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ARBITRATION AWARD

Case Number: GPBC1993/2022
Commissioner: William Richard Pretorius
Date of Award: 24 June 2024

In the ARBITRATION between:

Mbulelo Qotoyi Attorneys obo Zodidi Sibembe
(Applicant)

and

Department of Justice and Constitutional Development
(Respondent)

Details of hearing and representation

1. This arbitration was set down in terms of section 191(5)(a) of the Labour Relations Act 66 of 1995 as amended (the LRA) relating to unfair dismissal due to misconduct. It commenced before me on 2 May 2023 and was finalised on 4 June 2024 at the Mthatha magistrate court in the Eastern Cape.

2. Both parties filed comprehensive written closing arguments which were duly received on 13 June 2024 which is regarded as the last day of these proceedings for the purpose of issuing the award.

3. The parties submitted separate bundles of documents and agreed that the documents will serve as evidence of what they purport to be unless there are disputed facts. The applicant's bundle is referred to as bundle "A" and the bundle of the respondent as bundle "B". The parties also submitted into evidence their signed pre-arbitration minute dated 27 October 2023.

4. These proceedings conducted in English and isi-Xhosa were recorded digitally and in writing with interpreters appointed by Council.

5. The applicant, Ms Zodidi Sibembe, attended and was represented by Mr Pikolomzi Ponco, from Mbulelo Qotoyi Attorneys. The respondent, the Department of Justice and Constitutional Development, was represented by its employee, Mr Dan Silawule, the Deputy Director: Labour Relations.

Issues in dispute

6. I am required to establish whether the dismissal of the applicant was procedurally and substantively fair, if not, to determine appropriate relief.

Background

7. The applicant commenced permanent employment with the respondent on 1 August 2008 as an Administrative Clerk at the Mount Frere magistrate court. At the time of her dispute; she earned a basic monthly salary of R18,705.32.

8. Subsequent to a disciplinary hearing which was held on 17 March 2022, the applicant was found guilty on allegations of gross dishonesty, bringing the name of the respondent into disrepute and misrepresentation. She was dismissed on 15 November 2022 after her internal appeal was dismissed. The applicant referred an alleged unfair dismissal dispute to the Council on 15 December 2022 whereafter a certificate of outcome was issued dated 27 December 2022 which stated that the dispute remained unresolved.

9. The applicant's relief sought to be reinstated retrospectively, is opposed by the respondent.

Survey of evidence and arguments

10. The respondent led the evidence of seven (7) witnesses, namely, Ms Nompumelelo Ngewu (Ngewu) the Area Court Manager for the Lusikisiki Cluster; Ms Tembisa Mkizwane (Mkizwane), a member of the public who borrowed money from the applicant; Ms Thabile Mendu (Mendu), the former Administration Officer and supervisor of all the offices at the Mount Frere magistrate court; Ms Gloria Lulama Mbelu (Mbelu), a retired educator and complainant; Ms Chwayita Mdoda (Mdoda), an unemployed member of the public and complainant; Ms Lindelwa Zinyane-Mgibanyoni (Zinyane-Mgibanyoni), the Assistant Master of the High Court: Mthatha and Mr Siphiwo Mpako (Mpako), the chairperson of the disciplinary hearing.

11. Ms Zodidi Sibembe, the applicant, was the only witness in her case. All the witnesses testified under oath.

12. The testimonies led by all the witnesses are fully captured on the digital record of proceedings.

13. Only the survey of evidence of the relevant witnesses in relation to the allegations on which the applicant was found guilty are dealt with under the heading 'analysis of evidence and argument' hereunder. In this regard, I have not taken the evidence of Mendu and Zinyane-Mgibanyoni into consideration insofar as it relates to the allegations levelled against the applicant which resulted in her dismissal, because it was not relevant.

14. Mendu was not present when the incident happened which led to the dismissal of the applicant. Her evidence related to the commissioning of certain documents by the applicant was unrelated to the aforesaid allegations.

15. The evidence of Zinyane-Mgibanyoni was in regard to issues which spilled over from Mendu's evidence in relation to the Chief Masters Directive 1 of 2023 regarding the administration of oath or affirmation by officials of the Masters Office.

