

# ARBITRATION AWARD



IN THE GENERAL PUBLIC SERVICE SECTORAL  
BARGAINING COUNCIL (GPSSBC)

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Case Number: GPBC 2105/2021  
Commissioner: Tiyani Makhubele  
Date of Award: 27 September 2022

In the **ARBITRATION** between

**PSA Union obo Priya Lutchman**  
(Union/Applicant)

And

**National Treasury**

Union/Applicant's representative: Thabo Thobakgale

Respondent's representative: Adv Zenani Zingisa

## **DETAILS OF HEARING AND REPRESENTATIONS**

- 1 This is an award in the arbitration between **Ms Priya Lutchman** (hereinafter referred to as the Applicant) and **National Treasury** (hereinafter referred to as the Respondent).
- 2 The matter was set down for arbitration on 7 March 2022, 16, 17 May 2022, 7, 8 July 2022, and 1 and 2 September 2022. The Applicant appeared in person and was represented by Mr Thabo Thobakgale, a trade official. The Respondent was represented by Adv Zenani Zingisa, a practicing Advocate instructed by the Office of the State Attorney.
- 3 The arbitration was referred in terms of section 191(1) (5) of the Labour Relations Act 66 of 1995, as amended (the LRA). The award is issued in terms of section 138 (7) of the LRA.
- 4 Parties agreed to submit heads of argument by no than later 9 September 2022. I confirm having received the heads on the agreed date.  
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- 5 The proceedings were digitally recorded.

## **ISSUE TO BE DECIDED**

- 5 I am required to determine whether or not the dismissal of the applicant was substantively and procedurally fair. If not, I am required to determine the appropriate relief.

## **BACKGROUND TO THE DISPUTE**

- 6 The Applicant was employed by the Respondent on 1 December 2020. The Applicant was employed by the Respondent as a Chief Financial Officer. The Applicant was dismissed from her employment by the Respondent on 10 December 2021. At the time of her dismissal, the Applicant earned a salary of R85 072.12 per month.
- 7 For the purpose of completeness, the Applicant was charged with and found guilty of the following acts of misconduct:

## **GROSS DISHONESTY**

*It is alleged that you, Ms Priya Lutchman committed an act of “Gross Dishonesty”*

- *In that on or about 31st of August 2020, you failed to disclose full details that your former employer (Department of Arts Sports, Culture, and recreation) has preferred charges of misconduct, when you submitted the Pre-Interviews Questionnaire to the national Treasury (recruitment and selection unit).*
- *In that during your interview held on the 31st August 2020, you failed to disclose to the selection (Interview) panel that you were charged with misconduct and that you were undergoing disciplinary process at your former employer (Department of Arts Sports, Culture, and recreation) which breach SMS members ethics code.*

### **Charge 2**

## **MISREPRESENTATION**

*It is alleged that you committed an act of “Misrepresentation”.*

- *In that on or about the 31st of August 2020 when you submitted the Pre-interview questionnaire to National Treasury, you purported to be the aggrieved party while aware or ought to have known that formal charges were preferred against you, which you deliberately intended to mislead and misrepresented facts to National Treasury.*
- *You deliberately delayed the submission of your Pre-interview Questionnaire to National Treasury while were advice through email correspondence dated the 24th August 2020 with the intension to misrepresent information to advance your employment opportunity..*

8 Dissatisfied with her dismissal, the Applicant referred the dispute to the Council

- 9 The case was scheduled for a conciliation hearing. Attempts to resolve the dispute through conciliation were unsuccessful. The Applicant referred the matter for arbitration.
- 10 The Applicant seeks retrospective reinstatement in the event that I rule in his favour.

### **SURVEY OF EVIDENCE AND ARGUMENT**

- 11 It is not the purpose or the intention of this award to provide a detailed transcription of all the evidence that was placed before me. Even though all evidence and arguments were considered, I have only summarised the evidence that I found to be the most relevant to make a determination in this dispute.

