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

Case No: JR 383/2022

Not Reportable

In the matter between:

MABOYA MPHONGA RONNIE

Applicant

and

DEPARTMENT OF HOME AFFAIRS

First Respondent

GENERAL PUBLIC SERVICE

SECTORAL BARGAINING COUNCIL

Second Respondent

VICTOR MADULA N.O

Third Respondent

Heard: 14 May 2024

Delivered: This judgment was handed down electronically by circulation to the parties and / or their legal representatives by email. The date and time for handing-down is deemed 10h00 on 11 March 2025

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JUDGMENT

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ALLEN-YAMAN J

### Introduction

[1] On 17 January 2022 the third respondent handed down an award under case number GPBC 1121/2018 in which he found that the applicant's dismissal had been substantively and procedurally fair and dismissed the applicant's dispute. The applicant applied to this court for orders that the award be reviewed, corrected and/or set aside, and that it be substituted with orders (1) that his dismissal be found to have been both substantively and procedurally unfair, and (2) that he be retrospectively reinstated.

[2] Albeit that the first respondent delivered a notice of opposition upon the initiation of the application, it did not deliver an answering affidavit or otherwise enter any further opposition.

### Background

[3] The applicant, Mr Maboya, was employed by the first respondent, the DOHA, as an Immigration Officer on 23 October 2011. On 18 February 2014 he was placed to work at the arrivals section at OR Tambo International Airport, Johannesburg, on which day he authorised the entry of a Pakistani national, Mr Malik Ijaz Awan, into South Africa.

[4] Some two and a half years later Mr Awan sought to leave South Africa, again traveling *via* OR Tambo. On the version of the DOHA, the circumstances of his having been allowed entry into South Africa were then called into question by one or more immigration officials in the departures section, which led to an investigation being conducted and charges being initiated against Mr Maboya. This resulted in his eventual dismissal on 9 May 2017. On Mr Maboya's version, he had been guilty of no misconduct whatsoever, and the allegations of misconduct arose out of a fraud perpetuated by individuals within the DOHA.

[5] The charges in question read,

*'ALLEGATIONS OF MISCONDUCT AND NOTICE TO ATTEND A DISCIPLINARY HEARING: YOURSELF*

*You, Mr Mpho Ronnie Maboya employed by the Department of Home Affairs, and therefore an officer of the Public Service of South Africa, are charges with misconduct in terms of the Public Service Co-ordinating Bargaining Council Resolution No 1 of 2003 (Disciplinary Code and Procedures for the Public Service).*

*ALLEGATION 1*

*It is alleged that you committed an act of gross dishonesty in that on or about 18 February 2014 at or near the OR Tambo International Airport, whilst you were on duty, you irregularly admitted Mr Malik Ijaz Awan, Passport No AU 1606262, a Pakistani national into the Republic of South Africa who had no valid visa. This is in contravention to the Immigration Act 13 of 2002 as amended.*

*ALLEGATION 2*

*It is alleged that you committed an act of gross dishonesty in that on or about 18 February 2014 at or near the OR Tambo International Airport, whilst you were on duty, you irregularly endorsed Mr Malik Ijaz Awan, Passport No. AU 1606262, a Pakistani national with a permit to conduct work for the period of two (02) years in the Republic of South Africa. This is in contravention to the Immigration Act 13 of 2002 as amended.'*

[6] The chairperson of the disciplinary hearing found that Mr Maboya had committed the infractions alleged, and determined that the sanction of dismissal was appropriate. An appeal noted by Mr Maboya varied neither the finding nor the sanction, which led him to refer a dispute to the second respondent. In such referral he challenged both the substantive and procedural fairness of the termination of his employment.

[7] On the DOHA's version presented at the arbitration Mr Awan was a Pakistani national who, as such, was required to have been issued a visa prior to having

entered South Africa. Notwithstanding that Mr Awan had no such visa, Mr Maboya authorised him to do so. By having done so, he both authorised him to remain in South Africa until 8 October 2016, a period of some two years and eight months, and to work for the duration thereof. In the circumstances, it was alleged that Mr Maboya had acted in contravention of the Immigration Act, 2002 in that (1) he allowed Mr Awan entry in circumstances in which his entry had not previously been authorised by way of a visa; (2) he authorised Mr Awan to remain in South Africa for a duration far in excess of the maximum permissible period of three months allowed for vacation purposes; and (3) he authorized Mr Awan to work in circumstances in which he had no authority to do so.