Analysis of evidence and arguments

16. The dismissal of the applicant is not in dispute; therefore, the onus rests on the respondent to prove that the applicant's dismissal was fair. In this regard, the applicant challenged both procedural and substantive fairness of her dismissal.

17. In ***Emfuleni Local Municipality v SALGBC and others (JR 2525/11) [2015] ZALCJHB 356 (Emfuleni),*** the Court pointed out that *an employee is not entitled to the benefit of doubt as to the convincing nature of his or her explanation. On raising a particular defence, an evidentiary burden falls on the employee to establish that his or her version is likely. It is not necessary for the employer to adduce evidence to disprove positively a defence, especially if the defence is within the unique knowledge of the employee*.

18. Given the fact that most of the factual matrix regarding the relevant and material issues of this case was common cause, no serious issues arose which affected the reliability and credibility of the respondent's witnesses. Mdoda's evidence that the applicant borrowed money from the applicant in 2016 instead of 2018 was not material in that it is not in dispute that she lent the applicant money.

19. The applicant, on the other hand, was unable to maintain her version under cross-examination which exposed contradictions in her evidence. She failed to put material versions of her case to the witnesses when she had the opportunity to do so. The fact that she pleaded not guilty in these proceedings has casted doubt on her reliability and credibility as it brought her written statements, wherein she admitted and apologised for her conduct, into question.

20. The conflicting versions between the parties have been determined in the main on the probabilities thereof.

Procedural fairness

21. The Court in ***Avril Elizabeth Home for the Mentally Handicapped v CCMA (2006) 27 ILJ 1644 (LC),*** reminded commissioners that they are not reviewing tribunals. The Court held that the 'criminal justice model' applied by the erstwhile industrial court is no longer applicable in labour law. Unless the basic requirements of the *audi alteram* rule have been violated, there is no basis for a finding that the dismissal was procedurally unfair.

22. I have also considered Item 4(1) of the Code of Good Practice: Dismissal (the Code) as well as the relevant provisions of PSCBC Resolution 1 of 2003 which is the Disciplinary Code for the public service.

23. It is common cause that the applicant was duly represented at the disciplinary hearing by Mr Seakamela (Seakamela), an official from the Public Service Association of South Africa (the PSA).

24. The respondent called Mr Siphiwo Mpako (Mpako), the chairperson of the hearing, to give evidence regarding the procedures preceding the dismissal.

25. Among issues raised by the applicant in challenging procedural fairness, are that she was forced by her union representative from the PSA, Mr Seakamela (Seakamela), to plead guilty and that the chairperson of the hearing did not give her an opportunity to explain her plea of guilty and allow her to cross-examine witnesses.

26. In his testimony, Mpako, stated that the applicant, being represented by Seakamela from the PSA, pleaded guilty to all three allegations levelled against. He indicated that he asked the applicant whether she understood her plea and she responded in the affirmative. He indicated that he also enquired into the background of the matter. He said after the applicant pleaded guilty to the allegations and he was satisfied that she was not under duress; he invited mitigating and aggravating factors from the representatives. He pointed out that there was no need to call the respondent's witnesses, because the applicant pleaded guilty.

27. Under cross-examination, he indicated that there was reason for him to probe into the merits of the case given the fact that the applicant pleaded guilty. He stated that he did not record the proceedings as it was not a requirement in terms of the Disciplinary Code; however, he allowed Seakamela on the latter's request to record the proceedings.

28. The applicant, under cross-examination, was unable to give a plausible reason why she did not report the conduct of Seakamela to the PSA.

29. The applicant's version that her acknowledgement of being aware of the allegations without Mpako allowing her to explain what she meant by it, is highly improbable taking into account that she was duly represented by her own union of choice.

30. I am persuaded by Mpako's version that the applicant was not forced to plead guilty, taking into account that she had no plausible explanation regarding her failure to report the alleged unbecoming conduct of her union representative to the PSA or to subpoena Seakamela to testify in these proceedings. In addition, the applicant's notice of appeal on page 3 of bundle B is silent on her claim that she was forced to tender a plea of guilty.