#### ***Respondent's case***

- 12 **Mr Job Stadi Mngomezulu** testified that he was appointed by the Respondent as a Deputy Director General: Corporate Services. Furthermore, he was the immediate supervisor of the Applicant
- 13 On 20 January 2020, the Applicant applied for the position of Chief Director: Financial Management and she was invited to attend interviews on 31 August 2020.
- 14 On 24 August 2020, Ms Unathi Mkapu of the Respondent emailed to the Applicant a copy of an advert, pre- interview questionnaire form, MIE consent form SSA check and virtual meeting etiquette. The Respondent advised the Applicant to submit a pre-interview questionnaire, copy of certified qualifications including matric or senior certificate, a clear copy of ID (not older than 3 months) and salary advice or pay slip for processing.
- 15 The Applicant failed to submit the pre-interview questionnaire before the interview. The panel members of the interview did not have the pre-interview questionnaire when they interviewed the Applicant.
- 16 He testified that after the interviews, the Applicant submitted to the Respondent a pre- interview questionnaire form, copy of her pay-slip for April 2020 and a document titled 2020-08-31. These documents were submitted to Ms Unathi Mkapu on/around 14H40 p.m.

- 17 In the pre-interview questionnaire, the Applicant wrote that there was a disciplinary action taken against her and the nature of the disciplinary action relates to media exposure of the Executive Authority's unlawful instructions on a procurement related matter in February 2019 and the disciplinary action was expected in light of being one aggrieved parties.
- 18 During the interview, Dr Modise who was the member of the interviewing panel asked the Applicant if she was employed by Department of Sport, Arts, Culture and Recreation and whether she was the one who was lambasted by the MEC on the video that gone viral . The Applicant did not disclose to the panel members that she was on a precautionary suspension and that there was a pending disciplinary hearing against her.
- 19 The Applicant was recommended for appointment and the Respondent conducted background checks. The Applicant was subsequently appointed and resumed duties on 1 December 2020.
- 20 He made announcement of the applicant's appointment. Furthermore, he received information from a whistle blower informing him that there were pending disciplinary proceedings instituted by the DSACR against the Applicant. The Respondent then levelled charges of misconduct against the Applicant.
- 21 It was his continued testimony, that he did not suspend the Applicant because he was of the view that her presence will not influence the witnesses of the Respondent.
- 22 National Treasury introduced a pre- interview questionnaire because it identified a gap in the Z83 application form which did not have a question on whether the applicants have pending disciplinary actions being instituted against them. The pre-interview questionnaire was designed to assist the Respondent to get information from the applicants relating to any pending disciplinary proceedings.
- 23 The charges levelled against the Applicant were not investigated. The allegations levelled against the Applicant were based on documents which were made available to National Treasury by both the Applicant and DSACR.
- 24 During cross-examination, he conceded that a pre-interview questionnaire was not provided for in terms of any policy of the Respondent. He also conceded that when the Respondent appointed the Applicant it was in possession of the pre-interview questionnaire. He also conceded that the Applicant disclosed. He confirmed that there was no investigation into allegations that led to the

applicant' dismissal.

### ***Applicant's case***

- 25 **Ms Priya Lutchman** testified that she applied for the position of a Chief Financial Officer as advertised by the Respondent. She was shortlisted and invited to attend the interviews.
- 26 Ms Unathi Mkapu of Human Resource requested her to complete and submit the pre-interview questionnaire and other documents days before the interview. Dr Modise who was one of the member of the interviewing panel asked her if she was employed by Department of Sport, Arts, Culture and Recreation and whether she was the one who was lambasted by the MEC on the video that gone viral. The panel members appeared to be fully aware of the incident relating to the video. The interview was recorded however the Respondent indicated that the recording was lost.
- 27 It was the applicant's testimony that in the beginning of the interview, she apologised to the panel members for not submitting the outstanding documents including the pre-interview questionnaire. She submitted the pre-interview questionnaire together with other outstanding documents after the interview. She indicated that she did not submit the requested documents in time because she was busy preparing for an arbitration that was to take place on 3 September 2020.
- 28 She testified that, she found it peculiar and shocking when she was charged with gross dishonesty alleging that she failed to disclose full details that the DSACR has proffered charges of misconduct when she submitted the Pre-Interview questionnaire to the National Treasury.
- 29 She disclosed in the pre-interview questionnaire that there was a disciplinary action taken against her and that she provided the nature of the disciplinary action taken against her as required in the pre-interview questionnaire.
- 30 She submitted that if the Respondent needed some information from her regarding the answers she provided in the pre-interview questionnaire, it should have enquired from her. She did not see a need to inform the interview panel about the charges proffered against her by the DSACR since the information was in the public domain, the panel members were all senior managers and by virtue of their positions, they were politically connected and should have known about the charges levelled against her by DSACR.



