# Arbitration Award

Case Number: ***HO50-21***
Commissioner: ***Suria van Wyk***
Date of Award: ***7-Feb-2022***

In the **ARBITRATION** between

***PSA obo Members***
(Union/Applicant)

and

***SARS - SA Revenue Services***
(Respondent)

## DETAILS OF HEARING AND REPRESENTATION

1. The arbitration was held virtually and convened on 16 August 2021 whereafter a consolidation ruling was issued. By agreement between the parties the continuation of the arbitration was scheduled for 29 October 2021, 1 – 2 December 2021 and 20 – 21 January 2022 respectively. Arbitration was finalised on 21 January 2022 and parties were afforded an opportunity to submit closing arguments by 21 January 2022. Closing arguments were only filed by PSA (1st Applicant) and SARS (Respondent), no closing submission was filed by NEHAWU (2nd Applicant).

2. On 1 December 2021 the matter was postponed due to the witness being uncontactable. NEHAWU tendered the wasted costs of PSA and SARS. A postponement ruling detailing what transpired was issued.

3. During the proceedings, PSA was represented by Mr Ferdie Truter from Couzyn Hertzog & Horak Attorneys, NEHAWU was represented by Mr Mokheche Maraka and SARS was represented by Adv Tebogo Manchu instructed by Cliff Decker Hofmeyer Inc.

4. Parties held a pre-arbitration meeting and the minutes of the meeting were provided at the onset of the arbitration.

5. A digital recording was made of the hearing.



## ISSUE TO BE DECIDED

6. Whether the discontinuation of the leave encashment policy by the Respondent was fair and constitutes an unfair labour practice in terms of section 186(2) of the LRA.

## BACKGROUND TO THE DISPUTE, COMMON CAUSE FACTS AND ISSUES IN DISPUTE

7. Clause 5.4 of the Respondent's Leave Policy of February 2006, as collectively agreed between the Respondent and Organised Labour, provides for leave encashment of a maximum of 6 days of outstanding leave not taken or accumulated and to be paid out early the following year preferably before end of April.

8. On 1 January 2011, a new Leave Policy came into effect ("2011 Policy"). The 2011 Policy provides that it is effective 1 January 2004 unless otherwise indicated in the body of the policy. Clause 5.2.13 of the 2011 Policy provides: "*Of the total annual leave entitlement for all employees; a maximum of 6 days of outstanding leave not taken or accumulated will be paid out early the following year, preferably before end April.*"

9. The 2011 Policy provides that it will replace any other leave provisions formerly applicable in SARS.

10. A new Leave policy was introduced in 2016 which replaces any previous leave provisions formerly applicable in SARS. Clause 2.2.4 of the Respondent's Human Resource Policy on Leave of May 2016 provides for leave encashment of a maximum of 6 days of outstanding leave not taken or accumulated and to be paid out early the following year preferably before the end of April.

11. Clause 2.6.2 of the Respondent's Human Capital and Development Internal Policy Conditions of Service of December 2017 provides for leave encashment of up to a maximum of 6 working days.

12. On 23 June 2018, the Human Capital and Development Internal Policy Conditions of Service ("Conditions of Service Policy") became effective and was approved. Clause 2.6.2 (h) provides that:" *The following accumulation and encashment provisions will be applicable if an employee did not utilize the full entitlement by the end of the leave cycle: (i) A maximum of five (5) working days will be accumulated to the brought forward leave category, however, the accumulated balance my not exceed twenty (20) working days; (ii) Balances that remain after the accumulation may be utilized within the first six months of the following year or employees may opt to encash up to a maximum of six (6) working days of this balance.*"



13. The Parties had engagements on the discontinuation of the leave encashment and introduction of the new leave dispensation of the following occasions:

    a. SARS made a presentation on leave encashment at the National Consultative Forum ("NCF") of 6 November 2019.

    b. National Bargaining Forum ("NBF") of 7 November 2019.

    c. NBF meeting held on 4 December 2020, wherein a presentation was made by SARS to Organised Labour relating to leave encashment and the new leave dispensation.

    d. At the National Bargaining Forum ("NBF") of 4 February 2021 the Respondent provided an Annual Leave presentation, which set out the business rationale for discontinuing

the leave encashment practice and a desirous new leave dispensation. The Respondent informed the Applicants that no leave encashment will be paid. The Respondent also tabled a new leave dispensation split between statutory and non-statutory leave, whereby the statutory part is the minimum 15 days prescribed by the Act, which employees will forfeit if not used. The non-statutory part would make up the balance of the current leave credits. The proposal also intended to increase the annual leave credits, over time, to 30 days for all employees.

e. A Leave Dispensation Multilateral meeting was held on 17 February 2021 between the parties without resolution.

14. The above consultation sessions failed as the parties could not reach consensus on the proposed changes and the removal of the benefit by the employer.

15. The 1st Applicant referred its Unfair Labour Practice Dispute on 14 April 2021 and the matter was conciliated on 4 May 2021.

16. The 2nd Applicant referred its Unfair Labour Practice dispute on 23 March 2021 and the matter was conciliated on 4 May 2021.

17. The Applicants' disputes were consolidated on 17 August 2021.

18. The parties are presently engaged in litigation in the High Court under case number 34583/21 relating to the Wage Agreement dated 3 April 2019 wherein a key component of the dispute relates to SARS inability due to lack of requisite funds and budget to comply with the third year of increases.



19. It is in dispute between the parties that the qualifying employees are entitled to payment of their unused leave days in accordance with the abovementioned collective agreement and policies.

20. It is further in dispute that the policy of leave encashment is not finically sustainable for SARS given current and future funding constraints. That the policy is unjustifiable. Furthermore, it is not a practice SARS can support in moving towards its Strategic Intent and not aligned with the practices applied in the broader Government.

