**IN THE PUBLIC SERVICE CO-ORDINATING BARGAINING COUNCIL**

Case number: PSCB206-13/14

In the arbitration between:

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| **PSA obo S MAYOLI** | **Applicant** |
| And | |
| **DEPARTMENT OF ENVIRONMENTAL AFFAIRS** | **Respondent** |

# AWARD

## 1. Details of hearing and representation

The above arbitration was held on the 27th of November 2013 at the Respondent's offices, Brits. Mr. Makolomakwa, an official of PSA (the Union) and Mr. Malgas, Labour Relations Officer, appeared on behalf of the Respondent. The parties indicated that the issue to be determined could be dealt with by means of written submissions and it was agreed that parties would submit their arguments by the 6th of December 2013. An extension was granted to the Respondent to the 13th of December 2013.

## 2. Issue to be determined

Whether Resolution 1 of 2003 allows for the appointment of legal practitioners to chair and initiate at disciplinary hearing level.

## 3. Summary of argument

The Union submitted that it had raised an objection at the start of the Applicant's disciplinary hearing on the basis that the Respondent could not in terms of Resolution 1 of 2003 (the Resolution) appoint external legal practitioners to chair and act as initiators at the disciplinary hearing. The Union submitted further that the Chairman had dismissed the objection and had allowed an attorney to represent the Respondent at the Applicant's disciplinary hearing. The Union submitted that it was common cause that the Respondent had not obtained the consent of the Applicant to deviate from the provisions of the Resolution. The Union referred to *SAMWU & others v Dr. JS Moroka Municipality* (2011) 32 ILJ 2000 (LC), where it was held that an employer could not deviate from the provisions of a collective agreement.

The Union submitted that the Resolution did not make provision for deviations. The Union submitted further that the Respondent argued that the deviation was justified on the basis that it did not have sufficient capacity. The Union contended that although the Resolution was silent on this issue, this did not give the Respondent the prerogative to deviate from the Resolution.

The Union submitted that clause 6 of the Resolution was peremptory in that the Respondent was compelled to appoint an employee in the Public Service to initiate a disciplinary hearing for an employee who falls within the bargaining unit. The Union therefore requested that a finding be made that the gross irregularity committed by the Respondent impacted negatively on the procedural fairness of the Applicant's disciplinary hearing.

The Respondent submitted that it was of the view that the nature of the charges against the Applicant were very complex and this warranted the use of outside legal practitioners for both adjudication and prosecution. The Respondent submitted further that when the allegations surfaced against the Applicant, the Respondent had utilized the services of an experienced forensic investigating firm to help establish the evidence as it involved the contravention of supply chain process /financial mismanagement and the laying of false criminal charges against one of the Applicant's sub-ordinates and enticing witnesses to do the same against the latter.

The Respondent referred to *Hamata and Another v Chairperson ,Peninsula Technikon Internal Disciplinary Committee and Another* 2002 (5) SA 449 (SCA) where the degree of factual or legal complexity of the charges were one of the key aspects the court looked at when considering legal representation in an internal disciplinary hearing. The Court further held that "our common law does not automatically guarantee legal representation in an internal disciplinary tribunal …………however it does require disciplinary proceedings to be fair and ……if in order to achieve such fairness in a particular case legal representation may be necessary a disciplinary body must be taken to have been intended to have the power to allow it in the exercise of its discretion. The Respondent referred further to *Mosena and others v The Premier: Northern Province and others* which dealt with clause 7.3 (e) of the code in the Public Service as to whether the Presiding Officer can utilize such a discretion where the provisions of the code are provide contrary. In this case they correctly referred to clause 2.8 of the code which provides that **"**the code and procedure are guidelines and may be departed from in appropriate circumstances"

The Respondent submitted that it had received a letter from Martin Sambo Incorporated indicating that they were acting for the Applicant and the Respondent had assumed that the Applicant would be represented by senior counsel as the matter was complex. The Respondent submitted further that it had not objected to the Applicant having legal representation at the disciplinary hearing but the Applicant had not made such an application at the disciplinary hearing. The Respondent contended that in the circumstances it had intended to balance the comparative ability of the representatives.

