evan Rabie ("Dr Rabie")

23. Dr Rabie testified under oath that he was a registrar in Maxillo-Fascial and Oral Surgery employed by the respondent between 01 August 2016 and 30 November 2021 and, more recently, as a periodical specialist. He enjoyed a professional working relationship with the applicant. He recognised Prof. Mabongo's email to Anna Tally on 26 October 2021, which he had seen on the Medical Officers and Registrar's WhatsApp group, a group of eight or nine employees, approximately four of whom were white. However, he could not recall who posted the screenshot of the email in that WhatsApp group.
24. Dr Rabie confirmed that he knew Dr M, who had confided in him regarding allegations of sexual harassment by the applicant. He advised her to put her concerns in writing and recalled assisting her with some aspects of her affidavit. It was that affidavit that Prof. Mabongo referred to in his email reply to Anna Tally in which Dr Rabie was identified as the only white person whose name appeared more than twice therein. This inferred that the threats were directed at him. Although he could not see the salutation "to Anna" in the screenshot sent to him, he perceived the tone of the applicant's email to be threatening, victimising and unprofessional and decided to report it.
25. He recognised his WhatsApp message to the applicant on 27 October 2021, which included a screenshot of the email he received in the WhatsApp chat group. However, he was unaware of the anonymous email thread to which it was a reply. Although he believed the threat was directed at him, he conceded that it was possible that all Prof. Mabongo had meant was that he would report the emails to his superiors. However, the phrase "*Watch the space, you conspirator*" was perceived to be a direct threat but was also somewhat ambiguous in what it meant. It caused him to feel anxious, unsafe and insecure, especially because his registration as a specialist was dependent on the applicant's sign-off. Dr Rabie denied any issue with the applicant's appointment as the first black HOD or any interpersonal issues with the applicant, apart from the threatening email, which was only fully contextualised during the arbitration. After his complaint, he noted some delay in the payment of his claims for approximately five months at the behest of Prof. Mabongo.
26. During cross-examination, Dr Rabie confirmed that the screenshot he received and forwarded to Prof. Mabongo did not include the details of the person to whom it was

addressed, being Anna Tally. He inferred, through deductive reasoning and mild cognitive functioning, that it was directed to him. However, having sight of the entire email, he could see that it came from the email address anonymous.staff51@yahoo.com, and the applicant's response was specifically addressed to the same Anna Tally. He could not recall who sent the screenshot of the email to the WhatsApp group chat and was unfortunately no longer able to access that group.

27. He understood the term white supremacy as a philosophy that the white race was superior to other races and ethnic groups, including black and Jewish people. He reiterated that he understood Prof. Mabongo's threat to deal with him as referring to physical, emotional or professional harm. He conceded that it could have been interpreted to be disciplinary action against the sender of the Anna Tally emails and that there was actually no reference to anything physical. Dr Rabie denied that he tried to withdraw his grievance. However, he acknowledged emailing Prof. Shangase to apologise for his misconduct and overreaction when he failed to report for duty for several days after the applicant returned to work and also for not submitting a leave form. He denied that his email to her was any form of apology or withdrawal in respect of the grievance itself.
28. Asked directly who the sender behind the Anna Tally emails was, he testified that he suspected it to have been one of the two medical officers working in the department at the time.

ANALYSIS OF EVIDENCE AND ARGUMENT

29. It is well-entrenched in section 185(b) of the LRA that *"every employee has the right not to be subjected to an unfair labour practice"*, and section 186(2) sets out a closed list of what constitutes an unfair labour practice, including a specific definition in subsection (2)(b) which provides that:

'Unfair labour practice' means any act or omission that arises between an employer and an employee involving –

(b) the unfair suspension of an employee or any other disciplinary action short of dismissal in respect of that employee;

30. In the present matter, the applicant challenges both the final written warning and his unpaid suspension as meted out by the respondent. Given the nature of the dispute, the

onus of proof rests with the employee party. However, in assessing the evidence, a consideration of whether the employer discharged its onus at the disciplinary enquiry in establishing the employee's guilt stage is crucial.

