THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR606/2018

In the matter between:

MAHLANGU VUSI **Applicant**

and

COMMISSIONER P M NGAKO **First Respondent**

GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL (GPSSBC) **Second Respondent**

DIRECTOR GENERAL: DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM **Third Respondent**

Heard: **11 May 2023**

Delivered: **23 May 2023**

Summary: Review application – where the arbitration award is one that a reasonable decision-maker may reach – the Court of review is not empowered to interfere. The employee was dismissed for misconduct. The appointed commissioner reached a conclusion that indeed the employee is indeed guilty as charged. The commissioner did not find any unfairness with regard to the sanction of dismissal as imposed by the employer and did not interfere with it. The powers of this Court are that of review as opposed to an appeal. Held: (1)

The arbitration award is incapable of being reviewed and set aside and the application to review it is dismissed. Held: (2) There is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] This is an application, launched by Mr. Vusi Sunnyboy Mahlangu (Mahlangu) seeking to review and set aside an arbitration award issued by the learned Commissioner P M Ngako (Ngako) under the auspices of the General Public Sectoral Bargaining Council (GPSSBC), in terms of which he found that the dismissal of Mahlangu was fair. The application is duly opposed by the third respondent, the Director General: Department of Rural Development and Land Reform (DRDLR). Although the Director General was cited as a party in the present proceedings, at arbitration, the Department (DRDLR) was the cited party.

Background facts

[2] Factually, the dispute between Mahlangu and the DRDLR has as its genesis what appears to be a deleterious footing. That footing is suggestive of some corruption and or high handedness on the part of the former Honourable Minister Gugile Nkwinti (Minister). Mahlangu commenced employment with the DRDLR in 2006. In 2010, he was appointed as the Acting Deputy Director General: Land Distribution and Development (ADDG). In 2012, he was confirmed to be a permanent Deputy Director General (DDG).

[3] On Mahlangu's version in 2011, whilst attending a workshop in the presence of the Minister, the Minister placed a request for him to 'assist' two gentlemen

introduced to him by the Minister, to wit: Messrs. Boshomane and Present (potential land users) with land acquisition. Mahlangu, on his version, he 'innocently' as guided by the contemplated changes on what was known as Pro-Active Land Acquisition Strategy (PLAS), referred the potential land users to the Limpopo Provincial Office of the DRDLR for further assistance.

[4] I pause to remark that sadly, the affidavits and the heads of argument, fail, dismally so, in my view, to set out the background facts to the present dispute[1]. Because of that, this Court was compelled to re-read the evidence in order to distill the background facts. This exercise is not awaited where a Court has the benefit of heads of argument crafted by legal practitioners. Nevertheless, arising from the evidence one Sumaya Cachalia (Cachalia), the then head of the Provincial Office of DRDLR situated in Polokwane, as recorded in the impugned arbitration award, it is apparent that whilst provincial officers were in their mundane executive committee (*EXCO*) meetings an instruction from the national office (issued by Mahlangu) landed directing the Provincial Office to purchase land for the already identified beneficiaries, something unusual. Since the acquisition of the identified land, *Bekendvlei* farm, was in excess of the annual budget of the Provincial Office, Cachalia offered resistance to the acquisition.

[5] Despite some resistance on the part of Cachalia, the said land was purchased for the benefit of those beneficiaries, which were not assessed by the Provincial Office as per the usual process. It is apparent that the said land was acquired for a whopping R97 million rands. As expected, this transaction raised eyebrows. An investigation was conducted which culminated in Mahlangu being arraigned for a disciplinary enquiry in order for him to answer to five allegations of misconduct. It is unnecessary for the purposes of this judgment, to recite all those five allegations. It suffices to mention that Mahlangu was

[1] Rule 7A (2) (c) of the Labour Court Rules requires that a supporting affidavit to set out factual grounds. Similarly, rule 18 (2) directs in a peremptory fashion that a chronology of the material facts must be included. I must point out that heads of argument helps a judge on two fronts, namely; (a) when preparing to hear argument; and (b) when preparing a judgment for the parties. There shall come a time when this Court will reject heads of arguments that do not comply with rule 18, which rejection may be accompanied by an order of punitive costs.

accused of failure to comply with the policies and procedures; allowing identification of beneficiaries contrary to set procedures; issuing an instruction to the provincial office to acquire the land in question; abuse of his authority over Cachalia; and by-passing of applicable processes.