The Respondent submitted that in its opinion the matter involved the public interest as the Applicant was the Regional Program leader managing the office of Natural Resources Program which deals with community projects. The Respondent submitted further that these projects were created to empower communities and offer them self-sustainability. The Respondent contended that it had therefore utilised an external service provider to conduct the disciplinary hearing as it was deemed as a private issue which was in the public interest as it involved the communities.

The Respondent submitted that taking into consideration the issues when determining whether to allow legal representation such as the nature of the charges, the degree of factual or legal complexity, the potential seriousness of the consequences of an adverse finding and the nature of prejudice in permitting legal representation ( See *Hamata and Another v Chairperson ,Peninsula Technikon Internal Disciplinary Committee and Another* supra), then it was fair to allow the Respondent to have legal representation at this disciplinary hearing. The Respondent submitted further that the appointment of an external Chairman and Initiator had not prejudiced the Applicant. The Respondent contended that in order to ensure that disciplinary action was prompt and fair, especially as the Applicant had been placed on precautionary suspension, it had notified the Applicant that it was experiencing capacity difficulties and had determined to utilize external service providers. (See *Themba Majola v The MEC For Department of Public Works, Northern Province 2003 ZALC)*.

## 4. Assessment of argument

In *Northern Cape Forests v SA Agricultural & Allied Workers & others* (1997) 18 ILJ 971 (LAC), the Labour Appeal Court stressed that the interpreter of a collective agreement should in addition to applying the ordinary principles of interpretation of contracts ask the question whether the interpretation yielded by these principles accords with the objectives of the LRA.

In *Van de Merwe & Others and South African Police Service* (2003) 12 SSSBC 4.2.1 the Arbitrator, and I concur, found that the principle established in *Scottish Union and National Insurance Co Ltd v Native Recruiting Corporation Ltd* 1934 AD 458 at 465–466 that “It has repeatedly decided in our courts that in construing every kind of written contract the court must give effect to the grammatical and ordinary meaning of the words used therein. In ascertaining the meaning, we must give to the words their plain, ordinary and popular meaning, unless it appears clearly from the contract that both the parties intend them to bear a different meaning. If, therefore, there is no ambiguity in the words of the contract, there is no room for a more reasonable interpretation than the words themselves convey. If, however, the ordinary sense of the words necessity leads to some absurdity or to some repugnance or inconsistency with the rest of the contract, the courts modify the words just so much as to avoid that absurdity or inconsistency but no more," should apply to Collective Agreements.

In *NEHWU v Department of Social Services and Population Development* (2005) 11 BALR 1140 (PSCBC) it was found that a collective agreement is a written memorandum which is meant to reflect the terms and conditions to which parties have agreed at the time that they concluded the agreement. Arbitrators should therefore strive to give effect to that intention. This should be done by ascertaining the intention of the parties from the words which they used to express their agreement, in their ordinary meaning and within the context of the agreement as a whole. If the words are unclear or ambiguous, the circumstances in which the agreement was entered into can be referred to as a guide to the true intention of the parties. Evidence regarding the parties' intention is however only admissible if the words used in the agreement and read in their context, do not yield an indication of the parties' intention. Where the agreement is silent on a term which one of the parties contends should be implied into the agreement, the test to be applied is whether, at the time the parties were negotiating their agreement, they considered the terms so obvious that it was not necessary to record it expressly.

As a starting point clause 2.3 of the Resolution provides that discipline is a management function. This implies that management determines when disciplinary action is necessary or warranted. The Resolution provides the procedure to be followed when such decision has been taken.

