



# ARBITRATION AWARD

Case Number: NWKD999-21  
Commissioner: Foster Maluleke  
Date of Award: 3-Oct-2021

In the **ARBITRATION** between

PSA obo Modise, Irene Naledi

(Union/Applicant)

and

Mmabana Arts Culture and Sport Foundation

(Respondent)

## DETAILS OF HEARING AND REPRESENTATION

1. The Arbitration was conducted on 11 May 2021 and 21 to 22 September 2021. The Employee appeared in person and she was represented by Mr Kabelo Moalosi, a Labour Relations Officer from Public Servants Association. On 11 May 2021, the Employer was represented by Mr Victor Languza and Mr Lebeko, its Labour Relations officials. On 21 to 22 September 2021, the Employer was represented by Mr Itumeleng Sekgotha, an attorney from Office of the State Attorney and he was accompanied by Mr Lebeko.

## **PRELIMINARY ISSUES**

2. At the commencement of arbitration on 21 September 2021, the Employer's representative (Mr Sekgotha) moved an application for postponement. The reasons for the application were that the Office of

Only signed awards that contain the CCMA approved watermark are authorised.

NWKD999-21

Page 1 of 10

Last saved on: Tue 5-Oct-2021 08:06:16

Last saved by: NontsokoloN

the State Attorney was only instructed to represent the Employer on 07 September 2021. The Office of the State Attorney experienced technological glitches and was unable to brief counsel to represent the Employer. The Employer did not inform him that the matter was previously set down on previous occasions hence the application for legal representation was not made. Counsel was only instructed on 20 September 2021 and he was not ready to appear on the date of arbitration. Counsel requested him to move an application for postponement.

3. The Employee representative opposed the application and he indicated that the Employee was dismissed on 24 February 2021 and the matter was postponed in the previous sitting due to request of the Employer. He stated that at disciplinary hearing, the Employer did not wait for him to arrive and proceeded with the disciplinary hearing and concluded same within two hours in the Employee's absence. He submitted that the request for postponement is contrary to the expeditious resolution as required in terms of the LRA.
4. Mr Sekgotha replied by indicating that he was not aware that there were previous sittings on the matter at hand. He however proceeded to submit that the matter should be postponed since the Employer was not ready to proceed.

## **RULING**

5. For the purposes of this Ruling, it is important to indicate the background of the case. This matter was set down for Con/Arb before me on 11 May 2021. On the said date, both parties were represented. The Employer representative moved an application for postponement and tendered wasted costs. He did not have any valid reason except that the Employer was simply not ready to proceed. Since the application was the first one and with a view of providing a fair hearing to both parties, I agreed to postpone the matter even though there was no valid reason for the request.
6. The matter was thereafter set down for arbitration on 23 to 25 June 2021. The matter was postponed at the request of the parties. There was no official sitting as the application was done in writing and submitted to CCMA prior to the date of the case. The matter was thereafter set down for arbitration on 19 to 21 July 2021. The parties submitted an agreement to postpone the matter in terms of Rule 23(1) of the Rules for Conduct of Proceedings before the CCMA. As a result, they were not required to appear at the CCMA.
7. The matter was thereafter set down for arbitration on 21 to 23 September 2021. At arbitration, Mr Sekgotha moved an application for postponement. He only had ten minutes to address me on reasons for

request for postponement as he had a part heard matter before the High Court and he requested to be excused. I was not satisfied with reasons provided for request for postponement. It appears that the Employer concluded that the application for postponement was going to be granted. However, since the matter was set down for three consecutive days, I decided to adjourn the matter until 22 September 2021 to afford the Employer a further opportunity to either apply for legal representation or to allocate the matter to another available official or representative. However, on 22 September 2021, the Employer was still not ready to proceed with the matter for same reasons provided above.

