



**IN THE PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL
HELD AT BLOEMFONTEIN**

CASE NO: PSCB 540 – 12/13

PSA obo TTP Shezi

APPLICANT

and

Department of Transport KZN

RESPONDENT

ARBITRATION AWARD

DATE OF AWARD : 06th March 2016

ARBITRATOR : SUGEN REDDY

DETAILS OF HEARING AND REPRESENTATION

1. The arbitration proceedings commenced on the 03rd May 2013 and thereafter on the 12th July 2013, 20th February 2015, 30th October 2015 and 04th December 2015. On 03rd May 2013 Respondent brought an application challenging the jurisdiction of this Bargaining Council to determine this dispute. I issued a ruling to the effect that this Bargaining Council had jurisdiction to determine this matter. On 12th July 2013 the arbitration was adjourned to enable the parties to negotiate a settlement of this dispute. This was done because the prospects of the settlement seemed to be good and it would foster a better relationship between the parties. The matter thereafter commenced, taking many unexpected turn of events. Finally on 04th December 2015 it was agreed that, no evidence would be led, and that this matter would be decided on the contents of the parties respective Statements of Case, the relevant documents placed before me and written arguments which were to be submitted. In the event the parties submitted their written arguments save that Applicant did not submit replying arguments by 07th February 2016 as was agreed. After waiting for some time I decided to determine the dispute without the said replying affidavit.
2. Applicant, Tholakele P P Shezi (hereinafter referred to as 'the applicant'/'Applicant') was represented, by Mr P Govindasamy, (Govindasamy) an attorney of Govindasamy, Ndzingi & Govender Inc. Respondent, the Department of Transport (KZN), (hereinafter referred to as "the respondent"/'Respondent'), was at all times, represented by Adv. Christison, instructed by PKX ATTORNEYS.

ISSUE TO BE DECIDED

3. On 04th December 2015 it was decided that the issue to be determined by me was confined to whether PSCBC Resolution 1 of 2003 (hereinafter referred to as 'the Resolution') had been breached and if so the relief which Applicant would be entitled to. If I determine the Resolution was in fact breached by Respondent I would have to determine whether Applicant was entitled to be 'reinstated' as a Chief Provincial Officer at the Ixopo Traffic Inspectorate and

whether she would be entitled to claim compensation and damages. The quantum of Applicant's claim for damages and compensation, if competent, would stand over for determination.

SURVEY OF SUBMISSIONS AND ARGUMENTS

4. I set out hereunder as briefly as possible the details of this dispute, and only that which is necessary to place same in context and to determine this dispute. The facts in terms of which I have determined this matter are common cause. I do not intend repeating the parties' submissions and arguments in support of their versions as same form part of the record. Some of Applicant's submissions are however repeated herein.

5. Applicant referred a dispute to this Council reflecting the nature of the dispute as that concerning the 'interpretation/ application of Collective Agreement PSCBC Resolution 1 of 2003'. In the referral form Applicant summarises the facts of the dispute as follows:

"I was transfered from Ixopo Road Traffic Inspectorate to PMB Regional Office to allow an investigation to be conducted against me. The investigation was finalized in October 2011 and it was recommended that I be transferred back to Ixopo but the Department has refused, failed or neglected to do so."

6. Applicant states that the dispute arose on 11th July 2011. The outcome required by Applicant is reflected in the referral form as follows:

'I want to be reinstated in position and station as Chief Provincial Inspector in Ixopo Traffic Inspectorate with all my benefits and back payments.'

7. Subsequent to same Applicant in her Statement of Case also claims relocation costs from Ixopo to Pietermaritzburg, "Daughters boarding school fees and related costs" and compensation in terms of the Labour Relations Act.

8. Subsequent to the referral the matter was set down for conciliation. The Certificate of Outcome issued pursuant thereto reflects the dispute as being one concerning the "Interpretation/Application of Collective Agreement Resolution 1 of 2003."

9. The events giving rise to this dispute, on Applicant's version, which I shall accept as being correct are as follows:

“ 2.

The dispute arose from complaints by the Respondent's employees from Ixopo RTI.

3.

On the 01st March 2010, Respondent's employees staged a sit-in at Ixopo RTI and when Supervisor Vezi, on the instructions of the Applicant, enquired from them as to why they were defying their duties, they responded by stating that they have complaints and were waiting for Mr A.M. Ntanzi and Ms.B. Ntombela (Ndlovu as she was then) to arrive.

4.

After discussing the matter with Mr Ntanzi, the Applicant was instructed by him to inform the employees to go back to their duties. The employees failed to comply with her lawful instruction. They indicated that they would not resume their duties until their problems are resolved and that the Applicant cannot tell them what to do.