[8] On Mr Maboya's version, Mr Awan's passport had indeed contained a visa, one which had authorised him to remain in South Africa until 8 October 2016. He denied that he had authorised him to work. This being so, he disputed that he had been guilty of any misconduct, and asserted that his dismissal had been substantively unfair.

[9] As regards his complaint that his dismissal had been procedurally unfair, this was premised upon the fact that the disciplinary hearing which concluded that he had been guilty of misconduct and that dismissal had been warranted had been conducted in his absence in circumstances in which he had been ill, of which those responsible had been well aware. The DOHA, on the other hand, asserted that his whereabouts on the day of the disciplinary hearing had been completely unknown to those involved in the disciplinary hearing, which then proceeded in his absence.

[10] As stated above, the third respondent found in favour of the DOHA, and dismissed Mr Maboya's dispute.

#### Analysis

[11] It was Mr Maboya's case in the present proceedings that the third respondent had misunderstood the nature of the enquiry he was called upon to undertake; he failed to apply his mind to the evidence; ignored relevant evidence and considered irrelevant evidence; and his erroneous findings demonstrated that his understanding

of the facts was flawed. In the result, Mr Maboya contended that there was no rational connection between the evidence led and the award.

[12] As regards the finding that his dismissal had been substantively fair, the evidence introduced by the DOHA through its witnesses established *prima facie* the commission of the misconduct in question. The documentary evidence relied on by the DOHA included:

- A certified copy of Mr Awan's passport;
- A stamped endorsement at page 23 of Mr Awan's passport;
- Its stamp register;
- Its rules relating to the handling of stamps;
- Printouts from the DOHA's Enhanced Movement Control System;
- Mr Awan's asylum seeker Temporary Permit;
- Mr Awan's asylum application cancellation form;
- An SQL movement enquiry printout; and
- A boarding pass for Mr Awan.

[13] It was thereby established, either as uncontroverted or common cause, that Mr Awan had entered South Africa on 18 February 2014. He had then been assisted by Mr Maboya who captured on the DOHA's computer system that Mr Awan was visiting South Africa for the purpose of a vacation, and to that end was permitted to remain until 8 October 2016.

[14] At the time of his entry into South Africa stamp number 196, being the stamp which Mr Maboya was authorised to use, was used to endorse page 23 of Mr Awan's passport. Although the stamps utilised by Immigration Officers provide place for both its duration and its conditions to be endorsed, the stamp which was affixed to Mr Maboya's passport did not include any endorsement as to the duration of its validity, whilst the endorsement under conditions was indistinct. The DOHA's witnesses, Mr Matthews Nkuna and Mr Jeffrey Mabidikane, (both of whom were employed by the DOHA as Managers at OR Tambo) read the first word written as having been 'Work'.

[15] On 21 February 2014 Mr Awan presented himself to a refugee reception centre where he was granted an asylum seeker temporary permit. On 17 June 2016

he signed an asylum application cancellation form, and three days later exited South African *via* OR Tambo. The circumstances of his having entered South Africa were perceived to have been questionable by the immigration officers who processed his departure, which included Simelane, Chauke and Mofetsu.

[16] The Immigration Act 2002 is clear, the relevant provisions being,

*'10A Visas*

*(1) Any foreigner who enters the Republic shall, subject to subsections (2) and (4), on demand produce a valid visa, granted under subsection (3), to an immigration officer.*

*(2) ...'*

*'11(1) A visitor's permit may be issued for any purpose other than those provided for in sections 13 to 24, and subject to subsection (2), by the Director-General in respect of a foreigner who –*

*(a) Complies with section 10A; and*

*(b) ...*

*Provided that such permit –*

*(i) may not exceed three months and upon application may be renewed by the Director-General for a further period which shall not exceed three months; or*

*(ii) ...'*

Section 19 governs the issuing of work permits.

[17] The evidence introduced by the DOHA, if accepted as correct, established the commission of both the offences – in contravention of s10A, Mr Maboya granted Mr Awan entry into South Africa in circumstances in which he had no visa in contravention of s10A of the Immigration Act, authorised him to remain in South Africa for a period of two years and eight months in contravention of s11 of the Immigration Act, and granted him permission to work in contravention of s19 of the Immigration Act.