8. In **Carephone (Pty) Ltd v Marcus NO and others (JA 52/98) [1998] ZALAC 11; (1998) 19 ILJ 1425 (LAC) (handed down on 1 September 1998)** the Court held that in a Court of law, the granting of an application for postponement is not a right. It is an indulgence granted by the Court in the exercise of a judicial discretion. The Court stated that there are at least 3 reasons why the approach in postponement of cases in respect of Courts of law is not on a par with arbitration proceedings under the auspices of the CCMA: the arbitration proceedings must be structured to deal with the dispute fairly and quickly.<sup>1</sup> and the ability to make costs orders to counter prejudice in good faith postponements is severely restricted.
9. In **National Police Service Union and others v Minister of Safety and Security and others (CCT 21/00) [2000] ZACC 15; 2000 (4) SA 1110 (CC); 2001 (8) BCLR 775 (CC)** (handed down on 27 September 2000) at 1112F the Court held that: the postponement of a matter set down for hearing on a particular date cannot be claimed as of right. An Applicant for a postponement seeks an indulgence from the Court. In exercising that discretion the Court will take into account a number of factors, including (but not limited to): whether the application has been timeously made, whether the explanation given by the Applicant for postponement is full and satisfactory, whether there is prejudice.
10. In this case, it was submitted that the State Attorney was only instructed on 07 September 2021. This was fourteen days prior to the date of arbitration. Mr Sekgotha indicated that State Attorney's office was having technological glitches and could not brief counsel as a result. Counsel was only instructed a day before the arbitration. Clearly, the Employer was at least aware that there was a problem with its ICT systems and had an opportunity to bring an application for postponement in line with Rule 23 reads with Rule 31 of the CCMA Rules. However, same was left until the date of the case and Mr Sekgotha only had ten minutes to address me in this regard because he had a part heard matter before the High Court. The High Court matter was not an urgent application; therefore, an inference can be drawn that Mr Sekgotha

<sup>1</sup> Section 138 of the LRA provides that the Commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum legal formalities.

was at least aware that he would not be able to attend to the arbitration. Again, the application could have been brought in terms of the Rule 31 of the CCMA Rules.

11. It is important to indicate that the matter at hand was one of alleged unfair dismissal due to misconduct. In such matters, legal representation is not automatically permitted and parties wanting to be legally represented (such as the Employer in this case) should bring an application for legal representation.<sup>2</sup> It is only after legal representation application is granted will the legal representative apply for postponement due to unavailability. In *Moshela v CCMA and others (JR 1524/06) [2011] ZALCJHB 55; (2011) 32 ILJ 2692 (LC)* (handed down on 1 July 2011) an Employee decided on the day of proceedings that he wanted to make use of his attorney that handled his criminal trial. The Court held that the decision whether or not to grant a postponement should be considered objectively. The pivotal test is whether there exists a reasonable explanation for the postponement and whether any party will suffer prejudice if granted or refused. The court found that the decision of the Commissioner to refuse postponement was not reviewable.
12. In this case, the Employer failed to apply for legal representation as required in terms of CCMA Rules. There was no proper reason why such was not done. Further, the matter at hand was not sitting for the first time on 21 to 22 September 2021. In the last sitting (11 May 2021), I granted postponement despite the fact that the Employer representative indicated that the Employer was simply not ready to proceed despite the notice of set down having been effected promptly in line with the CCMA Rules. The Employer did not have any explanation for being not ready to proceed with the matter hence the then representative tendered wasted costs on the date in question. However, wasted costs in this regard would not serve the purpose since the parties reside in Mafikeng and transport and related costs is very low. I however, warned the Employer that future applications for postponements would not be easily granted. It appears that such a warning fell on the deaf ears and was not sufficient to prompt the Employer to take the matter serious and at least to follow the CCMA Rules. It is interesting to note that Mr Sekgotha was not even aware of the previous sittings of this arbitration.
13. In the meantime, the Employee was unemployed and awaiting the arbitration to be speedily finalized as required by the LRA. Although the Employee indicated how the dismissal affected her during leading of evidence, it is necessary to note some of the issues she stated. She stated that the dismissal affected her sex life with her partner which affected her family detrimentally. She stated further that she since has been diagnosed with depression as a result of the dismissal and she has no money to pay medical aid. She stated further that she is a bread winner and her kids are affected negatively by the dismissal.



