**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Not Reportable

Case no: JR 2015/18

In the matter between:

**GOVERNMENT PENSIONS ADMINISTRATION AGENCY** **Applicant**

and

**POPCRU (SASAWU) OBO MAIMELA AND ONE OTHER** **First Respondent**

**COMMISSIONER PM NGAKO N. O** **Second Respondent**

**THE GPSSBC** **Third Respondent**

**Heard**: **12 May 2022**

**Delivered**: **17 May 2022**

**Summary: An opposed review application – award falls outside the bands of reasonableness. Held: (1) The application for a review is granted. The dismissal is substantively fair. (2) There is no order as to costs.**

**JUDGMENT**

**MOSHOANA, J**

Introduction

[1] This is an archaic dispute, which ought to have been put to bed a long time ago. The dismissal involved herein took place almost a decade ago. It is unfortunate for both parties that almost a decade later a simple misconduct dispute has not been resolved notwithstanding the imperatives outlined in section 1 of the Labour Relations Act[1] (LRA). That said, this is an application seeking to review and set aside an arbitration award issued by Commissioner P M Ngako (Ngako) under the auspices of the General Public Service Sector Bargaining Council (GPSSBC), in terms of which, Ngako found that the dismissal of Bethuel Maimela and Regina Masote (hereafter "*dismissed employees*") was substantively unfair. He ordered the applicant, Government Pensions Administration Agency (GPAA), to reinstate the dismissed employees into the same or similar positions and on the same terms and conditions which applied at the time of dismissal (subject to any wage review and or change in terms and conditions in terms of collective agreement in the interim) and to pay to the dismissed employees arrear wages to the tune of R594 429.00 each. He further ordered that the reinstatement and the payment of arrear wages should be effected within 20 calendar days from the date of receipt of the award.

[2] The GPAA was chagrined, and around October 2018, it launched the present application. The application is duly opposed by POPCRU on behalf of the dismissed employees. After hearing a considerably long argument from both counsel, this Court reserved its judgment. What follows hereunder is the judgment and the order of this Court.

Background facts

[3] As highlighted earlier, this dispute is deplorably chronicled. Thus, for the purposes of this judgment, it is obsolete to detail the chronicle. It suffices to mention that the dismissed employees were employed in the so-called

[1] No. 66 of 1995, as amended.

withdrawals section of the GPAA as a Processor and a Checker respectively. The genesis of the wretched situation for the dismissed employees is the loss of the benefits of the late father of one Ms Ringetani Phillipine Rikhotso (Ringetani) to the tune of R102 236.90. When Ringetani sought to have the pension benefits of her late father paid into her nominated bank account, she was informed that the proceeds were paid into a different bank account, which bank account was untraceable.

[4] Owing to the above star-crossed incident, an internal investigation was conducted in order to establish the antecedent of the incident. The GPAA has in place a document tracking system known as CIVPEN. That system was reviewed and it revealed that the update of the bank account details was executed on CIPVEN #053 Dependents by user 010M26 – Bethuel Maimela (Maimela) on 25 July 2011. The investigations further revealed that the USER ID [….] of Regina Masote (Masote) was used on 29 July 2011 to authorize part-payment of R75 553.64. The balance of R26 683.26 was authorized by one Valentine.

[5] As a sequel to the above revelations, one Mr Isaac Mahlangu (Mahlangu), employed in the Forensic and Fraud Unit of the GPAA, armed with preliminary findings, had meetings with Maimela and Masote at different times and informed them about the preliminary findings. He expected them to co-operate and to tell him anything they knew about the unearthed fraudulent transaction. Both indicated that they are pleading their "*5th amendment*"- right to remain silent - and shall speak at the disciplinary hearing.