## SURVEY OF EVIDENCE AND ARGUMENT

21. At the outset, it must be noted that not all the evidence led at the arbitration will be captured in the award. The award will only contain a brief summary of the relevant and salient points. The summary is a compilation of evidence in chief, cross examination and re-examination. Simply because evidence is not recorded in the

summary, does not mean that the evidence was not considered. For a full record of all evidence parties should refer to the digital recordings of the hearing which is available from the CCMA upon request.

**Applicant's Case:**

22. **Mr Dirk Matthysen** testified under oath that he is an Operational Specialist operating as the full-time shop steward in SARS. He is a PSA representative and the National Chairperson for the PSA branch in SARS. He has been involved with negotiations in the NBF for the last 15 years and instrumentally involved in the conclusion of the collective agreements.

23. He was referred to the Leave Policy of SARS[1] and confirmed that it was signed by PSA, SARS and NEHAWU and the policy commenced on 22 February 2006. Since implementation of the policy, terms of paragraph 5.4,[2] employees have been provided with an option to have up to six days paid out of unutilised leave. Employees would be approached by the Respondent by the end of January every year to make this election and the payout would be done around February. The last payout was done in 2020.

24. In a *Newsflash*[3] dated 14 February 2019 the Respondent raised the issue of a new leave dispensation for the first time and a proposal of such a new dispensation was made. The proposal was considered and ultimately both unions rejected the proposal. He agreed in cross-examination that the Respondent had started to raise this issue as far back as 2019 and explained the financial difficulties faced by the organisation. He also agreed that that a special joint task team was established to delve into the financials of the organisation per cost element, to explore cost cutting opportunities to address the budget deficit from the Estimates of National Expenditure ("ENE") allocation submitted to National Treasury.

25. On 8 March 2019 a *Did you know?*[4] communication was received by HR in which the encashment or utilisation of the 2018 accumulated leave was highlighted to employees.

26. In email correspondence authored by the witness and dated 24 July 2019, the new agenda items for the August NBF were communicated. The agenda points included the issue of leave encashment for 2020. This was raised in July because at that time they had already become aware that the Respondent wanted to discontinue the encashment of leave. There was also uncertainty amongst

[1] Applicant's Bundle page 12.
[2] 1st Applicant's Bundle page 17.
[3] 1st Applicants' Bundle page 72-73.

membership as they needed to decide whether they would utilise the leave or whether they would be able to encash it. During the NBF of August 2019[5], the minutes noted that:" *PSA requests that the employer express their position with regards the optional encashment of unutilized leave due January 2020, which was currently allowed to a maximum of six (6) days as per the relevant policy derived from a previous collective agreement.*" The item was removed from the agenda. He could not say for sure why it happened. In cross-examination he agreed that members had an option to take leave instead of making use of encashment.

27. The National Consultative Forum ("NCF") was utilized to consult on items the Respondent did not intend to negotiate on, information was communicated for purposes of taking note and to make input for consideration but not for active negotiation. At the NCF of 6 November 2019[6] the Respondent told them that they did not want to honour the benefit of leave encashment. A concern was raised that they raised the issue at a consultative forum and that it was a current condition of service that needed to be re-negotiated in the normal manner and something had to be offered in exchange for the benefit to be forfeited. In cross-examination he agreed that in November 2019 there was an emphasis on the financial constraints necessitating changes and it was raised with Organised Labour.

28. The following day on 7 November 2019[7] an National Bargaining Forum ("NBF") meeting was held and the following transpired: The Respondent deliberated on the discussions held with the SARS Commissioner during the strategic engagement sessions on 11 October 2019 on the issue related to the leave encashment. The changes had an impact on the Conditions of Service Policy related to the leave encashment and a presentation on leave encashment was made at the NCF of 6 November 2019. The Respondent indicated that the changes were informed by the financial constraints faced by the organisation. Organised Labour raised concerns regarding the said changes and indicated that they viewed it as a withdrawal of benefits, also that they would exercise their rights in law, should the benefit be withdrawn unilaterally. Organised Labour would engage with their constituencies and revert to NBF by the next NBF.

29. An unfair labour practice dispute was referred to the CCMA and the dispute was ultimately settled. The Respondent reversed their decision and the leave encashment was paid. At that stage no new agreement had been reached regarding the leave encashment.



[4] 1st Applicants' Bundle page 79.
[5] 1st Applicants' Bundle page 88, 98.
[6] 1st Applicants' Bundle page 103.
[7] 1st Applicant's Bundle page 105, 119.

30. The communication from the SARS Commissioner dated 7 February 2020 was in his view not a true reflection, as in some divisions their members were actually struggling to take their full leave complement due to operational reasons, also some employees have more than 10 years' service and if the 6 days are enchased they still had approximately 22 days to utilize for off time.

31. He could not dispute that the practice of leave encashment costs the Respondent 80 – 90 million per annum and that in a number of engagement sessions this was communicated that the SARS Commissioner did not agree with the practice.[8] He agreed that the practice was costly but indicated that it had to be budgeted for as it was a condition of service. The witness indicated that the SARS Commissioner highlighted the objects of leave and that it was not to give employees more money, but they did not agree with his view. In principle he agreed that leave had an impact on the wellbeing of employees.

32. He could not dispute that the Respondent's budget was determined annually and that the income was allocated to SARS by Treasury. He agreed that if the Respondent did not have enough budget and that it was running a deficit, that it would impact on its ability to honour commitments. He also confirmed that currently there was a pending High Court matter where the issue is that the Respondent is unable to pay the negotiated wage increases.

