



# ARBITRATION AWARD

Panelist/s: NTATE JOSIAS MABILO  
Case No.: GPBC450/2022  
Date of Award: 27 AUGUST 2022

## In the ARBITRATION between:

PSA obo I Mothapo

\_\_\_\_\_  
(Union / Applicant)

and

Department of Public Works and Infrastructure

\_\_\_\_\_  
(Respondent)

**Union/Applicant's representative:**

Mr. Sibusiso Nkosi of PSA \_\_\_\_\_

Union/Applicant's address:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Telephone:

\_\_\_\_\_

email:

\_\_\_\_\_

**Respondent's representative:**

Mrs. Lebo Hlongwane \_\_\_\_\_

Respondent's address:

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\_\_\_\_\_  
\_\_\_\_\_

Telephone:

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email:

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## ARBITRATION AWARD

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### DETAILS OF HEARING AND REPRESENTATION:

1. The arbitration of the unfair suspension or disciplinary action dispute between **PSA obo I Mothapo** (applicant) and **Department of Public Works and Infrastructure** (Respondent) was held under the auspices of GPSSBC, on the 15 August 2022. The hearing was virtual.
2. The applicant, Mr I Mothapo was represented by Mr. Sibusiso Nkosi of PSA and the respondent was represented by Mrs Lebo Hlongwane, an employee of the respondent.
3. The proceedings were recorded both manually and electronically.

### ISSUE TO BE DECIDED:

4. I am required to determine whether the respondent committed unfair labour practice by taking a disciplinary action which resulted in the applicant being issued a Final Written Warning.
5. Remedy requested was to have the Final Written Warning set aside.

### BACKGROUND TO THE MATTER:

6. The applicant started to work for the respondent on 1 January 2011.
7. He occupied the position of Deputy Director: EPWP Environment and Culture Sector.
8. His annual salary notch was R978 936.00.
9. The dispute was referred to the GPSSBC on 2 May 2022.
10. The respondent is Department of Public Works and Infrastructure



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

### **Applicant's Submission:**

The applicant, **Mr Isaac Mothapo** testified under oath and stated the following:

11. That he was a deputy director in charge of EPWP(Expanded Public Works Programme) coordination and support to provinces and municipalities. He was asked by his manager to take care of two data capturers and he accepted the function and continued doing it.
12. On 24 August 2021, the manager asked him not to continue with the function anymore. He was told to remove the function from his work plan and he was not told why he had to discontinue with the function. All those data capturers had to report to his supervisor and no longer to him.
13. Two or three months later, the manager wrote a mail to him and two other colleagues of his, asking them to do those functions that he was stopped to do. Seeing that he was stopped to do the duties and was asked to remove the functions from his work plan, he was scared and cautious to do it again. He did not feel competent to do the same function again.
14. If he had been told why he was stopped, what went wrong with his performance of the function that let to him being stopped and given training if needed he would have gone back and performed the function.
15. Under cross examination, the witness confirmed his role as that of programme coordination and support to provincial EPWP and the municipalities. He further confirmed that he was asked to monitor data capturers and authorising allocations.
16. It was put to the witness that only the management function was removed from him and not the allocation of projects and capturing of data. He answered that he did not understand the differentiation of management from allocation. Again, it was put to him that the supervisor said that management shall be hers and the allocation was to remain his function. He answered that he never got that clarification.
17. When asked why did he not comply with the instruction of 11 January 2022 he replied that he was not comfortable to perform the function because he was removed from the function and he was not told what did he do wrong to be removed.
18. He did try and raise his reservations to his supervisor through the email of the 24 November 2021 which was in reply to the email from the supervisor instructing the three to perform the function.



19. In re-examination he submitted that had his supervisor engaged him when he raised his concern, he would have complied with the instruction.

**Respondent's Submission:**

The respondent's witness, **Lefentse Elizabeth Ratsela** testified under oath and stated the following:

20. That she was the Director: National Service and Maintenance. The applicant used to report to her and they had a good working relationship.
21. She gave the applicant an instruction per email on 11 January 2022 and he did not comply with it. On the 12 January 2022, she checked and the project was still not allocated.
22. As regards the removal of the function from the applicant she stated that she only took back the responsibility of managing, that being the management of the data capturers. She said that she left data capturing allocations to continue being done by the applicant as before.
23. She submitted that the applicant was well capacitated and he was the only one who was registered to allocate projects in Nelspruit. At that time, he was the only one to allocate that specific project to Mr Mokoena, which the applicant failed to do.
24. Reference was made to the Performance Management Policy which provided for a senior to give instruction. She said the applicant was supposed to provide support and there was no need for consultation with him.
25. Under cross examination, the witness stated that she did not find the need to engage the applicant when he raised his hand because she told him that she was only taking away the management of data capturers.
26. In the email of 24 November 2021, the applicant asked to be recused from the function. The witness did not see the need to discuss his concern because she responded and said that she only took back the management thereof.
27. Failure to carry out the instruction led to the Final Written Warning being issued to him.