[18] The first issue to be addressed was the question whether the DOHA had established that Mr Awan had not been issued with a visa prior to his having gained entry to South Africa, in circumstances in which it was common cause that as a Pakistani national, a visa had been required to have been issued in advance.

[19] In substantiation of his denial that Mr Awan had not been in possession of a visa, and that the contrary proposition was true, Mr Maboya asserted that:

- an element of fraud had been involved in the certification of Mr Awan's passport; and
- given the obligations imposed by the Immigration Act on conveyancers of passengers, Mr Awan would not have been allowed to have boarded the aeroplane which brought him to South Africa had he not been in possession of a visa.

[20] As a point of departure it may be noted that Mr Nkuna's evidence concerning that which was evinced by the document produced by the DOHA's Movement Control System was not challenged in cross-examination,

*'Page 19 is also a printout from the Movement Control System, and this is what we call an "F5 Function". Under "F5 Function" when a person applies for certain documents, or whenever a foreigner applies for certain documents within the Department of Home Affairs, under Roman V it will be stated that this person applied on this date, this was the outcome of an application, whether it was approved or rejected. But when you check on the record of Mr Malik, on V we do not have any comment, it means there was never any application for a temporary residence permit or visa to be issued for him.'*

[21] The copy of Mr Awan's passport upon which the DOHA relied, which copy included 36 pages, bore no evidence of a visa. Mr Maboya, however, challenged its authenticity, having pointed out that the date on which the photocopies of Mr Awan's passport had been certified had been 19 June 2016 in circumstances in which it was evident that Mr Awan had departed South Africa from OR Tambo on 20 June 2016. As with the previous issue, this particular aspect was not raised with any one of the DOHA's witnesses in cross-examination. Had this been done, it would have been

possible for the DOHA to have elicited the evidence of the commissioner of oaths who had effected the certification in question, from which an explanation for the discrepancy might have been elicited. Given that the date reflected the 19<sup>th</sup> and the certification was said to have taken place on the 20<sup>th</sup>, the commissioner may, for example, have explained that the date stamp utilised had not been changed from the day before which had not been noticed at the time. Certainly nothing *ex facie* the copies themselves demonstrate that the original passport had been varied in any way.

[22] Although it was put to Mr Nkuna had been that the copy of the passport was incomplete, which was disputed by Mr Nkuna who demonstrated that the pages were numbered consecutively from its beginning to its end, how it could have been said to have been incomplete was never expanded upon.

[23] Despite Mr Maboya's representative having challenged the probabilities of Mr Awan not having been in possession of a visa, his version was never put to any of the DOHA's witnesses. Mr Maboya's eventual evidence on this issue was that,

*'... where I gave him not more than three years under the expiry date, I gave him not more than three years because he had a visa that allowed him to be under the visitor's permit on the day that [indistinct] Mr Awan to enter South Africa.'*

[24] Not only did this did not accord with his own summary of the facts of dispute as had been expressed in his referral to the second respondent wherein he stated that,

*'It is alleged that the applicant committed an act of misconduct and dishonesty in that on the 20<sup>th</sup> February 2014 whilst on duty he irregularly admitted a foreigner Mr Malik Awan into the Republic of South Africa and that Mr Awan had no visa. These allegations are disputed in totality by the applicant. The applicant dispute that Mr Awan had no visa and will state that Mr Awan produced a document which purported to be a visa and that the applicant*



*believed that the said document was indeed a valid visa and granted him access into the republic,'*

but nor in the course of his evidence did he mention the document which was alleged to have existed independently of Mr Awan's passport, which was purported to have been a visa.

[25] As to his assertion that, by virtue of the provisions of s35(7) of the Immigration Act,<sup>1</sup> it was physically impossible for Mr Awan to have boarded an aeroplane bound for South Africa without a passport, this was disputed by Mr Nkuna, who testified,

*'From my years of experience as a manager at OR Tambo and also gathering from experiences of other managers, it is something which has been seen occurring, and us as officials, we have a role to play in that regard, we end up having, what do you call it, cases such as the one of Mr Maboya, where people were admitted when they should not have been admitted.'*

[26] The DOHA accordingly established that it was most probable that Mr Awan had not been in possession of a visa prior to Mr Maboya having allowed him entry. This having been the case, Mr Maboya's further claim that such a visa had authorised Mr Awan's extended stay of almost three years fell to be rejected. He was therefore established to have acted in contravention of both s10A and s11 of the Immigration Act.