33. In the NBF meeting held on 5 November 2020[9] Organised Labour raised a concern and requested clarity why some of the Conditions of Service Policy provisions had been amended. This related to the 2006 collective agreement. The Respondent indicated that there was consultation at NCF on all changes made on the policy. The response was that it had no bearing on the policy but was intended to expand on issues not clarified. Organised Labour indicated that it was a requirement of the SARS Act to consult on any changes big or small. Organised Labour indicated that any changes of conditions of service had to be discussed at NBF by the Head: Remuneration & Benefits. It was decided that the matter would remain on the agenda and the Respondent would respond to Organised Labour in writing on Conditions of Service Policy by the next meeting. The PSA also raised the concern that their members requested clarity on the Respondent's position as to whether they would be able to encash six (6) days of unutilised leave as the previous year an issue arose. It was decided that the Respondent would schedule a leave encashment meeting by mid November 2020.

34. Since the communication by the SARS Commissioner on 7 February 2020, the issue was raised again by PSA, no further communication was received in this regard from the Respondent.



[8] 1st Applicant's Bundle page 130.
[9] 1st Applicant's Bundle page 139, 146, 148.

35. In the NCF of 7 December 2020[10] a presentation was made on the issue of annual leave and they were informed of the changes to the leave dispensation. It was similar to the proposal made in 2019 which did away with the option of annual encashment and only upon retirement / termination would a limited number of days be paid out. Organised Labour again rejected the proposal.

36. At the NBF of 4 February 2021[11] Organised Labour made it clear to the Respondent that they would not agree to the discontinuation of the leave encashment benefit and that they reserved their rights. The Respondent indicated that the status quo remained and that they would seek mandate from their principals and revert back at the next NBF meeting and that a Multilateral Meeting would be scheduled on Annual Leave Encashment Practice.

37. On 23 February 2021[12] he wrote an email to the NBF indicating the reasons for rejecting the Respondent's new leave dispensation draft proposal. The reasons for rejection were read into record. No feedback was received and the leave encashment for 2020 was not paid out in 2021 as per the policy. Under cross-examination he agreed that if employees were struggling to take leave it was something that could be managed and negotiated with the employer but some of their members were not in favour of a mandatory leave policy as they did not want to be forced to take leave on a specific time and they would rather utilize leave encashment.

38. A new unfair labour practice dispute was referred to the CCMA on 14 April 2021.

39. In his view, no new agreement had been reached between the Respondent and Organised Labour since 2006 and the collective agreement remains valid.



40. The Respondents claim of financial constraints was unjustified. The benefit has come a long way, it is a condition of service and it has always been budgeted for. Budget constraints should not have an effect on one thing only and needed a holistic approach, that was why the task team was given an opportunity to look into constraints.

41. During cross-examination the witness agreed that the issue of the leave encashment was raised and discussed with Organised Labour in November 2020 at the NBF and that the employer highlighted that there would be no leave encashment payout and the practice would be abandoned. The new leave dispensation did not get rid of leave but only the encashment is removed and in some respects even more days were added. He also agreed that in 2006 the Respondent could not foresee the future and

[10] 1st Applicant's Bundle page 157 – 163.
[11] 1st Applicant's Bundle page 169, 174.
[12] 1st Applicant's Bundle page 178-181.

know that it would be facing a deficit in 2020, and that if Treasury cut the allocation that it would affect the capacity of the organisation to pay for leave encashment. He further agreed that other expenses were affected like bursaries, interns, etc. and not only leave encashment but said that items those did not come from a collective agreement.

42. He also agreed that at the NBF of 4 February 2021 the Respondent again raised the issue. It was thus not a true reflection to say that the Respondent unilaterally changed the terms and conditions of employment by discontinuing the annual encashment of leave. The Respondent tried to obtain the consent of Organised Labour since November 2020[13] and that a task team had an opportunity to look into cost savings with regard to the financial constraints. He could also not dispute that the practice was not prescribed by any statute.

43. In relation to the issue of a decrease in the economic growth, the witness had no first-hand knowledge and he could not recall anything of this sort being conveyed to him by the Respondent in consultations. He was aware of the deficit as conveyed by the SARS Commissioner but he had no knowledge of the figures. He was aware that SARS took measures such as not paying increases to employees not in the bargaining unit, a moratorium on vacancies, etc.

44. **Mr. Sebusiso Given Valashiya** testified under oath that he was an Operational Manager at SARS but was released in 2012 to perform union duties and he was currently the National Co-ordinator of NEHAWU at SARS. The dispute related to the withdrawal of the leave encashment benefit which culminated through the NBF process where the dispute could not be resolved.



45. He gave a brief exposition of the circumstances leading to the conclusion of the collective agreement in 2006. It resulted from a situation where employees lost leave days because operationally, they were not able to take their leave, encashment of a maximum of six (6) days was then negotiated. The benefit was ultimately included in the Conditions of Service Policy and could therefore not be unilaterally withdrawn. There were no other collective agreements concluded that replaced this agreement.

46. As a benefit the leave encashment was budgeted for by the organisation and therefore the Respondent could not say they did not have funds to pay the benefit to employees. It was not discretionary as in the case of bursaries and performance bonus and that was where the issue of a deficit was coming in.

[13] 1st Applicant's Bundle page 198.

47. They became aware of the intention of the Respondent to cancel the leave encashment as well as the bursaries during the built up to the 2019 wage negotiations. A task team was formulated but the focus of the task team was not on the leave encashment as the proposal had already been rejected by Organised Labour as it was a benefit and a condition of service.[14] The task team looked into cost cutting measures and fruitless and wasteful expenditure. Proposals were made but it was in his view not considered by the Respondent and the wasteful expenditures continued.[15] In the response from Mr. Mampuru, it was indicated that the issues raised in the submissions were already catered for. NEHAWU was of the view that if the proposals as suggested were implemented in totality that there would be enough money for the leave encashment benefit. The task team was only used to get rid of the leave encashment benefit.

48. It was put to the witness that their proposals would not have had a real impact on the deficit and that it was not even costed. The witness stated that it could not be costed as they were not provided with the information they required. If SARS allowed the process to unfold, perhaps the story would be different.