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

22. The dispute was referred as unfair suspension or disciplinary action in terms of section 186(2) (b) of the Labour Relations Act 66 of 1995 as amended. According to the LRA there are specific actions that constitute unfair labour practice and they are stated as follows:
- (a) unfair conduct by employer relating to the promotion, demotion, probation, training or provision of benefits.
  - (b) the unfair suspension of an employee or any unfair disciplinary action short of dismissal in respect of an employee.
  - (c) failure or refusal by an employer to re-instate or re-employ a former employee in terms of any agreement.
  - (d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosure Act of 2000.
23. The applicant's matter is closely linked to subsection (b) above.
24. I am required to determine the alleged unfairness of the disciplinary action taken against the applicant. Therefore, the onus rest with the applicant to show that the respondent's action amounted to unfair labour practice.
25. According to schedule 8 of the LRA, employers and employees should treat one another with mutual respect. While an employee should be protected from arbitrary action, employers are entitled to satisfactory conduct and work performance from their employees, as per the introduction to schedule 8 of LRA.
26. The applicant's version in this case is that the respondent removed the applicant from performing the function of managing and allocation of projects to data capturers without any explanation as to why he was removed. When he was ordered to resume the function after about three months, still nothing was said to him why he was removed. He then got scared and refrained from performing the function as he did not know what he might have done wrong previously. He informed his supervisor that he was having a concern and the supervisor did not address the concern. As such he was afraid that he might do things that led to his removal from the function. Had the supervisor engaged him on why he was removed from the function or addressed his concern, he would have carried out the instruction.
27. The respondent's version is that the function of allocating projects was never taken away from the applicant but only the management of the data capturers was removed from him. The applicant



refused to carry out an instruction while he had capacity to carry it out. He was given a specific instruction to allocate a project to a certain Mr. Mokoena and he failed to carry it out. As such he deserved the disciplinary action and the resultant sanction.

28. The two versions have some commonalities and differences. The applicant did not deny that he did not carry out the instruction to allocate the project as instructed. Instead, he gave reasons as to why did he fail to carry out the instruction. The respondent also did not deny that the applicant stated his concern about going back to do the function from which he was removed. The supervisor did not find it necessary to engage the disgruntled employee either.
29. Flowing from the above, it is evident that the applicant was dissatisfied that he was removed from the function and not told why. The respondent did not deny this and I find no valid reason why there was no engagement. When the applicant was called to resume the function, it was again by letter directed to him and other two officials. No engagement was found necessary by the supervisor. That increased the dissatisfaction on the part of the employee.
30. It is important for managers to manage and not rely solely on memoranda or emails because documents do not answer questions. Policies are there to guide, but they do not replace interaction and engagement between managers and employees. It is my finding that the supervisor failed to engage the applicant's concerns which contributed significantly to the applicant's behaviour. The supervisor was wrong to avoid engagement whenever it was needed.
31. On the other hand, it is expected of employees to carry out instructions from their superiors. If not satisfied an employee has a grievance procedure to follow. The applicant should have initiated a grievance to address his concerns. Refusing to carry out a clear reasonable instruction from his senior could lead to dismissal from employment. I find this behaviour to be a serious error of judgement on the part of the applicant.
32. It is my conviction that the dispute emanated from communication failures and disgruntlement and both parties contributed to it. I find the sanction to be harsh given the above errors on the part of the respondent. Final written warning is one step short of dismissal and it is therefore a very serious sanction.
33. In ***Nampak Corrugated Wadeville v Khoza 1999 20 ILJ 578 (LAC)***, it was held that a court should, therefore, not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether the court would have imposed the



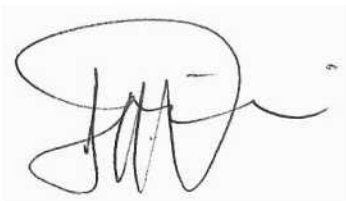
sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable.

34. Based on the above and on a balance of probabilities I am convinced that the applicant had discharged the onus for an unfair action on the part of the respondent. The respondent's sanction was too harsh. However, the applicant party is not innocent either.

**AWARD:**

The award is as follows:

1. The sanction of Final Written Warning is replaced with that of Written Warning valid for six months.
2. The respondent, Department of Public Works and Infrastructure is hereby ordered to oblige.

A handwritten signature in black ink, appearing to read 'NTATE JOSIAS MABILO', is written over a light gray rectangular background.

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**NTATE JOSIAS MABILO**

**(GPSSBC Panelist).**