31. While much of the evidence of Prof. Mabongo and Dr Rabie was not in dispute, it became abundantly clear when Dr Rabie took to the stand that he was not privy to the full set of facts and had effectively only been exposed to selective information prior to the arbitration proceedings, which in my view, may have altered his perception of the unfortunate situation and his decision to proceed with his grievance against the applicant.
32. If one has regard to the factual matrix, what the applicant did was nothing more than respond, in a somewhat unprofessional manner, to an email from an anonymous person who presented vague accusations that he had sexually harassed Dr M and other individuals. His interaction was with Anna Tally, yet on 27 October 2021, a screenshot of his response to him/her was pasted by a participant of the Medical Officer and Registrar's WhatsApp group to that group. Notably, on the evidence of Dr Rabie, the applicant was not a group member, meaning that it could only have been one of the eight or nine members of that group who did so. It is unfathomable how Dr Rabie was unable to recall who posted such a "life-threatening" message or that the respondent failed to try and ascertain, at the time of it being brought to its attention, who had done so, as this would most certainly have assisted in determining the identity of Anna Tally and is a critical element in this dispute. Instead, both Dr Rabie and the respondent expect second-hand evidence from an anonymous source who potentially was known to them, to be used against the applicant under the guise of it being perceived as a threat to Dr Rabie's life.
33. When one has regard to the wording of the charge for which Prof. Mabongo was found guilty, the situation becomes even more incomprehensible, as it incorrectly attempts to create the impression that Prof. Mabongo himself made a threatening communication on a university WhatsApp group directed specifically to Dr Rabie. Nothing could be further from the truth, as the undisputed evidence of Dr Rabie was that he received the screenshot of the applicant's email in the Medical Officer and Registrar's WhatsApp group from one of the members. Given that the applicant, according to Dr Rabie, was not a member of that group, it would be impossible, and somewhat bizarre, for him to post his unprofessional response in that group.

34. Having regard to the content of Prof. Mabongo's response to Anny Tally, the deductive reasoning employed by Dr Rabie is flawed when considering that he was not privy to the complete set of facts and information available to the respondent. His conclusion that the email was directed at him was based on nothing more than assumptions, fuelled by what was not the best of relationships with the applicant and the anonymous individual behind the Anna Tally emails. Taking into account the full conspectus of facts, and also that Anna Tally identified him/herself not to be a white person, had Dr Rabie been apprised in this regard, he could not reasonably have concluded that the "threat" was directed to him unless he was the author of the emails, which is highly improbable in my view.
35. Even the content of the applicant's response cannot reasonably be interpreted to be a threat to the receiver's life. In fact, Dr Rabie conceded that what he initially perceived as a physical, professional or emotional threat was ambiguous and could be interpreted in a variety of ways, including that Prof. Mabongo intended to report the matter to his superiors and/or take disciplinary action against the sender. Whilst inappropriate, as the email was written in his capacity as HOD, I accept that the reference to Dr M's affidavit, which was actually not an affidavit, and to white supremacy might have been misguided attempts by Prof. Mabongo to identify the author of the emails and bore no racial connotation. Had the respondent adequately investigated the matter and fully contextualised the facts, common sense would have dictated that the applicant ought not to have been required to answer to the allegation preferred against him. As a result of the ineptitude, the respondent neglected to ascertain, at the very least, who posted the screenshot in the Medical Officer and Registrar's WhatsApp group and, secondly, who was behind the Anna Tally emails, which appeared to be an attempt by one of the employees of the department to Prof. Mabongo potentially incriminate himself.
36. Accordingly, there was no cogent evidence adduced that the applicant misconducted himself in the manner described, and the respondent's decision, through its presiding officer and subsequently the executive authority to issue the applicant a final written warning, valid for six months, and to subject him to one month's unpaid suspension, was unfair, without any reasonable basis, questionable and constituted an unfair labour practice.
37. While the final written warning expired six months after 22 March 2022 and ought, by the date of this award, to have been removed from the applicant's file, it should never have been issued to him based on the feeble evidence adduced at the time.

38. Similarly, the imposition of even a single month's unpaid suspension was also unfair and requires redress in the form of the respondent reversing the remuneration it withheld from the applicant and reimbursing him that which he ought to have received in respect of May 2023, amounting to R139,391.35.

AWARD

39. The respondent subjected the applicant to an unfair labour practice as contemplated in section 186(2)(b) of the LRA.
40. The respondent, the Department of Health – Gauteng, is ordered to pay the applicant, Prof. Mzubanzi Mabongo, the amount of R139,391.35 (One Hundred and Thirty-Nine Thousand, Three Hundred and Ninety-One Rand and Thirty-Five Cents) by no later than 30 November 2023.
41. Although a moot point, the respondent is further ordered to ensure that the expired final written warning is removed from the applicant's file.



Allan Kayne