49. Reference was made to some of the proposals made by NEHAWU and it was put to the witness that these proposals were already underway. The witness responded that such was not communicated to them. It was further put to the witness that the issue of relocation costs was limited and that it would not make an impact. The witness indicated that because they did not have figures, he could not agree to the statement. The witness then expanded on their proposal that the current budget of funded vacancies should be used to top up employees' salaries though a mobilization process which would save over 65% of the allocation, however no figures were provided. In his view it was the duty of SARS to substantiate the claim of lack of funds.



50. It was put the witness that he was testifying on assumptions and no numbers are placed before the arbitration. It was agreed that SARS had closed offices and some savings were achieved but the witness did not want to respond to the submission that despite the savings there was still not enough money, because in his view it was something to be addressed in the High Court dispute. He highlighted the period of dispute was 2020/2021 and now there are new expenditures.

51. Leave encashment could not be argued to be part of fruitless and wasteful expenditure as it was negotiated as a benefit in a collective agreement and factored into the budget.

52. In cross-examination he agreed that SARS prepared a budget and requested the money from Treasury, but it was never communicated to them that Treasury did not allocate money for the leave

[14] 1st Applicant's Bundle page 72-74.

encashment and this was now only recently raised. He however disputed that Treasury did not allocate the budget as requested and as such dispute that a deficit exists. He was referred to the communication[16] that stipulates that the task team was created to look into the deficit resulting from the allocation received by Treasury. He stated that it was only an estimation and they wanted to look into the finances, to them it remained an estimation and was not what was allocated by Treasury. It was put to him that the first witness confirmed that the Respondent disclosed its finances to Organised Labour, but he disputed that NEHAWU was provided information and it was recorded in their communication.

53. He confirmed the engagements with the Respondent in the NBF and NCF and also indicated that the new leave dispensation and the withdrawal of the leave encashment benefit was rejected by Organised Labour throughout and also in the bilateral meetings. In cross-examination he also agreed that the issue of leave encashment and financial constraints had been raised from 2019. He could not dispute that the cost of leave encashment amounted to 80 – 90 million per annum.

54. The Respondent did not utilise the dispute resolution clause as contained in the collective agreement to address the issue of unaffordability.[17] The Collective Agreement also did not have a cancellation clause. In cross-examination it was established that the agreement identified the CCMA as the forum to deal with disputes.

55. It was not fair for the Respondent to withdraw the benefit as it was in violation of the collective agreement and also not in line with the constitution of the NBF which speaks to the dispute mechanism processes which speaks to what is contained in the collective agreement.



56. In cross-examination the witness agreed that the SARS Commissioner indicated that he did not agree with the practice and he could not dispute that the cost of leave encashment amounted to 80 – 90 million per annum. The witness however testified that as NEHAWU they believed that the leave encashment was factored into the budget and therefore the funds were available, however no evidence of this was presented.

57. He was aware of the pending dispute in the High Court but it has no relation to the current dispute at all.

**Respondent's case:**

[15] 1st Applicant's Bundle page 76.
[16] 1st Applicant's Bundle page 76.
[17] 1st Applicant's Bundle page 27.

58. **Ms. Susan Visser** testified under oath that she was employed as the Head of Employee Shared Services and from March 2021, she was also the Head of Remuneration and Benefits on an interim basis. She had 30 years of service with SARS. She gave a brief exposition of what her duties entailed and indicated that she was the custodian of the Conditions of Service Policy which contained the leave provisions of SARS. She was part of the team that developed the leave dispensation and policies in 1999 when SARS became an autonomous organisation.

59. In cross-examination she agreed that the 2006 collective agreement had been incorporated into the Conditions of Service Policy and since then some amendments were made. The policy was effective from 21 December 2017. She was not aware of any other collective agreement in relation to leave.

60. When asked why SARS did not honour the agreement, she stated that it was because of the financial constraints, unaffordability and because SARS did not want to continue with the practice. She agreed that conditions of service could not be changed unilaterally and therefore the consultations were held with Organised Labour to cancel the practice.

61. She stated that employees had to take annual leave to rest and refresh and that contributed to productivity of the Respondent. There were also some other types of leave in the policies.

62. Before 1997, SARS was part of the Finance Department and a Government Department. When SARS became autonomous, they reviewed their HR policies and one of the first policies reviewed was the leave policy. The scenario was that leave could be accumulated without a cap leaving some employees with 400 days accumulated which was very costly. Accumulation was then capped at 20 days and 6 days per annum could be enchased and other days must be used in an 18-month cycle.

63. Currently the 2016 agreement applied: An employee could accumulate five (5) days in the brought forward balance category to a maximum of 20 days; the employee can then encash six (6) days if they wish to, but if not, the leave is placed in the forfeit leave category and must be taken by June the next year.

64. Challenges were on multiple levels as many employees have more than 10 years' service and then get additional leave days. Most do not take all the leave purposefully and the encashment and then affects the affordability of the practice. The trend had also been noted that Wellness Services were

utilized more severely and there was in increase in the usage of sick leave. Reference was made to some statistics.[18]

65. The presentation indicated that the cost to SARS for leave encashment had grown from R53 million in 2015 to R74 million in 2019. If it was paid in 2020 the cost would have been approximately R102 million. The Wellness Utilisation Rate was 10% and the top three wellness risks were identified to be stress, relationship issues and mental health/psych. The sick absence rate for 2019 was 4.51% and the industry benchmark was 2 – 3 %. The 2020 rate of 2.3% was influenced by Covid and personnel working from home and not logging sick leave when they do not feel well. Sick utilisation rate was at 95% in 2019 and 55% in 2020 and the industry benchmark was 25-30%. The aforementioned shows that employees were not using leave sufficiently to rest despite the generous leave provided by SARS (24 – 29 days per annum), instead they elect to sell back the days to SARS.