[27] It was undisputed that Mr Maboya had no authority to issue Mr Awan, or any other foreigner, a work permit. The DOHA's evidence that he had done so was predicated on the handwritten note appended to the condition portion of the endorsement of Mr Awan's passport utilising Mr Maboya's issued stamp, stamp 196. Both Mr Nkuna and Mr Mabidikane testified that the first word written thereon was 'Work' and whilst the second word was largely illegible, it began with a 'P'.

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<sup>1</sup> S35(7) of the Immigration Act reads,

A person in charge of a conveyance shall ensure that any foreigner conveyed to a port of entry  
(a) for purposes of travelling to a foreign country, holds a valid passport and transit visa, if required; and

[28] Mr Maboya's denial that he had issued Mr Awan a work permit was premised on the fact that, when admitting him, he had captured the purpose of his visit as having been for 'Vacation' purposes on the DOHA computer system. Whilst it is clear that he did so, his explanation for the contents of the endorsement effected in Mr Awan's passport with stamp 196 was less clear. On his version, despite having admitted that he had processed Mr Awan and authorised his entry to South Africa, he denied that he had made the endorsement in his passport and disputed that the wording thereof was consistent with the granting of a work permit. He testified,

*'Commissioner, I can only make out one alphabet here, it mentions "W" and then there is another one there, for me it looks like "A", bit it is W. So the person who was writing this could imitate my handwriting, so they went for whatever they wanted to write here, but the alphabet [indistinct] it is "W", hence now Mr Simelane on the affidavit, he wrote "Work Permit", and I can tell you Commissioner, ne, Mr Simelane, when he was writing that work permit, he was misled by this "W" [indistinct] Commissioner.'*

Under cross examination he reiterated that he had not written the annotation under 'Conditions' on the endorsement.

[29] Notwithstanding his denial, and despite the fact that it was common cause that he had been the Immigration Officer who had authorised Mr Awan entry into the country, he did not identify who had been responsible for the endorsement, utilising his own stamp, if not him. Given that he had been responsible for allowing Mr Awan to gain entry, and to that end had processed him through the point of entry at OR Tambo, his unsubstantiated denial that he himself had effected the endorsement of Mr Awan's passport fell to be rejected. That being the case, the question was why, if not purporting to have authorised Mr Awan to work in South Africa, did he not note 'Vacation' on his passport, as he had captured in the DOHA's computer system?

[30] Whether Mr Maboya intended to create the impression by means of the notation that Mr Awan was permitted to work or not is, however, immaterial. By having allowed Mr Awan entry into South Africa without a visa, and having

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(b) holds a valid passport and visa, if required.

authorised him to stay for a period of almost three years, his rendered himself guilty of misconduct sufficiently egregious to have justified the termination of his employment, as was correctly conceded by Mr Marweshe in the course of argument. This is so for the reasons given by Mr Nkuna concerning the break down in the employment relationship,

*'The first aspect relates to how we are seen as a nation, or how we are seen as a country when it comes to enforcing immigration-related matters. When people who do not have visas eventually end up inside the country, the confidence which other countries look at us with, it goes down, then as a result the freedom of movement of South Africans will then be limited, for instance, you want to go to the UK, you want to go to the USA, instead of going as a visa exempted person, you will always be scrutinised to say that how much are you earning, where are you working, those kind of things, so the manner in which the rest of the world sees us in immigration-related matters, it is declining, it is creating the picture that we are not doing what we are supposed to be doing.*

...

*The trust is also, what do you call it, tainted, and not only tainted in the sense of, what do you call it, employer/employee only, it is also tainted to say that the Department of Home Affairs is not delivering to the people of South Africa what is due to them, and as a result people are now in a position to say, you know what, we do not trust government officials because of their actions.'*

[31] In consideration of the aforementioned, Mr Maboya's grounds of review regarding the third respondent's conclusion that his dismissal had been substantively fair cannot be sustained. Regardless of the third respondent's various factual findings, it is evident that the conducted the enquiry which he was required to undertake, enabled both parties to present their cases, and ultimately arrived at a decision which was reasonable, in consideration of the totality of the evidence before him.