31. The most plausible inference to be drawn from Mpako's uncontested evidence that there was an interaction between the applicant party and the respondent party prior to the start of the hearing. is that the applicant voluntarily entered into a plea of guilty with an expectation of a lesser sanction and when it did not happen; she became confused and disgruntled.

32. Mpako's testimony that he allowed the applicant an opportunity to explain her plea of guilty, is corroborated by his written record of proceedings. It follows that there was no need to call the witnesses of the respondent to testify. Mpako's evidence, under cross-examination, that he allowed Seakamela to record the proceedings is undisputed.

33. In light of all the above reasons, it is my finding that the applicant out of her own free will pleaded guilty being allowed an opportunity to state her case in respect of her plea of guilty.

34. I, therefore, find that the respondent has discharged the onus to prove that the applicant's dismissal was procedurally fair.

Substantive fairness

35. Having found that the applicant was not forced to tender a plea of guilty at the disciplinary hearing on all the allegations levelled against her, I am obliged in this arbitration, which is a hearing *de novo*, to consider the respondent's witnesses and testimonies in relation to the allegations and circumstances leading to the applicant's dismissal even though such evidence was not led.

36. Similarly, I am bound to consider the applicant's version in relation to the allegations and circumstances referred to above.

37. In addition, given the fact that applicant disputed such a plea and given that she now disputed that she was guilty of the misconduct, I am obliged to make my own finding on the question of guilt, taking all evidence into account.

38. In deciding whether or not the reason for the dismissal is a fair reason, I have taken into account Item 7 of the Code. Parties were in dispute over whether or not the applicant contravened the rule; the awareness of the rule and appropriateness of dismissal as a sanction. The inconsistent application of the rule was not in dispute.

39. I turn now to each of the allegations levelled against the applicant.

ALLEGATION ONE

GROSS DISHONESTY

"You were gross (*sic)* dishonest and engaged yourself in a corrupt activity in that, while you were deployed (*sic*) as Clerk of the Magistrate Court at Mount Frere, you used your office position and abused your powers of having knowledge that public members (**Ms Chwayita Mdoda and Ms Gloria Lulama Mbelu**)

have claimed maintenance monies in respect of deceased estate and borrowed money from them for your personal use and as a result (*sic*) an act you knew or ought to know (*sic*) it was wrong to do so."

40. The applicant during these proceedings and in her closing arguments submitted that she was not aware of the rule she contravened and that the drafting of the charges was not clear as to whether the applicant was charged in terms of PSCBC Resolution 1 of 2003 (the Disciplinary Code) and/or the Code of Conduct for public servants (the Code of Conduct).

41. The respondent called Ms Nompumelelo Ngewu (Ngewu), the Area Court Manager for the Lusikisiki Cluster, to testify *inter alia* regarding the Code of Conduct. According to her uncontested evidence, the Code of Conduct is available on the website of the respondent and all employees have accessed to it. She highlighted several paragraphs of the Code of Conduct which *inter alia* stated at par. C.5.4 under the heading 'personal conduct and private interests' that an employee shall "not use or disclose any official information for personal gain or the gain of others".

42. The relationship between the Disciplinary Code and the Code of Conduct is clear and unambiguous: Annexure A of the Disciplinary Code contains a list of acts of misconduct which include *inter alia* the *contravention of any prescribed Code of Conduct for the public service*. The applicant's argument that the respondent did not present Annexure A of the Disciplinary Code is clearly an afterthought and misplaced, taking into account that Annexure A is not a separate document but is part of the Disciplinary Code, the latter was not placed in dispute in terms of the signed pre-arbitration minutes between the parties.

43. Turing to the drafting of the allegations by the respondent, it is settled law that employers in proceedings of this nature are not expected to draft allegations with the precision and detail as it is done in criminal cases. Against this backdrop, I am satisfied, contrary to the applicant's closing arguments, that the allegations are clear and straightforward.