14. The Employer having been notified of the arbitration well in advance and having been aware of the circumstances which gave rise to the application for postponement, namely failure to instruct counsel, at least an application for legal representation ought to have been made. On failure to do so, at least an application for postponement should have been brought as soon as the Employer became aware that there were technological glitches which rendered it impossible to instruct counsel. This is in line with the established practice and in line with the Labour Court decisions referred to above.
15. Having had regard to the above established facts and having sought guidance from the Labour Court decisions referred to above which are binding on me as an arbitrator, I had to decline the application for postponement.
16. The Labour Relations Officer employed by the Employer (Mr Lebeko) remained in the proceedings and indicated that he was not prepared to proceed with the case.

#### **ISSUE(S) TO BE DECIDED**

17. I am required to decide:

17.1 Whether the Employee was dismissed and if so, whether her dismissal was procedurally and substantively fair.

17.2 The appropriate relief if the dismissal is found to be unfair.

18. The Employee sought reinstatement in terms of section 193 of the Labour Relations Act 66 of 1995 as amended ("the LRA").

#### **BACKGROUND**

19. The Employee was employed by the Employer as a Senior Payroll Officer on 06 July 2006. She was dismissed on 24 February 2021. At time of dismissal, she earned the monthly salary of R 48 675,40. She challenges both the procedural and substantive fairness of the dismissal.

## SURVEY OF EVIDENCE

20. The Employee testified herself and she did not call any other witness. Her evidence is captured below as follows:

20.1 She was charged, found guilty and dismissed for four allegations of misconduct. She was employed as a senior payroll officer and she was responsible for paying salaries to the employees. Her role was limited to capturing and her superiors would authorize and release salaries. It was her evidence that the Finance Manager was responsible for releasing salaries. She would only release salaries after receiving a go ahead from the Finance Manager. At the time in question, only top three officials (HR Director and CFO and the Finance manager) were responsible for releasing the salaries. In their absence, she was tasked to release salaries but only authorised to do so with permission of the Finance Manager.

20.2 In relation to Charge one and two, she was found guilty of misconduct by withholding a fellow employees' salary (Grace Msumbu). It was her evidence that they were paying salaries on the 20<sup>th</sup> of every month. She stated that Grace Msumbu informed her that there were unauthorized deduction(s) in her account and requested her not to pay the salary until she sorted the bank account challenges. However, Grace informed her that her account was sorted. As a result, she released the salary on the same date of 20 May 2020.

20.3 Charge three concerns alleged misconduct in that the Employee allegedly paid salary to a deceased employee (Mr Sikwane). It was a response that she processed the accrued leave pay to Sikwane's account not salary.

20.4 In respect of charge four, she was charged for allegedly deducting monies to insurance companies when such payment was not due. Her response was that she was not aware of the details of the insurance company in question. However, in general, she indicated that employees generally hand a written letter to payroll department indicating that they joined a particular insurance company and the insurance company will also provide a schedule to payroll. She did not process wrongly any amount to any insurance company.

20.5 On procedural fairness, she indicated that the disciplinary hearing was held in her absence. The hearing was previously scheduled and postponed. She was told that she would receive the notice of the set

down for the hearing. On the date of hearing, she received a text message from the Labour Relations Officer (Lebeko) who stated that the hearing was proceeding. She was still sleeping at the time and she called the union official. The text message did not have details about the venue of the hearing. Lebeko was only informing her and the text message did not constitute a formal notification. She immediately dressed without taking a bath and went to the lodge where she thought the hearing was being conducted. Her representative, Moalosi told her that there was no hearing at the lodge. The Employer knew the union official on record but did not notify him of the proceedings. The hearing proceeded without her giving her version.

20.6 She felt the dismissal was too harsh in the event she committed an offence which she denies. She worked for many years for the Employer. Since suspension, she was diagnosed with depression. She does not have medical aid and she is not sexually active anymore and she takes frustration to her partner and kids. She is a bread winner and staying unemployed frustrated her.