66. For SARS the practice of leave encashment was unjustifiable, unsustainable and unaffordable. The practice was also not aligned with other Departments in the broader Government where the current dispensation was a "use it or lose it" basis nor was this a practice in the private sector.

67. She did not agree with the submission in cross-examination that employees had ample leave to encash and to rest and based her answer on the statistics that showed employees were utilizing the wellness services and sick leave more extensively.

68. In the 2019 wage negotiations, SARS tabled a proposal on a new leave dispensation which they believed was aligned with best practice. The proposal included the discontinuation of the encashment and employees would get an additional leave day between 5 – 9 years of service adding up to 29 leave days and after 10 years of service they would get 30 days annual leave. The leave was further split into two categories: statutory leave in compliance with the BCEA which they would be forced to take and non-statutory which could be accrued up to 60 days for a sabbatical or for use in case of family emergencies. The cycle would remain 18 months and they also looked at leave over the festive season.[19] The proposal was rejected by Organised Labour and therefore not implemented at that time.

69. Because there were peak and off-peak times for different categories of workers within SARS, leave must be planned by staff and management according to the operational requirements and the 18-month cycle was sufficient to cater for this. She could not dispute that some employees could not take

[18] Respondent's Bundle page 119.
[19] Respondent's Bundle page 124.

leave between January and March and indicted that employees in her division took leave during that time.

70. She was taken through a time line of communications and meetings. She confirmed that in 2018 the decision was made to pay the encashment. She could not explain why there was no communication regarding the alleged financial constraints between March 2019 and August 2019[20] and she conceded that there was also no communication from the Respondent to the employees between 7 February 2020 and 5 November 2020.[21] She elected not to comment on the statement that while employees were planning their leave the Respondent did nothing for nine (9) months and then two (2) months before the leave encashment became due, the benefit was withdrawn.

71. The proposal of the new leave dispensation was again tabled in December 2020 and rejected by Organised Labour in December and again rejected on 23 February 2021.

72. A joint task team was created to look at the finances and possible cost cutting options and since 2019 the Respondent has expressed its view on the leave encashment and has highlighted the issue of financial constraints and their position on the issue never changed.

73. She conceded that the Respondent had embarked on an aggressive recruitment campaign during 2021 wherein approximately 250 new employees were appointed and that currently there were approximately 250 vacancies advertised. Also, that appointing specialists were expensive and that where they were upskilling, employees' salaries would be increased. She explained that SARS had to balance development of employees and after bursaries were requested, this after there were no bursaries given in 2019 and a moratorium placed on the filling of vacancies. She stated that additional money was received from Treasury but that it was ring-fenced to obtain special skills required by the organisation. It made no sense not to address the skills gap in the organisation and to use the money for leave encashment and as SARS, they were seeing how best to utilize the available finances.



74. **Ms. Musa Langa-Makhaye** testified under oath that she was employed as a Manager in Collective Bargaining and responsible for collective bargaining issues in the NBF and NCF and liaison between the employer and employees.

75. During the 2019 wage negotiations, Organised Labour said that they were of the view that SARS was not negotiating with them in good faith. Discussions were held and it was decided that a task team would be established to look at cost savings initiatives. The terms of reference and time frame were

[20] 1st Applicant's Bundle page 79.

set and everybody was able to continue. The process was to end by close of business on 28 February 2019. It was also agreed that the issues raised and withdrawn in the communication of December 2018 would be held in abeyance to enable the processes to move forward.

76. Parties in the task team were equal partners and all were privy to information. Organised Labour would ask questions and information was shared. At that stage other cost cutting measures had already been embarked on and such information was shared. Organised Labour made contributions[22] and all of it was considered. Some of the initiatives had a very minute impact but all was considered. All proposals were included in the spreadsheet by finance and send to the Secretary of the NBF.[23] The proposals were then directed to the "powers that be" for consideration and a decision to be made. EXCO made the final decision based on what was allocated by Treasury to SARS. The task team's focus was not solely for the purpose of dealing with leave encashment but cost saving initiatives addressing the deficit in totality.

77. Under cross-examination with reference to the task team[24], she was unable to confirm whether the proposals made by Organised Labour on cost saving initiatives were actually communicated or sent to EXCO or whether there was a report from EXCO on the recommendations. She also did not know when EXCO made the decisions or why there was no report. There was no response to the resubmission of the list of initiatives submitted after the deadline as it was already responded to.

78. Leave had been part of the discussions on wage negotiations[25] and that included moving away from the leave encashment practice.

79. At all times during communications since March 2019, the position of the Respondent was made clear and Organised Labour was informed that SARS wanted to move away from the leave encashment practice as a result of financial constraints.[26] The Respondent's position on this never changed but Organised Labour came back and said that the issue needed to be revisited[27] and the position of SARS was confirmed but Organised Labour did not agree.

80. She attended the meeting of 6 November 2019[28] and the discussion with Organised Labour continued. SARS position remained the same. She also attended the meeting[29] on 11 October 2019

[21] 1st Applicant's Bundle page 130.
[22] 1st Applicant's Bundle page 75 – 76.
[23] 1st Applicant's Bundel page 78.
[24] 1st Applicant's Bundle page 72.
[25] 1st Applicant's Bundle page 83.
[26] 1st Applicant's Bundle page 81.
[27] 1st Applicant's Bundle page 86.
[28] 1st Applicant's Bundle page 99, 103.

which was a high-level strategic meeting with Organised Labour and the paying points being the element of leave was also discussed together with the financial constraints. She was present at the meeting of 5 November 2020[30] and PSA raised the issue that members were moving towards the time of taking leave or encashment and they wanted clarity if it would be allowed. Again, on 4 December 2020 it was a topic at the NBF and parties did not agree. PSA was to consult and revert back to the Respondent. Subsequent to a strategic meeting with Organised Labour on 24 March 2021, Organised Labour rejected the new dispensation and challenges were raised hence the letter of 26 March 2021[31] was written and the position of SARS was re-emphasised and the bullet points (unaffordable given the current and future financial and funding constraints; unsustainable and unjustifiable practice; not a practice in support of SARS' Strategic Intent; and not aligned with practices applied in broader Government) have always been raised with Organised Labour.