44. I say so, because the allegations contain sufficient particulars which are covered in the rules of conduct of the respondent and the allegations contain sufficient particulars which is supported by various statements, including the applicant's own written statements, and other documentary evidence which at the end of the day was sufficient to put the applicant to her defense. The categorisation by the respondent of the alleged misconduct is of less importance.

45. The most plausible inference to be drawn from the applicant's testimony that she had never borrowed money from clients in the past, because they were not her friends, is that she was indeed aware of the rule, albeit that she might have had a different interpretation thereof.

46. Based on all the above reasons, it is my finding that the respondent has succeeded to prove that the applicant was aware of the Code of Conduct. This being so, the applicant was aware of the conduct expected from her in dealing with members of the public and the consequences accompanying breach thereof. Even if there is still doubt about this conclusion, of which there is none, the applicant ought to have known the Code of Conduct as well as the Disciplinary Code by virtue of her length of service and nature of her work in the employ of the respondent.

Whether or not the applicant contravened the rule as alleged?

47. The respondent called Ngewu, Mkizwane and the two complainants to testify in support of its version that the applicant used her office position and abused her powers of having knowledge about the respective estates of the complainants and borrowed money from them for her personal use. Both Mbelu and Mdoda denied being friends with the applicant and maintained, under cross-examination, that they lent the applicant the money, because they trusted her being an official of the court. They also confirmed that they went to the applicant's workplace to report the applicant's failure to repay the money she borrowed from them.

48. The applicant in essence testified that she borrowed the money from the complainants, because they were her friends and at the time when she borrowed the money; she was not aware whether the maintenance monies from their respective estates have been paid out to the complainants. She also submitted that the complainants would not have borrowed her such substantial amounts if they were not friends. She pointed out that she borrowed the money outside working hours and that it was a personal issue which had nothing to do with the respondent. According to her, she drafted the letter of demand to assist Mdoda with the release of her money from the bank which was in a fixed account.

49. The factual matrix of this case is largely common cause. The objective facts show that:

(a) The applicant during 2018 on different occasions borrowed R117,000.00 and R50,000.00 from Mbelu and Mdoda respectively and prior borrowing the money from them, the applicant assisted both of them as beneficiaries with claims in respective of their respective deceased estates.
(b) Mkizwane borrowed money from the applicant to assist her in a project. The applicant in turn approached Mbelu who deposited the money into the bank account of Mkizwane. The agreement was that the applicant will repay Mbelu.
(c) On 23 February 2021, the complainants reported the applicant's failure to repay the money to Ngewu who managed to resolve the matter internally regarding the outstanding amounts owed by the applicant.

(d) In this regard, the applicant in her undisputed written statement emailed to Ngewu on 1 April 2021 agreed to repay the outstanding amount of R50,000.00 in respect of Mbelu. The applicant also in her undisputed written statement dated 2 September 2021 agreed to repay the outstanding money in respect of Mdoda.

(e) The applicant admitted that she drafted a letter of demand which purported that Mdoda owed her monies and upon submitting the letter of demand to the bank the money which she borrowed was released.

50. Much was made by the parties regarding the nature of the agreement between the applicant and the complainants as well as the exact amounts borrowed and those amounts outstanding. The parties spent considerable time on the issue of jurisdiction; commissioning of documents and the appointment of attorneys, etc. Lastly, a lot was said and argued about the contested issue of friendship between the applicant and the complainants.

51. The aforementioned issues are peripheral and to some extent irrelevant to the real issue to be determined in regard to this allegation; namely, whether the applicant by virtue of her position used official information at her disposal to borrow money from Mdoda and Mbelu for personal gain?

52. The most plausible inference to be drawn from the proven fact that the applicant borrowed the money after she interacted with the complainants in regard to their respective claims of the estates; is that she borrowed the money from the complainants based on her prior knowledge that they were beneficiaries from their respective deceased estates, and she knew the value of the estates which explained the substantial amounts borrowed from the complainants.

53. In this regard, Ngewu was undisturbed in her testimony that in order for the applicant to establish jurisdiction, she first had to establish the value of the estate. Moreover, the applicant conceded, under cross-examination, that she became aware of the value of the estate of which Mbelu was the beneficiary through the uncontested bank statement on page 28 of bundle B whereafter she advised Mbelu to refer the matter to the Master of the High Court on the basis that it exceeded the jurisdictional amount of R250,000.00 of the magistrate court.