- 31 The Applicant disputed that she was dishonest in answering the question regarding the issue of disciplinary action being taken against her.
- 32 She was not that informed about the process of the investigation. She testified that the DG did not suspend her when she was charged
- 33 During cross-examination, she conceded that she did not submit the pre-interview questionnaire before the interview. She also conceded that she did not disclose to the panel members during the interview process that she going through the process of disciplinary hearing.

### **ANALYSIS OF EVIDENCE AND ARGUMENT**

- 34 Section 192 of the LRA provides that in any proceedings concerning any dismissal, the employee must establish the existence of the dismissal. Once the existence of the dismissal is established, the employer must prove that the dismissal is fair. The dismissal of the Applicant was not in dispute in this matter; therefore, the Respondent bears the onus of proving, on a balance of probabilities, that the dismissal was fair.
- 35 In terms of Section 188(1) of the LRA, the dismissal of the Applicant by the Respondent is unfair if the Respondent fails to prove that the applicant's dismissal was based on a fair reason and that proper procedures were followed.

### **Substantive fairness**

- 36 The Applicant was charged, found guilty and dismissed for gross dishonesty and misrepresentation. The first critical question for determination is whether Applicant was dishonest and whether the Applicant failed to fully disclose to the Respondent that her former employer (Department of Arts Sports, Culture, and recreation) has preferred charges of misconduct, when she submitted the Pre-Interviews Questionnaire to the National Treasury (recruitment and selection unit).
- 37 There was no legal obligation provided for in terms of the respondent's policy that the Applicant was required to fully disclose to the Respondent that her former employer preferred charges of

misconduct against her.

- 38 During cross-examination, Mngomezulu conceded that a pre-interview questionnaire was not provided for in terms of any policy of the Respondent.
- 39 Close analyses of the evidence presented by the Applicant revealed that the Applicant submitted the pre-interview questionnaire after the interview process. What remains in dispute is whether the Applicant fully disclosed that her employer preferred charges of misconduct against her. The Applicant was asked in the questionnaire if she was aware of any disciplinary action taken against her. In response to the question, the applicant's answer was affirmative. The Applicant further provided an explanation that there was a disciplinary action taken against her and the nature of the disciplinary action relates to media exposure of the Executive Authority's unlawful instructions on a procurement related matter in February 2019 and the disciplinary action was expected in light of her being one of the aggrieved parties. It is my considered view that the explanation provided by the Applicant serve as a disclosure that there was a disciplinary action taken against the Applicant. If the statement provided by the Applicant was not enough or was ambiguous, the Respondent could have asked for additional information. I do not agree with the respondent's version that the Applicant failed to fully disclose in the pre-interview questionnaire that there was a disciplinary action being taken against her by her former employer (Department of Arts Sports, Culture, and recreation) and that her former employer preferred charges of misconduct against her.
- 40 The Applicant testified that before the interview began she apologised to the panel members of the interview for failing to submit the outstanding documents and that none of panel members objected that the interview would not continue because the Applicant did not submit a pre-interview questionnaire. The evidence presented by the Applicant regarding the interview also revealed that Dr Modise who was one of the member of the interviewing panel asked the Applicant if she was employed by Department of Sport, Arts, Culture and Recreation and whether she was the one who was lambasted by the MEC on the video that gone viral. I am inclined to agree with the applicant's contention that the panel members were aware about her disciplinary issues since they asked her about it during the interview.
- 41 After the interviews, the Respondent was in possession of the pre-interview questionnaire that was submitted by the Applicant. The Respondent could have contacted the applicant's former employer to get more clarity about the disciplinary hearing that the Applicant was undoing at the time. Despite being aware of the information disclosed by the Applicant on the pre-interview questionnaire, the



Respondent went ahead and invited the Applicant to attend a competency test. Moreover, the Respondent conducted reference check and continued to appoint the Applicant.