81. In cross-examination she disputed the statement that there was no purpose for the meeting as the decision had already been taken. She said that it was not the first meeting on the issue and the intention was to continue engagement with Organised Labour to provide clarity on the issue.

82. She alluded to the once of payments of R1500.00 that were made and indicated that it was not an issue raised in 2019 and formed part of an agreement for this year. It resulted from a meeting with Organised Labour where the plight of employees was recognised and it was an attempt to help out in good faith and salvage what they could. This did not mean that SARS was no longer having financial problems.

83. She was not aware of any other collective agreement that revoked the 2006 agreement and indicated that at this moment they were working with the policy which had the same wording. She confirmed that the policy had not officially been revoked but that consultations had been held and the intention of the Respondent had been made known. The agreed processes referred to the SARS Commissioner in his communication[32] referred to the NBF and NCF.

84. She did not agree that the task team was only a pacifier because it was a process that ran parallel with the wage negotiations. The aim was to delve into financials of the organisation and to come up with cost saving initiatives to address the deficit of R808 million, it was not aimed at specifically leave encashment only.



[29] 1st Applicant's Bundle page 105, 119.
[30] 1st Applicant's Bundle page 139, 148, 155.
[31] 1st Applicant's Bundle page 198.
[32] 1st Applicant's Bundle page 130.

85. **Ms Yolandi van der Merwe** testified under oath that she was the Chief Financial Officer of SARS. She was responsible and accountable for the budget and managing it. She provided some background on the legislative framework and operations of SARS and how money/grant is obtained from Treasury.[33] SARS had to submit an estimated budget aligned with the core mandate of the organisation for the next three (3) years by June/July every year, and that fed into the Medium-Term budget speech of October. Then the ENE (Estimated National Expenditure) process followed which starts with a preliminary budget process where they have to explain how they would spend the allocation and Treasury required that it fits into the grant allocation on the excel database. The grant allocated to SARS in the last three years was not sufficient and therefore a deficit now existed. Thus, the allocated budget had to be optimally utilized to deliver on the organisations mandate.

86. A letter[34] was written to Treasury because of PFMA requirements and Treasury was informed that SARS needed an additional R260 million to conclude business, a further R225 million for critical vacancies and in estimation they needed a further R380 million for the financial year. A request for an allocation to cover the deficit was made. The request was not approved and the advice to utilize the AENE process, did not result in an additional allocation being made. Instead, further budget cuts resulted for the Covid relief fund.

87. She confirmed that in the said financial year the non-bargaining forum employees did not get paid increases but the bargaining forum employees did get the increases as per the wage agreement. Bonusses could also not be paid.

88. Previously there were no constraints on SARS until 2016/2017 and thereafter there was a 5.2 billion reductions over the next few years which was significant. Consequently, in 2016/2017 a moratorium was placed on the filling of vacancies and future attrition from September 2018. The money swept from this was used to fund salaries and leave encashment. Resources were not developed and became depleted and that has started to impact on service delivery and the moratorium could no longer be sustained. Therefore, the aforementioned moratorium was lifted in 2021.

89. In 2019/2020 the issue of encashment was highlighted to the new SARS Commissioner. The SARS Commissioner started to raise the issue in 2019 and said that the leave encashment would not be paid, but ultimately the encashment was paid in 2020 because all budget was no utilized where allocated and therefore the "left over" could be swept. The leave encashment was paid only in March 2020. If money allocated by Treasury was not used, then it must be returned after 31 March.

[33] Wage dispute pleadings page 58, 61.
[34] Wage dispute pleadings page 78, 80.

90. The gratuity payment of R1500.00 was linked to the increases and once it was established that there were some operational savings the SARS Commissioner was informed and it was decided to pay the gratuity as a once off expenditure which did not have a knock-on impact to the next year.

91. The moratorium of the past couple of years resulted in a shortage of critical skills in the organisation and the graduate program was also stopped. Subsequently the additional R1 billion from Treasury was ring-fenced for three areas: Annual performance plan projects; ICT infrastructure; and critical vacancies. The R1 billion could not be used for anything else and was kept separate from the rest of the allocations. Money for attrition was no longer swept and departments were allowed to fill vacancies where it was a critical need or if a specialist was needed, the management capacity team had to sign off on the appointment. Vacancies were also budgeted for at mid points of pay bands and where a "saving" occured in terms of an appointment, the balance was released for further appointments.

92. The revenue target for collection by SARS was increased significantly in the Mid-Term budget and to attain this target 250 fixed term contract (January – April) appointments were made in the debt collection space as not meeting the target set had far reaching implications. It not only affected collections but also the credit rating of the country and National Treasury planning. Some permanent appointments were also made for call Centre agents to improve service delivery but these appointments were not as costly as specialists.

93. Encashment was not part of the original intention of leave and priorities had to be identified for purposes of budget allocation.



94. In cross-examination the witness indicated that when preparing the budget SARS prioritized salaries and then contractual obligations where after operational expenditure and projects followed. They did however not prioritize the obligation in terms of the collective agreement as it formed part of labour.

95. It was put to her that the testimony that the increases which were paid due to the wage agreement supported the case of the Applicants as that also culminated from a collective agreement.

96. In relation to the estimation requested from Treasury[35], she confirmed that they did not ask for money for the leave encashment as they already foresaw the changes to the policy. She also confirmed that approximately R742 million was received more for 2021 than for 2020.