54. The claim for the estate of Mdoda which was less than R250,000.00 was done by the applicant at the Mount Frere magistrate court as confirmed by the letter of authorisation that was issued.

55. Even if I accept the applicant's version, amplified by her closing arguments, that at the time she borrowed the monies she was not aware whether the monies were paid out to the complainants, it does not change

the fact that she had prior official information at her disposal which, on a balance of probabilities, put her in the position to borrow the money from the complainants.

56. It is highly improbable, based on the proven facts, that the applicant would have borrowed the money from the complainants in circumstances other than the link with their respective estates, taking into account that Mdoda was unemployed at the time and Mbelu, a retired educator as referred to above.

57. At the end of the day, it is a proven fact the complainants approached the respondent as citizens for assistance regarding their claims as beneficiaries of their respective estates – whether the applicant and the complainants were friends or not – does not change the known rule in respect of the conduct of public servants towards citizens or members of the public.

58. The applicant knew or ought to have known that it was unprofessional and unethical to borrow money from citizens with whom the respondent had a relationship as a direct result of her position, knowledge and assistance rendered.

59. Given all the above reasons, I am convinced that the applicant used official information by virtue of her position to borrow money from Mbelu and Mdoda for her personal gain which was in conflict with the Code of Conduct.

60. I, therefore, find it has been established that the applicant has committed the misconduct in allegation one.

ALLEGATION TWO

BRINGING THE DEPARTMENT'S NAME INTO DISREPUTE

"You committed an act of misconduct by contravening Annexure A of the PSCBC Resolution 1 of 2003, in that you were dishonest and you engaged yourself in a corrupt activity in which it is in contravention to the Public Service Regulation and because of your action, you have brought the department's name into shame and disrepute, as a result, the Public Members you borrowed monies from are still are (sic) not paid the balance of the monies owed; **Ms Chwayita Mdoda (R15 000) and Ms Gloria Lulama Mbelu (R40 000)** an act you knew or ought to have known it was wrongful to do so (*sic*)."

61. It is the applicant's case that the borrowing of the money from the complainants took place outside working hours and as such was a personal issue which had nothing to do with the respondent's operations.

62. It is common cause that the money was borrowed outside working hours. I agree that it would have been a personal issue, if the applicant had borrowed the money from the complainants from an income source

other than the estate, e.g., if the complainants were beneficiaries from a stokvel society as raised during the testimony of the applicant.

63. It is settled law that an employer may discipline an employee for misconduct which happened outside working hours. I am satisfied that there was a link between the misconduct and the respondent, its operational requirements and the context of the working relationship, taking into account that it has now been established that the applicant was aware of the rule which regulates the conduct of employees in relation to citizens or members of the public; her prior knowledge of the respective claims by the complainants as beneficiaries of their estates by virtue of her position in the estate office at the time, the proven fact that the complaints were officially reported to the respondent by the complainants as well as the applicant's own written statements, on pages 13, 14 and 93 of bundle B, wherein she apologised for her conduct.

64. Given the above, it is clear that the official reporting of the matter to the respondent by the complainants which prompted the applicant to apologise has tarnished the reputation of the respondent given the nature of its operations and the professional and ethical conduct expected from its employees.

65. I, therefore, find it has been established that the applicant has committed the misconduct in terms of allegation two.

ALLEGATION THREE

MISREPRESENTATION

"You committed an act of misconduct by contravening Annexure A of the PSCBC Resolution 1 of 2003, in that without permission or Authority, you created documents meant for the use of Small Claims Court, in which it directed that Ms Mdoda had a judgment in which Ms Mdoda owed you, acting as a complainant/clerk in which Ms Mdoda submitted to the bank as proof that she desperately needs the money and the bank accepted the documents and paid the money, an act you knew or ought to know it was wrong to do so."

66. It is uncontested that the applicant drafted the letter of demand wherein she stated that Mdoda owed her money which was false. The applicant and Mdoda went together to the bank and upon presentation of the letter of demand, the bank released the money which the applicant had borrowed from Mdoda.