### ANALYSIS OF EVIDENCE

21. In this matter, I only have the uncontested evidence of the Employee to make a decision on whether she was dismissed and whether such dismissal was procedurally and substantively fair.
22. Section 186 (1) (a) of the LRA defines dismissal to mean that the employer has terminated the contract of employment with or without notice. The Employee provided a dismissal letter to prove that she was dismissed. I found such evidence to be acceptable to prove that she was dismissed.
23. The Employee referred to the following charges which were labelled against her:

#### Charge 1

*"You are guilty of misconduct in that while on duty you conducted yourself in an improper, disgraceful and unacceptable manner in that you used the resources of the organisation to settle personal scores thereby manipulating the payroll by withholding the salary of a fellow employee, Ms Grace Msumbu"*

#### Alternative to charge 1

*"Alternatively, you are guilty of misconduct in that while on duty you contravened section 34 of the Basic Conditions of Employment Act 72 of 1997, as amended., by withholding the salary of an employee without written consent of the employee and you used the resources of the organisation to settle personal scores thereby manipulating the payroll by withholding the salary of a fellow employee, Ms Grace Msumbu"*

#### Charge 2

*Alternatively, you are guilty of misconduct in that while on duty you contravened section 34 of the Basic Conditions of Employment Act 72 of 1997, as amended., by withholding the salary of an employee in excess of a quarter of the salary"*

#### Charge 3

*"You are guilty of misconduct in that you were negligent in your scope of duties in that you processed salary payment of a deceased person/employee ( Mr Sikwane)"*

#### Charge 4

*"You are guilty of misconduct in that you were grossly negligent in your duties by deducting monies to insurance companies when such payment was not due and payable not was such payment effected in accordance with prescripts"*

24. In respect of charges one and two, the Employee denied that she withheld the Employee's salary. It was her testimony that Grace Msumbu requested her not to pay the salary until she brings a different account. Grace Msumbu told her that she was having unlawful deductions in her bank account. Grace later informed her that she resolved the challenges in respect of her bank account. She still managed to process the payment to Grace on the 20<sup>th</sup> of May 2020 which was the pay day for the Employer. The explanation provided by the Employee is in my view reasonable and acceptable.
25. In respect of charge three, the Employee testified unchallenged that she did not pay salary to the late Sikwane. She stated that the payment she processed was for accrued leave. The response provided by the Employee is also reasonable and acceptable.



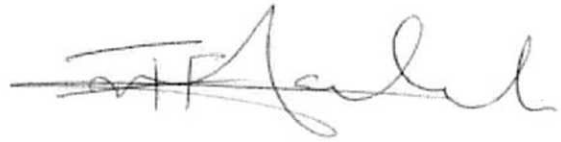
26. On the last charge which concerns the negligent payment of monies to insurance companies when such monies were not due, she stated that the charge did not disclose which insurance companies she paid monies to. She also explained the process how such payments are generally made.
27. In the absence of any challenge to her evidence, I find that the Employee was not guilty of all charges against her.
28. In respect of procedural fairness, the Employee stated that the Employer failed to notify her of the date of the disciplinary hearing. This was despite the Employer being aware of her address and the contact details of her trade union representative. She was thereafter dismissed in absentia.
29. I consequently find that the dismissal was both procedurally and substantively unfair.

## REMEDY

30. Section 193 of the LRA provides that if the dismissal of an employee is found to be substantively unfair, the primary remedy of reinstatement or re-employment must be ordered unless the employee does not wish to be reinstated or re-employed. In this case the Employee indicated that she wanted reinstatement. There was no evidence before me that the relief of re-instatement should not be granted.
31. As a result of the unfair dismissal, the Employee lost the salary for the period from 24 February 2021 to 25 October 2021 (date of reinstatement) which totals to R 48 675,40 X 8= R389 403,20

## AWARD

32. The Employee was dismissed and her dismissal was procedurally and substantively unfair.
33. The Employer is ordered to reinstate the Employee to the position she occupied prior to her dismissal on the same terms and conditions which existed prior to the dismissal.
34. The Employer is further ordered to pay the Employee back pay in the amount of R389 403,20 (**Three Hundred and Eighty-Nine Thousand and Four Hundred and Three Rand and Twenty Cents**) using the method of payment which was used to pay her salary prior to the dismissal.
35. The amount in the paragraph above must be paid to the Employee by not later than 25 October 2021.
36. The Employee is directed to report for duty on 25 October 2021.



Signature: \_\_\_\_\_

Commissioner: **Foster Maluleke**

Sector: **Business/Professional services**