5.

On the 02nd March 2010 and subsequent days, the employees (subordinates) refused to work, but held meetings with Mr Ntanzi and other senior officers of the Respondent where they raised further grievances.

6.

On the 09th March 2010, the management of Respondent held a meeting with the Applicant regarding the issues which the Applicant was experiencing with her subordinates.

7.

On the 11th March 2010, the Applicant and her colleague, Mr R Varden, were called to the Regional Office by Mr AM Ntanzi and Ms B Ntombela (Ndlovu as she then was) for a meeting. It was suggested and offered to the Applicant and Varden to be temporarily transferred for the purpose of an investigation to take place. Both the Applicant and Varden rejected this offer.”

10. Applicant continues in her Statement of Case to state the following:

‘ 10.

On the 23rd March 2010, the Applicant and Varden where locked out and not allowed inside by the Respondent's employees. She called Mr Ntanzi to address the wrongful and unlawful behaviour of the Respondent's employees,

but nothing was done to prevent such wrongful and unlawful conduct by the Respondent's employees. The SAPS arrived at the premises shortly and the Applicant's subordinates threatened the Applicant if she entered the Respondent's premises.

11.

The Respondent reassessed the situation following the incident that took place on the 23rd March 2010 at Ixopo RTI and decided that it would be in the best interest of both the Respondent and the Applicant to place the Applicant on a precautionary transfer from Ixopo RTI to TTIU (Transport Inspection Unit) in order to allow a full investigation and to calm down the situation at the station in Ixopo and in order to ensure that the Respondent refocuses on its constitutional mandate of service delivery. The Respondent pointed out that the precautionary transfer does not at all mean that the Applicant is being viewed as a guilty party in whole situation. However, the element of safety for all concerned has been one of the factors taken into account to arrive at this decision.'

11. Following the activities and or conduct set out above Applicant was transferred in terms of a letter dated 24th March 2010 which reads as follows:
"PRECAUTIONARY TRANSFER FROM RTI IXOPO TO TRANSPORT AND TRAFFIC INSPECTION UNIT (TTIU)

The above matter refers;

As you are aware that the management had a meeting with you on the 9th March 2010 around the conflict situation that exist between yourself and your staff at RTI Ixopo station, we have also re-assessed the situation following the incidence that took place on the 23rd Mach 2010.

After a thorough re-assessment, the management came to a conclusion that it would be of the best interest to both the Department of Transport and yourself to place you on a precautionary transfer from RTI Ixopo to TTIU to allow full investigation and to calm down the situation at the station in order to ensure that the Department refocus on its Constitutional mandate of Service Delivery.

This does not at all mean that you are being viewed as a guilty party in the whole situation. The element of safety for all involved has been one of the factors taken into account to arrive at this decision.

Your co-operation in this regard will be highly appreciated.

BN Ndlovu

GM: Pietermaritzburg Region”

12. In support of the relief claimed Applicant contends that “it is patently clear that the transfer was effected in terms of paragraph 7.2 of the Resolution” and that Respondent breached the resolution “in that having transferred the Applicant as a precautionary measure it failed to hold a disciplinary hearing for the Applicant in terms of paragraph 7.2.c” of the Resolution. Applicant continues by stating that Respondent ought to have reinstated her to her position as Chief Provincial Inspector once it was found by Respondent’s employee tasked with investigating her complaint that the complaints against her were unfounded and malicious.
13. Paragraph 7.2.c of the Resolution reads as follows:
 - ‘a. The employer may suspend an employee on full pay or transfer the employee if:
 - i. the employee is alleged to have committed a serious offence; and
 - ii. the employer believes that the presence of an employee at the workplace might jeopardise any investigation into the alleged misconduct, or endanger the wellbeing or safety of any person or state property.
 - b. A suspension of this kind is a precautionary measure that does not constitute a judgement, and must be on full pay
 - c. If an employee is suspended or transferred as a precautionary measure, the employer must hold a disciplinary hearing within a month or 60 days, depending on the complexity of the matter and the length of the investigation. The chair of the hearing must then decide on any further postponement.’
14. Applicant denies that she was transferred in terms of section 14 of the Public Service Act of 1994 as contended for by Respondent.

15. As stated by Respondent, Applicant was transferred in terms of section 14 of the Public Service Act of 1994 given that it was in public interest that Applicant be transferred from Ixopo in view of the “breakdown of the working relationship between her and her subordinates”. According to Respondent Applicants transfer was not a form of precautionary transfer as contemplated in Resolution 1 of 2003.