67. The applicant's version that her supervisor, who has since passed away, authorised the drafting of the letter of demand is unsubstantiated as there is no other evidence to support her claim. Even if the letter of demand was authorised as claimed by the applicant, it would not have changed the fact it was a misrepresentation of the truth in that Mdoda did not owe the applicant money. The applicant's explanation

in re-examination that she drafted the letter in order to help Mdoda to service her car is no justification for her conduct which was clearly dishonest.

68. On the above reasons, I find that it has been established that the applicant has committed the misconduct in terms of allegation three.

69. With all the above reasons, it is my finding that the respondent has succeeded to discharge its onus that the dismissal was effected for a fair reason with procedures followed. I will now consider appropriateness of dismissal as a sanction.

70. The allegations on which the applicant was found guilty resort under serious misconduct in terms of par. 6 of the respondent's Disciplinary Code with the possibility of dismissal if found guilty as provided for at par. 7.4 for possible sanctions.

71. Item 3(4) of the Code of Good Practice: Dismissal provides that it is *generally not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. Examples of such serious misconduct, subject to the rule that each case should be judged on its merits, are gross dishonesty…*

72. My own assessment of the gravity of allegations one and two is that it does not warrant dismissal as a first offence, because there is no element of dishonesty or corruption present as alleged by the respondent. At best these two allegations show that the applicant misused her position in borrowing the money which conduct could have been corrected through progressive discipline.

73. However, allegation three is fatal for the applicant's case despite the fact that she admitted that she drafted the letter of demand. It is serious in that it involves an element of dishonesty which is aggravated by the fact that it was done deliberately.

74. Dr Grogan in his book *Dismissal*, 2nd edition indicated that *employees accused of misconduct are thus faced with a stark choice: they can either deny the commission of the offence in the hope that the employer will not be able to prove it; or they can confess and apologise in the hope that their remorse will count in their favour when mitigation is considered. The Labour Appeal Court has made it plain that the employee who chooses the former option, and fails, cannot expect sympathy*.

75. The applicant in these proceedings has chosen the former option and has thus shown no remorse. Her lack of remorse coupled with the element of dishonesty in allegation 3 have outweighed by far her uncontested clean disciplinary record and long service record.

76. There was no direct evidence led by any of the witnesses of the respondent on the issue of the trust relationship. Ngewu on the issue of possible reinstatement testified that because the applicant was found guilty on the Code of Conduct, the law must take its cause.

77. Notwithstanding, our Courts have been consistent that where an employee, as *in casu*, is found guilty of gross misconduct it is not necessary to lead evidence pertaining to a breakdown in the trust relationship as it cannot be expected of an employer to retain a delinquent employee in its employ. See ***Impala Platinum Ltd v Jansen & Others [2017] 4 BLLR 325 (LAC) (Jansen).***

78. Certain misconduct, on face value, may, on the nature of the misconduct itself, infer that the employment relationship is irretrievably broken. Acts of dishonesty which includes theft, fraud, and misrepresentation (***Mothiba v Exxaro Coal (Pty) Ltd t/a Grootgeluk Coal Mine (2021) 42 ILJ 1910 (LAC)***), are said to go straight to the heart of the employment relationship and once the employer can prove the misconduct did take place a sanction for dismissal would be warranted.

79. There can be no doubt that the applicant's act of dishonesty which includes misrepresentation flowing from allegation three, on its own, warrants dismissal taking into account the judgments in ***Jansen*** and ***Mothiba*** referred to above.

80. I have considered all the factors presented before me at length and have come to a conclusion that dismissal was the only appropriate sanction under the circumstances.

81. I, therefore, find that the respondent has discharged the onus to prove that the dismissal was substantively fair.

82. I, therefore, deem it appropriate to make the following award:

Award

83. The dismissal of the applicant, Zodidi Sibembe, by the respondent, the Department of Justice and Constitutional Development, is both procedurally and substantively fair.

84. There is no order as to costs.

William Richard Pretorius
GPSSBC Panellist