## ANALYSIS OF EVIDENCE AND ARGUMENT

[35] 1st Applicant's Bundle page 277.

97. The facts in this case are a classic example that one set of facts could be pursued in three different categories of disputes:

a. Contractual disputes typically arise when a party does not comply with the terms of a contract or does not perform their side of its obligations under a contract. The obligations stemming from the collective agreement could have been pursued as a contractual dispute in which case the CCMA would not have the jurisdiction to arbitrate the dispute.

b. Allegations of a unilateral change to terms and conditions have been made and such a dispute, being a matter of mutual interest, would have to be resolved through industrial action. Disregard by an employer of a binding collective agreement which governs terms and conditions of employment will amount to a unilateral variation. Disputes regarding unilateral changes to terms and conditions of employment are disputes of interest and therefore cannot be arbitrated by the CCMA.

c. The Applicants have however chosen to refer this matter as an alleged unfair labour practice relating to benefits in terms of section 186(2) of the LRA. It is therefore for the Applicants to discharge the onus on a balance of probabilities that an unfair labour practice was committed by the Respondent. In these disputes the test is not lawfulness of the conduct, but the fairness.

98. Having outlined the above categories, I will navigate through the maze of facts and focus solely on the aspect of an alleged unfair labour practice, which is the only dispute I am empowered to arbitrate.



99. Section 186 (2) of the LRA defines an unfair labour practice to be any unfair act or omission involving unfair conduct by the employer relating to (in this case) provision of benefits to an employee.

100. In *Skhosana v CCMA and others* (JR 2160/15) [2019] the Court held that in the case of an unfair labour practice dispute relating to benefits, it is often difficult to draw a clear distinction between what is the substantive justification for the conduct of an Employer, and what can be seen to be procedurally fair in the course of such conduct. In the end, it is a single holistic enquiry, with the view to deciding whether the decision taken by the Employer was fair. It is not appropriate to separate it into substantive and procedural components. There is no distinct and separate requirement of procedural fairness, in unfair labour practice disputes relating to benefits, as would be, for example, the case where it comes to dismissals. The unfair labour practice doctrine is intended to protect against irrational, mala fide and arbitrary decision making by an Employer, and any decision by an Employer

must be evaluated on that basis, and not the basis of the dual fairness requirement of substantive fairness on the one hand, and procedural fairness on the other.

101. Based on the aforementioned judgement the analysis will follow a holistic approach.

102. In *Apollo Tyres South Africa (Pty) Ltd v CCMA and others* (2013) 34 *ILJ* 1120 (LAC) the Court held the definition of benefit, as contemplated in section 186(2)(a) of the LRA was not confined to rights arising ex contractu or ex lege, but included rights judicially created as well as advantage or privileges Employees have been offered or granted in terms of a policy or practice subject to the Employer's discretion.

103. From the evidence presented and the common cause facts it is clear that the right to the leave encashment stems from both a collective agreement and a policy. The collective agreement was open ended and at no stage did the Respondent withdraw from the collective agreement as provided for in section 23(4) of the LRA. In addition to this, the content of the collective agreement was thereafter included in the Conditions of Service Policy of SARS. Therefore, the Applicants have established the right to the leave encashment. I reiterate that I am not in a position to pronounce of the validity and enforcement of the collective agreement (the contractual dispute) and as indicated in paragraph 94(b) above that a disregard by an employer of a binding collective agreement which governs terms and conditions of employment will amount to a unilateral variation which cannot be arbitrated by the CCMA.

104. It was not an issue in dispute whether the option of leave encashment was benefit and based on the *dicta* in *Apollo Tyres SA (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 1120 (LAC), I am satisfied that the option of leave encashment is indeed a benefit. I am however mindful that leave encashment it is not a stand-alone benefit and that it is intrinsically linked to the provision of annual leave. It was also noted that the number of leave days of employees were not made less.

105. For an unfair labour practice to exist there must be an act or an omission which is, in itself, unfair. Section 186(2) cannot be utilized as a vehicle to enforce contractual rights and therefore the starting point in deciding the issue is considering objective justification for the conduct of the Respondent. The determination of whether the conduct of the Respondent to discontinue the leave encashment portion of the annual leave was unfair, entails considering whether the decision is objectively justified, accounts for all the relevant facts, and is not arbitrary (based on random choice or personal whim, rather than any reason or system), capricious (making of a decision without reasonable grounds),

mala fide (carried out in bad faith or with intent to deceive), irrational (not logical or reasonable) or grossly unreasonable (not guided by or based on good sense).

106. Extensive evidence was presented on the operation of the NBF and NCF in SARS as well as numerous meetings held from 2019. My understanding of the evidence was that in the NBF negotiations took place and at the NCF matters were already decided and simply communicated to participants. The evidence of Mr Valashiya confirmed that the dispute related to the withdrawal of the leave encashment benefit which culminated through the NBF process where the dispute could not be resolved and the evidence of Mr Matthysen also reflected that the Respondent tried to obtain the consent of Organised Labour in changing the leave dispensation, but that Organised Labour rejected the proposals.

107. The documentary evidence was supported by verbal evidence that as far back as 2019, the Respondent raised the issue of financial constraints in both the NBF and NCF and they made a proposal on a new leave dispensation. The proposed leave dispensation eliminated the option to sell back leave to SARS (encashment) but introduced additional days of leave from 5 years of service instead of 10 years of service. The proposal was rejected. In 2020 the proposal was tabled again and it was common cause that throughout the Applicants rejected the proposal and insisted on the annual leave encashment benefit remaining in force.