[6] Ultimately, Mahlangu, finalised his report and recommended that disciplinary steps be taken against the dismissed employees. Indeed around 11-12 June 2012, the dismissed employees faced allegations of gross dishonesty in the form of fraud as well as gross negligence. The disciplinary hearing was chaired by one Mr Kabelo Jonathan (Jonathan). After hearing extensive evidence, Jonathan found the dismissed

employees guilty on the charges of dishonesty. In reasoning out his findings, he lamented on the lack of co-operation with the internal investigations by the dismissed employees. He found them not guilty of the alleged gross negligence charge. After hearing aggravating and extenuating circumstances, he issued a sanction of final written warnings valid for six months in respect of both the dismissed employees.

[7] The Chief Executive Officer of the GPAA was discomfited with the findings and altered the sanction imposed by Jonathan and imposed a sanction of dismissal, since in his ebullient view; the sanction of final written warning was irrational. The dismissed employees attempted an internal appeal to no success. Ultimately, the dismissed employees remained dismissed. Aggrieved by this dismissal (effected by the CEO) the dismissed employees referred a dispute to the GPSSBC and alleged unfair dismissal. The first arbitration found in favour of the dismissed employees and ordered their reinstatement. Their success was short lived because this Court reviewed and set aside the first arbitration award and remitted the dispute back to the GPSSBC for a hearing *de novo*. The hearing *de novo* conceived the assailed arbitration award.

Grounds of Review

[8] It is unfortunate that despite being legally assisted, the GPAA failed, in my view, to properly distil the acceptable grounds of review. In a detailed founding affidavit, GPAA raised some appeal grounds and disguised them as review grounds. Nevertheless, what this Court could decipher is the following legally acceptable grounds.

8.1 The Commissioner misconceived the dispute before him;
8.2 The decision reached is not one that a reasonable decision maker will reach;
8.3 He exceeded his powers with regard to the relief of reinstatement and payment of arrear wages; and
8.4 He failed to apply his mind.

[9] The dismissed employees vehemently opposed these grounds and submitted that the arbitration award is one that a reasonable decision maker may reach.

Evaluation

[10] Before this Court can consider whether the arbitration award is reviewable in law, it is vital to record the following legal observations. Section 192 of the LRA places an *onus* on the employer to prove that a dismissal is fair. Section 188 (1) (a) (i) of the LRA provides that a dismissal that is not automatically unfair is unfair if the employer fails to prove that the reason for the dismissal is a fair reason related to the employee's conduct. In other words, if an employer dismisses an employee for his or her conduct, such a dismissal is in the eyes of the LRA for a fair reason.

[11] It is by now settled law that when challenged, an employer must justify the fairness of the dismissal using the reason it used to dismiss an employee[2]. There is no doubt in this dispute that the dismissed employees were dismissed for reasons related to their conduct. However, it is observed by this Court that at arbitration, the GPAA advanced a further reason that was not used to dismiss the dismissed employees. The reason advanced to dismiss the employees is one of dishonesty and fraud and not of failure to co-operate with the investigations as punted for at the challenged arbitration proceedings.

[12] On 31 May 2012, Mr Kemp, the Senior Manager: Human Resources Management issued the dismissed employees with a charge sheet. In that sheet, the relevant charge was couched in the following terms:

> "Gross dishonesty in the form of fraud in that:

[2] *Absa Brokers (Pty) Ltd v Moshoana NO and Others* (JA45/03) [2005] ZALAC 3 (26 May 2005).

- Through irregular and unethical conduct and in contravention of the strict ethical codes of the State
- Between the period 05 January 2011 and 05 August 2011 or any date incidental thereto
- You colluded with an employee of GPAA, Ms Regina Masote/ Mr B Maimela
- Where you allocated created/ authorised or facilitated the processing/ payment/ of pension benefits amounting to R102 236.90 (or any other amount incidental thereto) into a fraudulent Nedbank Account No. [….]
- Under the pretense (sic) that the account belonged to the rightful beneficiary
- The rightful beneficiary Ms R.P Rikhotso is not the holder of the fraudulent Nedbank Account and she did not receive the payment deposited therein."