[6] Following an internal disciplinary enquiry, Mahlangu was found guilty and dismissed. Aggrieved by his dismissal, he referred a dispute to the GPSSBC and alleged unfair dismissal. As indicated above, the dispute was not resolved in his favour. Disenchanted thereby, he launched the present application. At some point, the present application was deemed withdrawn. On 6 December 2021, my brother Tlhotlhalemaje J in a written judgment ordered the reinstatement of the present application.

Grounds of review

[7] Properly considered, Mahlangu raises grounds of appeal which masquerades as review grounds. Mahlangu accuses Ngako of various unsubstantiated gross misdirections. They range from (i) failure to appreciate unspecified facts and evidence which served before him; (ii) disseminating an arbitration award that is not rationally connected to the unspecified evidence and unspecified reasons given by him for it; (iii) ignoring unspecified compelling and common cause evidence; (iv) misconstruction of the law; (v) ignoring the inconsistency in administering discipline; (vi) failure to identify testimony he found credible; and (vii) having reached unreasonable conclusions.

Evaluation

[8] This Court must state upfront that this is one of the hopelessly prepared and pursued review applications. Where Mahlangu alleges some failures on the part of Ngako, evidence and facts not appreciated; not connected; ignored; and contradictory is not specified. Not a *scintilla* of such evidence was set out in the founding affidavit. The supplementary affidavit did not shed any light other than

being argumentative. The Court remains none the wiser after considering the supplementary affidavit. This is bad pleading.

[9] That notwithstanding, it is by now settled law that since the Labour Court is bereft of appeal powers, the test is one of reasonableness as opposed to correctness[2]. Where an employee is dismissed for reasons related to conduct and the employer is challenged to justify the fairness of such a dismissal, the appointed commissioner must, on the balance of probabilities, be satisfied that the employee is (a) guilty of the misconduct allegations that led to his or her dismissal and (b) that dismissal as a sanction is appropriate or fair.

[10] In *casu*, Mahlangu was accused of five acts of misconduct. On his own version, the instruction issued to him by the Minister did not spell out how the said instruction must be carried out. He, on his own version, after placing an understanding on PLAS, 'innocently' took the initiative to refer the potential land users to the Limpopo Provincial Office. Therefore, even if it were to be accepted that he actioned the instructions of the Minister, it cannot be said that the Minister suggested to him that he must carry out those instructions by bypassing the known internal processes of acquisition of land and identification of beneficiaries.

[11] It is undisputed that Mahlangu, in order to action the instructions of the Minister, informed Cachalia to acquire the land in question. Of course he disputed the evidence of Cachalia that he instructed her not to follow acquisition procedures. On the undisputed version of Cachalia, the duty to identify beneficiaries for land acquisition rested on the Provincial Office. It does so by conducting a set assessment process. It became common cause that the potential land users were not identified through the set assessment process. They were, for the lack of a better word, parachuted to the Provincial Office. It is undisputed that the Provincial Office would use its own funds emanating from its own budget to acquire land for the purposes of undertaking projects. Having raised

[2] A view exist in some quarters that in truth, there is only one test and that of correctness. Perhaps in due course this compelling view shall gain traction and acceptance in the labour jurisprudence.

impecuniosity, Cachalia was expressly rebuked[3] by Mahlangu and was advised that the national office shall shift funds in order to acquire the land. Thus it became common cause that the whopping R97 million, which exceeded the budget of the Provincial Office by a proverbial mile[4], emanated from the National Office budget.