- 42 Relative to the charge about misrepresentation, I was not persuaded that the Applicant was guilty of this charge. The fact that the Applicant portrayed herself as a victim cannot be said that she misrepresented the facts. The applicant's disciplinary hearing was yet to be finalised, therefore the Applicant was considered innocent until proven guilty.
- 43 In light of the aforesaid analyses, it is my conclusion that the applicant's dismissal was substantively unfair.

#### **Procedural fairness;**

- 44 When arbitrators decide whether a dismissal was procedurally fair, they must have regard to Item 4 of Schedule 8 of the Act (Code of Good Practice). Item 4 of Schedule 8, spells out the nature and extent of a right to a fair procedure preceding a dismissal for misconduct. A summary of the requirements as set out in Item 4 of Schedule 8 are as follows; an investigation should be conducted by the employer into the alleged misconduct; employee should be notified of the allegations; employee should be afforded an opportunity to state a case in response to allegations; employee should be entitled to a reasonable time to prepare the response; assistance of a representative or fellow employee; a decision by the employer and notice of that decision. The essence of procedural fairness is whether the employee was given a fair opportunity to state a case in response to the allegation levelled against him by the employer.
- 45 Legal representation is not automatic during disciplinary hearing. The general principle is that legal representation is subjected to the discretion of the chairperson and that it can either be declined or granted. The SMS Hand Book Chapter 7, clause 3(e) provides that in a disciplinary hearing, neither the employer nor the member may be represented by a legal practitioner, unless the member is a legal practitioner. For the purposes of this agreement, a legal practitioner is defined as a person who is admitted to practise as an advocate or an attorney in South Africa. It was clear from the evidence presented that the Applicant was not a legal practitioner.
- 46 Relative to the Respondent failing to conduct an investigation, the Respondent is not legally required to conduct investigation. The essence of procedural fairness is whether the employee was

given a fair opportunity to state his case in response to the allegation levelled against him by the employer. It was common cause that the Applicant was invited to attend a disciplinary hearing and was represented by PSA. It is therefore, appropriate to conclude that the Applicant was given an opportunity to state her case in response to the allegations levelled against her by the Respondent.

## **Findings**

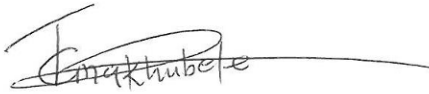
- 47 Based on the analysis above I have reached the decision that the Respondent has failed discharged the onus to prove on a balance of probabilities that the applicant's dismissal was substantively fair. It is, therefore, my finding that the applicant's dismissal was substantively unfair and procedurally fair.

## **Relief**

- 48 Section 193(2) of the LRA sets grounds under which an arbitrator should not order reinstatement. The Applicant's wish was to be reinstated. In my view, the circumstances surrounding the dismissal are not those that would make a continued employment relationship intolerable. In my view, it is practicable for the Respondent to reinstate the Applicant. There is no evidence before me, to the contrary.
- 49 In awarding reinstatement with back pay, I considered the following factors: The dismissal was substantively unfair and the Applicant has been unemployed since 11 December 2021. I find that full back pay of 10 months is just and equitable in the circumstances. (R R85 072.12 x 10= R 850 721.2).

## **AWARD**

- 50 The applicant's dismissal was substantively unfair and procedurally fair.
- 51 The Respondent is ordered to reinstate the Applicant retrospectively with effect from 10 December 2021. The Applicant must report for duty on 15 October 2022
- 52 The Respondent must pay the Applicant R 850 721.2 back pay by no later than 15 October 2022.

A handwritten signature in black ink, appearing to read 'Tiyan Makhubele', with a long horizontal stroke extending to the right.

GPSSBC Commissioner: Tiyan Makhubele