[32] The final issue for determination concerns the third respondent's conclusion that Mr Maboya's dismissal had been procedurally fair, Mr Maboya's complaint

having been that the disciplinary hearing had proceeded in his absence notwithstanding that he had been away from work on account of illness on the day of the hearing, 21 November 2016. In substantiation of his claim that his dismissal had been procedurally unfair Mr Maboya testified that:

1. He had notified his supervisor, Mr Peta, that he would be absent from work due to illness; and
2. The DOHA's subsequent authorisation of his sick leave for the period 20 to 23 November 2016 substantiated the veracity of his absence.

[33] In so far as the issue concerning the official to whom notification of his absence was alleged to have been given, his version fluctuated throughout the proceedings.

[34] In his affidavit in support of his application for condonation for the late referral of his dispute to the second respondent he stated,

*'After being booked off sick, I notified my line manager and the Labour Relations Specialist responsible for this matter. It is common cause that my line manager was a witness during the disciplinary hearing – it would appear that both my line manager and the Labour Relations Specialist deliberately failed to inform the chairperson of the disciplinary hearing that I was off sick.'*

[35] Firstly, the medical certificate issued to him concerning his absence for the period 20 to 23 November 2015 was issued by the attending physician on 22 November 2015, the day after the hearing had been concluded. As such, no notification given to anyone thereafter could have been relayed to those involved in the disciplinary hearing prior to the commencement thereof.

[36] Secondly, it was put to Mr Nkuna that he had been the person referred to by Mr Maboya in his affidavit as his 'line manager', with which proposition Mr Nkuna concurred on the basis that he had been the person who had testified at the disciplinary hearing. He denied, however, that Mr Maboya had notified him of his intended absence from the disciplinary hearing. Notwithstanding that which had been put to Mr Nkuna, at no point in his subsequent evidence did Mr Maboya testify that

he had in fact notified Mr Nkuna of his absence. Rather, he testified that it had been his supervisor, Mr Peta, who had been informed of his absence; a proposition not put to any one of the DOHA's witnesses, nor mentioned in his affidavit in support of his condonation application.

[37] Finally, although it was put to Ms Lerato Sibiyi, the DOHA's Labour Relations Officer at OR Tambo, that Mr Maboya would testify that he had informed her of his intended absence from the disciplinary hearing on the morning thereof, which she denied, this was not his eventual evidence in chief.

[38] Given the equivocal nature of Mr Maboya's evidence concerning who he had allegedly notified of his intended absence from the disciplinary hearing, the third respondent's conclusion that his evidence was to be disbelieved cannot be found to have been that of an unreasonable decision maker.

[39] The further fact that he obtained a medical certificate post fact the disciplinary hearing which appears to have retrospectively justified his absence from work (and which the DOHA accepted on 6 December 2016 for the purpose of affording him the benefit of paid sick leave) was irrelevant to the issue of the procedural fairness of the disciplinary hearing. The notification given to Mr Maboya of the DOHA's intention to convene a disciplinary hearing was unambiguous as to his obligations as well as the consequences which would ensue in the event of his failure to attend,

*'4.a. Failure to attend the hearing without providing a valid reason will result in the hearing continuing in your absence,'*

and

*'6. Should you have any queries please do not hesitate to contact Ms Lungile Ngobese at Discipline Management, Department of Home Affairs, Private Bag X114, Pretoria, 0001, Telephone number (0[...].'*

[40] In the circumstances, it cannot be said that the third respondent's conclusion that the disciplinary hearing had been procedurally fair was not one which a reasonable decision maker could have arrived at.

[41] In view of the conclusions reached by this court, it is found that the award is not one which falls to be reviewed and set aside. The application will accordingly be dismissed.

### Costs

[42] As the DOHA did no more than deliver a Notice of Opposition, the issue of costs does not arise.

### **Order**

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

K Allen-Yaman  
Judge of the Labour Court of South Africa

### Appearances

Applicant:

Mr M Marweshe, Marweshe Attorneys

Respondents:

No appearances