[13] Jonathan was appointed and mandated to decide whether the dismissed employees were guilty as charged and if guilty to impose the appropriate sanction. After executing his mandate, Jonathan reached the following findings in relation to the relevant charge:

> "6. **FINDING**
>
> Based on the analysis of evidence presented by Employer and Employee, the Chairperson can draw from point of conclusion that:
>
> 6.1 Accused (Bethuel Maimela & Regina Masote) **are found guilty on charges of dishonesty**…"
>
> [Own Emphasis]

[14] In substantiating why the dismissed employees are guilty of the dishonesty charge, Jonathan tabulated a plethora of reasons, amongst them prominently featured the fact that the dismissed employees failed to co-operate with the internal investigations. He was however satisfied that the GPAA failed to prove that the dismissed employees benefitted

financially from the transaction processed. When considering an appropriate sanction to impose, Jonathan stated the following:

> "I have reason to believe that actions by employees not to cooperate with employer during the initial stage of the preliminary investigation are the core of the guilty findings, in terms of dishonesty to employer"

[15] During the presentation of aggravating circumstances, the employer representative pressed on dismissal as an appropriate sanction. To that, Jonathan remarked as follows:

> "In closing, I have deduced that the proposal by employer to terminate employment of both charged employees is not warranted and justifiable. Of course the employer would like to send a strong message to all GPAA employees would-be Fraud stars (sic) and corrupt officers that such conduct will not be tolerated. But it should be noted that employees were not found guilty of Fraud or corruption as it was clear from the forensic investigation report that there was no evidence to suggest that both employees benefitted financially from the transaction in question."

[16] It is clear that Jonathan was satisfied that the dismissed employees were guilty of dishonesty based on the role they had played in what was clearly a fraudulent transaction. It seems that Jonathan held a view, which in the Court's view is a wrong view, that because there was no evidence of financial benefit fraud was not proven. This Court do state in passing though that it would have been difficult for the GPAA to prove financial benefit. It may have happened that whoever the account holder of the Nedbank account was may have at some stage rewarded the dismissed employees for their clear and uncontested role in the indisputably fraudulent transaction. Nevertheless, Jonathan clearly found the dismissed employees guilty of dishonesty.

[17] Therefore, in line with section 188 of the LRA, the fair reason is related to dishonesty as opposed to failure to co-operate with the investigations. In dismissing the dismissed employees, the CEO used the reason of dishonesty to impose the sanction of dismissal. The discharge letter read thus:

> "2. Following the disciplinary hearing held on 11th and 12th June 2012 the Presiding Officer found you guilty and issued a sanction of final written warning against you. However after due consideration of the presiding officer's findings. I have come to the conclusion that the sanction imposed is irrational.
> 3. You are therefore, informed of your dismissal from the public service on account of misconduct with effect from the date of signature of this letter…"

[18] The dismissed employees were never charged, found guilty or dismissed for a misconduct of failure to co-operate with the internal investigations. Resultantly, as the trite authorities have it, such cannot be used to justify the fairness of the challenged dismissal. The CEO and Jonathan differed only on the appropriateness of the sanction to be imposed. This is further evident from the appeal internally noted by the dismissed employees. Nowhere in the appeals do they make a reference to the failure to co-operate misconduct. Thus Ngako was spot on when he concluded that the dismissed employees were dismissed for the charge that they were found guilty of – dishonesty.

[19] When the dismissed employees referred the dispute to the GPSSBC in October 2012, with regard to substantive fairness issues they stated the following as the reasons why:

> "Changing the sanction of the chairperson"

[20] Thus, the case to have been met by the GPAA on the substantive front was one of having altered the sanction of the chairperson. This Court is

not privy to the records and the outcomes of the first arbitration, inclusive of an order or judgment of this Court reviewing the first arbitration. Nevertheless, this Court's focus is the second arbitration proceedings which birthed the impugned arbitration award. It is indeed so that an arbitration is a hearing *de novo*. However, that does not suggest that an arbitrator should deal with issues that are not placed in dispute. For instance, if an employee does not challenge procedural fairness, it shall be inappropriate for an arbitrator to determine issues of procedural unfairness at the altar of a *de novo* hearing.