16. Section 14 of the Public Service Act reads as follows:

‘1) Subject to the provisions of this Act, every officer or employee may, when the public interest so requires, be transferred from the post or position in the same or any other department, irrespective of whether such a post or position is in another division, or is of a lower grade or higher grade, or is within or outside the Republic

2) (a) The transfer of an officer or employee from one post or position to another post or position may, subject to the provisions of paragraph (b), be made on the authority of the person having the power of transfer.

[Para. (a) substituted by s. 11(a) of Act No. 47 of 1997.]

Wording of Sections

(b) In the case of a transfer from one department to another department the approval of the persons who in respect of each of those departments have the power to transfer, shall first be obtained.’

ANALYSIS OF EVIDENCE AND ARGUMENT

17. It might be apposite to point out at this stage that whilst I may not have mentioned the specific arguments of the parties hereto I have given full consideration to same. I have however determined the matter following a different line of reasoning which overlaps with much of that contended for by Respondent but is in essence premised on a different argument.

18. It is also necessary and important to point out that the Resolution is, exclusively, the Disciplinary Code and Procedure which applies to employees falling within the registered scope of the Public Service co-ordinating Bargaining Council. As such Clause 7.2 of the Resolution, relating to precautionary suspensions and transfers, is incidental to disciplinary proceedings or contemplated disciplinary proceedings against employees and when implemented has to be regarded as a holding operation.

19. The first issue to be determined is the reason for Applicant's transfer. Once that is determined the inferences necessary to determine this dispute can be made.

20. Was the transfer of Applicant effected, as a holding operation, because of the suspicion that Applicant had committed a serious offence/s. If the transfer was the result of such suspicion then, as stated it would have been effected as a holding operation pending the determination of the allegations of misconduct. If, following any such determination Applicant is dismissed that would be the end of the matter (for our purposes). If the allegations of misconduct are not proved or even if proved does not result in Applicant's dismissal or if investigations reveal that no grounds exist for Applicant to be dismissed then in terms of clause 7.2 of the resolution, Applicant must return to her job. Transfers under the afore-going circumstances, i.e. as a result of allegations of misconduct, must lead to the conclusion that Applicant was transferred in terms of clause 7.2 of the Resolution. Was Applicant therefore transferred as a result of allegations of (serious) misconduct?

21. The circumstances that preceded Applicant's transfer are set out above (see paragraphs 9, 10 and 11 hereof). As stated these circumstances are those that existed on Applicant's own version. Given the foregoing circumstances, (where, inter alia, SAPS needs to be called and Applicant is threatened by her subordinates), management immediately decides to transfer Applicant, despite having met the previous day, terming it a precautionary transfer (as a result of the situation that has arisen at Ixopo RTI). Having regard to the reasons provided for Applicant's transfer in the afore-mentioned letter (see paragraph 11 hereof) it cannot be said that Applicant's transfer was effected as a holding operation which, as stated, is the purpose of Clause 7.2. I say this because nowhere in the said letter does it refer to any allegation of Applicant having committed a serious offence nor does the investigation referred to therein relate to an investigation of any such offence. Furthermore it is made clear that Applicant is not being transferred because she is viewed as a 'guilty party in the whole situation'. The letter clearly conveys a message that an untenable situation between Applicant and her subordinates at Ixopo RTI has arisen and that same cannot be allowed to continue. In order to stabilise/normalise the situation Respondent decided that the best course of action, for the safety of everyone involved, the interests of service delivery and to enable a "full investigation" [of the crisis Ixopo RTI], is to transfer Applicant. This then is the most plausible reason for Applicant's transfer.

22. Given the afore-going it cannot be said that Applicant was transferred in terms of clause 7.2 of the Resolution. A situation had arisen which called for immediate action by Respondent. Respondent had to respond as a matter of necessity. Whether its

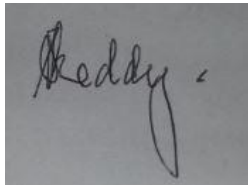
response in transferring Applicant was correct, fair and/or lawful is irrelevant for the purpose of determining this dispute. There is therefore no need for me to deal with arguments raised by the parties in relation to whether Respondent acted in terms of section 14 of the Public Service Act or whether in effecting Applicant's transfer Respondent acted unfairly.

23. In the circumstances having found that Respondent did not act in terms of Clause 7.2 of the Resolution in effecting the transfer of Applicant it is not permissible for me to grant any relief arising from the interpretation and/or application of same.

AWARD

24. Applicant's application is hereby dismissed.

SIGNED AT DURBAN ON THIS 06th DAY OF MARCH 2016

A handwritten signature in black ink, appearing to read 'Sugan Reddy', is written on a light-colored rectangular background.

SUGEN REDDY
PSCBC Arbitrator