Clause 7.3(b) of the Resolution provides that the chairman of a disciplinary hearing "must be appointed by the employer and be an employee of a higher grade than the representative of the employer." Although "employee" is not defined in the Resolution I believe that I may accept that the parties used the word in its ordinary, general and popular sense. I am further guided by S213 of the Labour Relations Act where "employee" is defined as "(a) Any person, excluding an independent contractor, who works for another person or the State and who receives, or is entitled to receive, any remuneration, and (b) Any person who in any manner assists in the carrying on or conducting the business of an employer." In this context I am not persuaded that an external 'service provider' can be deemed to be an "employee" of the State or an employee as contemplated in clause 7.3(b) of the Resolution. I am further of the view that it cannot be implied that the word would include the appointment of external legal representatives. In addition, clause 7.3(b) uses the word "must", which is peremptory and not the word "may" which would imply that the Respondent had some discretion in appointing the chairman.

Clause 7.3(c) does provide the Respondent with an alternative to the appointment of an employee to chair a disciplinary hearing. The Respondent could, in terms of this clause, refer the matter to the relevant Bargaining Council for an arbitrator to be appointed as chairman. It does not appear that the Respondent made use of this option and I am of the view that this clause cannot be interpreted as allowing the Respondent to engage the services of an external legal representative that is not an accredited panellist of the relevant Bargaining Council.

The Respondent had argued that it appointed legal practitioners for two reasons, namely, that it lacked capacity to make such an appointment and wished to ensure expediency, and because the charges against the Applicant were serious and complex. In this regard I agree with my learned colleague in *PSA obo NS Hodgeson and The Department of Infrastructure Development*, case number PSCB82-12/13 issued 11 February 2013, where the Arbitrator held that "considerations of expediency in the guise of alleged procedural fairness and a desire to comply with substantive requirements of the Code cannot be countenanced...The use of legal representative in this case on the grounds that there were capacity constraints is merely an excuse for expediency. The practical approach is in my view, well catered for in clause 7.3(c), and outside this clause, nothing in the Resolution can be read to imply that any party has a right to deviate from its provisions."(at par. 19).

Clause 7.3(f) provides that in a disciplinary hearing neither the employer nor the employee may be represented by a legal practitioner, unless the employee is a legal practitioner or the representative of the employer is a legal practitioner or the disciplinary hearing is conducted in terms of clause 7.3(c). In terms of settled law the Respondent, or indeed the Applicant, may make an application to the chairman of the disciplinary hearing to consider allowing legal representation notwithstanding the provisions excluding such representation. In determining such an application the chairman would consider *inter alia* the nature and complexity of the charges, any legal or factual complexity, comparative abilities of the parties to the hearing and the public interest (See *Hamata and Another v Chairperson ,Peninsula Technikon Internal Disciplinary Committee and Another* supra*, Mosena and others v The Premier: Northern Province and others* supra and *MEC: Department of Finance, Economic Affairs and Tourism Northern Province v Schoon Godwilly Mahumani* (2004) JOL 13269 (SCA)). A properly appointed chairman in terms of clause 7.3(b) may, in my view, determine whether it is appropriate to allow either the employer or the employee to have legal representation at a disciplinary hearing.

The Respondent may therefore appoint a legal practitioner to represent it at a disciplinary hearing if an application is made to the properly appointed chairman and such an application is granted. The Respondent may not exercise this discretion itself. As this dispute concerns the interpretation and application of a collective agreement the remedy that the Council may issue is limited to what the proper interpretation or application of the particular Resolution should be.

## 5. AWARD

5.1) Clause 7.3(b) of Resolution 1 of 2003 does not permit the Respondent to appoint any person other than an “employee” to preside over its internal disciplinary hearings.

5.2) Clause 7.3(f) of Resolution 1 of 2003 is to be interpreted to allow for a properly appointed chairman of a disciplinary hearing to have discretion, on application by either party, to allow or disallow legal representation.

5.3) There is no order as to costs.

K. DRISCOLL 19 December 2013
Arbitrator