[21] A referring party is the one which outlines the dispute to be resolved by arbitration. Section 191 (5) (a) of the LRA makes it abundantly perspicuous that the Commission arbitrate a dispute at the behest of an employee. In *casu*, the dismissed employees explicitly stated that what they are in dispute with the GPAA about is the alteration of a sanction of dismissal. Put it differently, they took a view that the sanction as imposed by Jonathan is appropriate for the misconduct they were found guilty of as opposed to the one imposed by the CEO. Under those circumstances, the GPAA was obliged to justify the fairness and appropriateness of the sanction of dismissal. Therefore, it must have been reasonable for the GPAA to approach the dispute from an angle that the sanction of dismissal was appropriate.

*Where does the failure to co-operate allegation emerge from?*

[22] The arbitration transcript reveals that this allegation was coined and or created by the GPAA counsel. Having acknowledged that the dismissed employees faced two allegations of misconduct internally – dishonesty and negligence – for some unapparent reason counsel for GPAA stated the following on the first day of arbitration:

> "MR V MAIMELA: I have responded that the reason is that the former employees are saying that they are not guilty of the offences for which they have been charged with.

MR BECKER: Both?

MR V MAIMELA: Yes

MR BECKER: Okay. So there was the **gross dishonesty,** or gross misconduct, 1 and then there was the **gross negligence** one, okay. Just on that score then, just to finalise the issues, there was a finding by the internal disciplinary Chairperson that there was misconduct on the part of the employees, since they have refused to state their version or cooperate during the internal investigation…"[3]

[23] The assertion that the dismissed employees were also found guilty of refusal to cooperate in the investigation was placed in dispute upfront[4]. It is trite principle of law that a party cannot escape the ineptness of its chosen legal representative[5]. The dismissed employees' representative made it abundantly clear that the arbitration was a hearing *de novo.* Equally, Ngako made it extremely perspicuous that the GPAA bore the *onus* to prove all the elements of the fairness of the dismissal they effected.

*Was there evidence to prove dishonesty on the part of the dismissed employees?*

[24] The GPAA tendered the oral testimony of one witness; namely; Mr Isaac Mahlangu (Mahlangu). Regarding the allegations of dishonesty, his testimony was as follows:

"MR MAHLANGU: That is correct, I have seen it before.

MR BECKER: What is it?

MR MAHLANGU: The investigation report that I have compiled after the completion of the investigation.

[3] There was no such a finding. Counsel was misleading the proceedings to that extent.
[4] Review Record Bundle C paginated page 12 line 17.
[5] *Saloojee v Minister of Community Development* 1965 (2) SA 135 (A).

MR BECKER: What is the date of the report?

MR MAHLANGU: 2 March 2012.

MR BECKER: What does the report say in essence? You don't have to read it verbatim into the record. I can merely ask you, do you confirm the contents of that report?

MR MAHLANGU: That is correct, I do.

MR BECKER: what is the gist of what your report states?

MR MAHLANGU: It states that there was a fraudulent transaction that had happened at GPAA. The benefits that was due to a beneficiary was paid into a fraudulent account, was paid without supporting documents, the officials who processed the payment did not have any reference or did they receive any request to do so. That means to process the payment.

MR BECKER: And who are they? The two officials?

MR MAHLANGU: It is Mr Bethuel Maimela and Ms Regina Masote."