108. In the matter before me the Respondent was without a doubt experiencing financial constraints. Evidence on a balance of probabilities proved that the Respondent was not allocated the requested budget by Treasury and ran a deficit amounting to 808 million. The CFO, Ms Yolandi van der Merwe, testified on the process of requesting the required budget and indicated that historically the requested budget was allocated, but from 2016/2017 Treasury reduced the allocation significantly and the Respondent had to optimally manage the operations with available funds. The only witness that disputed the issue of financial constraints was Mr Valashiya that submitted that if the Respondent implemented all their cost cutting initiatives, then the financial constraints would not be an issue. His evidence was however not substantiated and based on his own version, he could not speak to the issue of actual numbers and costing.



109. The financial constraints were not caused by the Respondent themselves but resulted from the reduced allocation of funds by Treasury. The conduct of the Respondent not to pay the annual leave thus had a commercial rationale.

110. It was further noted in the evidence that despite the unaffordability and unsustainability of the annual leave encashment practice, that when plans could be made, the leave encashment was paid out. It

was undisputed that from September 2018 a moratorium was placed on the filling of vacancies and attrition and the available budget swept, and as a result of that enabled the Respondent to honour the leave encashment and CCMA settlement agreement of 2019 paid out in 2020. Examples of other measures implemented during this time included that non-bargaining unit employees did not get increases or bonusses. Even in 2021, when there were some savings left, some was channeled into the R1500.00 gratuity that was paid.

111. The primary mandate of the Respondent entails the collection of revenue which directly impacts on the National Treasury allocations for Government and it has an influence on the credit ratings of the country. The non-filing of vacancies and the exodus of employees has however left a skills gap in the organisation which now required urgent attention to ensure the organisation delivers on its mandate. This meant that the unintended consequence of the budget deficit needed to be diverted elsewhere.

112. In the matter of *Phil Skinner and others v Nampak Products Limited and others* (JS 197/16) [2019] ZALCJHB 189 the court dealt with a similar question and stated: "*Therefore, can it be said that where there is commercial rationality, there is unfairness? I reckon not. To borrow from the jurisprudence developed in dealing with dismissal for operational requirements, the LAC reasoned thus, in the matter of BMD Knitting Mills (Pty) Ltd v SA Clothing and Textile Workers Union, 47: '... Viewed accordingly, the test becomes less differential and the court is entitled to examine the content of the reasons given by the employer, albeit that the enquiry is not directed to whether the reason offered is the one which would have been chosen by the court. Fairness, not correctness is the mandated test.*"

113. In taking guidance from the abovementioned judgement, I cannot decide on whether the withdrawal of the annual leave encashment practice was the correct answer to the financial constraints. I can only conclude that indeed the Respondent faced serious financial difficulties and that the consequences of not delivering on their operational mandate had far reaching and dire consequences. Prioritising expenses and effectively managing operations within the allocated grant was essential.

114. The Applicants' case to a large extent was based on the argument that the leave encashment had to be budgeted for, but what was the Respondent to do when (like in the past) the necessary funds were not allocated. The consequences of not addressing the skills shortage now and not using available budget to ensure that the revenue target is met, could affect all employees much more severely in the long run. This while the entitlement to the number of annual leave days have not been affected and employees are free to utilize their leave.

115. Based on the aforementioned I cannot come to the conclusion that the conduct of the Respondent was arbitrary, capricious, mala fide, irrational or grossly unreasonable. This clearly, in my view,

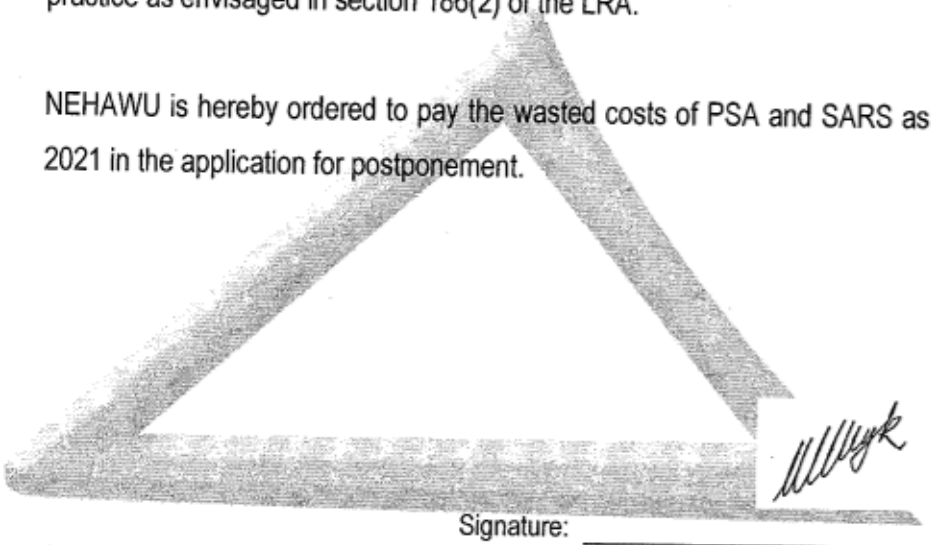
constitutes a proper substantive basis justifying the making of such a decision. The Applicants were made aware in no uncertain terms that the Respondent was facing financial difficulties and that the leave encashment practice was costly and unsustainable. The decision was thus far from simply being unilateral as a clear path of consultations took place over a period of almost two years.

116. I therefore find that the Applicants have failed to discharge the onus to prove that the conduct of the Respondent amounted to an unfair labour practice as envisaged in section 186(2) of the LRA.

**AWARD**

117. The conduct of the Respondent, South African Revenue Service, does not amount to an unfair labour practice as envisaged in section 186(2) of the LRA.

118. NEHAWU is hereby ordered to pay the wasted costs of PSA and SARS as tendered on 1 December 2021 in the application for postponement.



Signature: _____

Commissioner: ***Suria van Wyk***

Sector: ***Banking/Finance***