[12] Ultimately, Ngako was somewhat faced with two conflicting versions. Strictly speaking, the conflict was more on who between Mahlangu and Cachalia should be responsible for not following the set procedures in the transaction in question. Fact that procedures were not followed became common cause. Ngako reached the following reasonable conclusion before confirming a verdict of guilt in respect of some of the charges. He said:

> "11.3 …I agree with the view of the respondent that the applicant as Deputy Director General of Land Reform, was the custodian of all land reform projects and whether the Minister had instructed him to introduce the two future beneficiaries to the Provincial office or not, he had a moral obligation and ethical duty to ensure that Present and Boshomane did not receive preferential treatment. On the contrary, it was incumbent upon the applicant, given his position, that he ensured that they followed all processes.
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> 11.4 …This is confirmed by the evidence of Cachalia which was not disputed by the applicant that National Office is the one that identified Boshomane and [P]resent as beneficiaries, the applicant as he referred the project as a package to the Province he was under obligation to ensure that the PLAS manual is complied with.
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> 11.5 …As a result, I am satisfying (*sic*) that the Province could not assess Boshomane and Present because the Province was instructed to appoint them as beneficiaries as a result by his conduct and instruction

[3] In an email to Cachalia, Mahlangu remarked as follows: "*I should mention my observation with your attitude Sumayya, you are the only Province so far that did not accommodate budget for projects that came from National it's clear that you are defying Minister's directive…it can be confirmed from the records of the meetings where you keep on question the role of my Office vs that of Province. This shortfall is very deliberate from your part*".

[4] They could only demonstrate a meagre R25million.

> prevented the Province precluded the Province from evaluating this package that makes the applicant guilty…
>
> 11.6 …The applicant abused his powers in acquiring these farms."

[13] The above findings are findings that a reasonable decision-maker may reach regard being had to the available evidence. Contrary to the assertion of Mahlangu, Ngako dealt with the inconsistency assertion. Regard being had to the situations of the comparators, Ngako reached an unassailable conclusion that there was no inconsistency on the part of DRDLR when it pursued disciplinary hearing charges against Mahlangu.

[14] When considering the appropriateness or fairness of the sanction, Ngako considered the seriousness of the charges that Mahlangu was found guilty of and concluded that each attracts the sanction of dismissal because they go to the heart of a trust relationship. This finding is incapable of being besmirched. In terms of section 188 (2) of the LRA, any person considering whether or not the reason for dismissal is a fair reason must take into account any relevant *code of good practice* issued in terms of the LRA. In terms of item 3 (4) of schedule 8 code issued in terms of the LRA, dismissal is appropriate if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable.

[15] In *Quest Flexible Staffing Solutions (Pty) Ltd v Legoabe*[5], the LAC clarified the issue thus:

> "In *Sidum*o, the Constitutional Court held that a Commissioner is not empowered to establish afresh what the appropriate sanction is, but rather to decide whether the employer's decision to dismiss is fair. In making this determination, the commissioner should not defer to the decision of the employer but should weigh up all the relevant factors, including the importance of the rule that has been breached, the reason the employer imposed the sanction of dismissal, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of the dismissal on the employee, and the employee's

[5] (2015) 36 ILJ 968 (LAC).

> service record. These factors are, however not considered by the Constitutional Court to be an exhaustive list. Hence other relevant factors that may warrant consideration in assessing the fairness of a sanction include the seriousness of the misconduct, the effect of such conduct on the continuation of the employment relationship, the nature of the job and the circumstances of the infringement…In addition, the appellant regarded seriously disrespectful conduct, of the nature committed by the respondent, as an offence that warranted dismissal on the first occasion. Its code of conduct provides as much. In failing or refusing to demonstrate any acceptance of wrongdoing or remorse, the respondent rendered the continued employment relationship with the appellant intolerable and undermined the applicability of corrective or progressive discipline."

[16] In summary, the DRDLR had a fair reason to dismiss Mahlangu and given the seriousness of the offences, dismissal was an appropriate sanction. Regard being had to the elaborate submissions by Mr. Motimele, counsel for Mahlangu, an attempt is made to appeal in the circumstances where this Court lacks appeal powers. Accordingly, on application of the platitudinous test of review, the application falls to be dismissed.

[17] In the result the following order is made:

Order

1. The application for review is dismissed.
2. There is no order as to costs.

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G. N. Moshoana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Mr M I Motimele
Instructed by:	MacRobert Inc, Pretoria.
For the Respondent:	Mr T P Kruger SC
Instructed by:	The State Attorney, Pretoria.