[My own emphasis]

[25] This evidence remained unchallenged in cross-examination. The bulk of the testimony of Mahlangu related to the lack of cooperation allegation. Thus Mr Maimela, an attorney representing the dismissed employees directed his attention to this irrelevant evidence. The forensic report, contents of which were confirmed by Mahlangu, was placed before Ngako. The report contained statements made by Ringetani and Ms Meiring Coetzee (Coetzee). The report constituted hearsay evidence. Section 3 (4) of the Law of Evidence Amendment Act (LEAA)[6], governs the admissibility of hearsay evidence. In order to have rejected the forensic report as inadmissible evidence, Ngako should have sought recourse from the provisions of LEAA. Paramount to the admissibility of

[6] Act 45 of 1988

such evidence is the interests of justice.[7] Nowhere is it outlined in the arbitration award that Ngako rejected the testimony of Mahlangu and the forensic report. Mahlangu's evidence taken together with the hearsay evidence contained in the forensic report, justifies a conclusion that the dismissed employees were on the balance of probabilities guilty of an act of dishonesty.

[26] During cross-examination, Maimela conceded that they had no gripe with the guilty finding, what they griped about was the change of the sanction. That being the case, the GPAA was required to meet[8]. Maimela only commented that Mahlangu did not lead evidence about the charge[9]. That was wrong. As set out above he did and was not challenged. The dismissed employees were legally represented in the arbitration proceedings. Similarly, Masote testified that she is not guilty of fraud and she was taken up on the case she and Maimela referred to the GPSSBC.[10] On the balance of probabilities, the dismissed employees are guilty of dishonesty and they have not challenged the clear evidence of Mahlangu. Based on their own referral documents, their gripe was the change of the sanction and not the finding of guilt. Both the dismissed employees did not present a version as to what happened in relation to the transaction nor to contradict the evidence outlined in the report and confirmed by Mahlangu. Mahlangu specifically stated that they both processed the transaction without supporting documents. There is no *iota* of doubt that the transaction was fraudulent in nature.

[27] Accordingly, a finding by Ngoako that the dismissal was substantively unfair because the GPAA failed to prove on the balance of probabilities that the dismissed employees are guilty of the charge involving dishonesty is not one that a reasonable decision maker will reach based on the material that was placed before him.

---

[7] See *Southern Sun Hotels (Pty) Ltd v SACCAWU and another* [2000] 21 ILJ 1315 (LAC).
[8] Record of Review Bundle C paginated pages 90 line 19-25 and 91 lines 1-25.
[9] Record of Review Bundle C paginated page 79 line 2-8.
[10] Record Bundle C paginated page 108 line 1-14.

[28] Having reached a conclusion that the dismissed employees are guilty of dishonesty, it must follow axiomatically that the sanction of dismissal is appropriate for the offence[11].

*Fairness based on the alteration of a sanction*

[29] Although the dismissed employees sought to challenge the actions of the CEO in their referral forms, it does seem that this case was abandoned. In any event, Ngako did not entertain it. He did not make a finding of substantive unfairness based on the alteration of the sanction.[12] There is no counter-review before me. Accordingly, this Court shall not consider this review based on that.

Conclusions

[30] Given the views expressed above, it is unnecessary to consider the issue of the appropriateness of the remedy of reinstatement. Being guilty of dishonesty is enough to offset any remedy of reinstatement. As indicated dismissal for dishonesty is appropriate. The evidence was overwhelming that the dismissed employees were involved in the fraudulent transaction. That is an act of dishonesty. Nowhere in the testimony did the dismissed employees gainsay the roles they played in this perspicuously fraudulent transaction.

[31] In the results, I make the following order:

Order

1. The arbitration award issued by Panelist PM Ngako under case number GPBC4249/2012 dated 30 July 2018 is hereby reviewed and set aside.
2. It is replaced with an order that the dismissal is substantively fair.

[11] *Autozone v DRCMI and others* [2019] JOL 41073 (LAC).
[12] See *Moloantoa v CCMA and another* (JR 1281/19) 2021 10 (31 May 2021).

3. There is no order as to costs.

_____

G. N. Moshoana

Judge of the Labour Court of South Africa

Appearances:

| | |
|---|---|
| For the Applicant: | Mr W Bekker |
| Instructed by: | MacRobert Attorneys, Pretoria. |
| For the Respondent: | Mr T F Mathibedi SC |
| Instructed by: | Victor Maimela Attorneys, Atteridgeville. |