

ARBITRATION AWARD

Case Number: **GATW1364-21**

Commissioner: **Maputle Mohlala**

Date of Award: **19 October 2021**

In the **ARBITRATION** between

PSA obo Matshika Faith Karabo

(Union/Applicant)

and

Companies and Intellectual Property Commission (CIPC)

(Respondent)

Details of Parties and Representation

- APPROVED**
1. The arbitration proceedings were scheduled for 05 October 2021 at the Tshwane CCMA Offices. The applicant was in attendance and was represented by Thabo Thobakgale, a member of his trade union. The respondent was represented by Chris Mudau, an admitted attorney. The applicant had referred an alleged unfair dismissal dispute relating to misconduct. At the commencement of the proceedings the parties agreed that the only issue in contention was the harshness of the sanction and the proceedings were digitally recorded only to the extent of the agreement. The matter stood to be decided as a stated case through the parties' written heads of arguments. I am indebted to the parties for their compliance with the agreed submission dates.

Background to the Dispute

2. The parties are PSA obo Matshika Faith Karabo (the applicant) and Companies and Intellectual Property Commission (CIPC) (the respondent). The applicant was employed by the respondent on 01 April 2013. At the time of her dismissal on 18 January 2021 she occupied the position of Deputy Director: Budgets and earned R90 886.92 per month. The applicant had referred an alleged unfair dismissal dispute relating to misconduct. She was charged and dismissed under a charge reading as follows: "Falsifies records or any other documents. On or about 12 August 2019 you received an email from Dumisani Ntuli of Ayandza (Pty) Ltd with a quotation of R242 190.00 (two hundred and forty thousand, one hundred and ninety thousand), you then altered the quotation to an increased amount of R270 940.00 (two hundred and seventy thousand, nine hundred and forty rand) and you on or about 16 August 2019 you scanned the altered quotation using the employer's property." She was acquitted on a charge reading as follows: "In that on or about 4 July and 7 August 2019 you received an email from Dumisani Ntuli of Ayandza (Pty) Ltd requesting you to print RFQ 34/2019 and RFQ 44/2019 he had received from the employer. You printed out the document for him using the employer's printer without the employer's consent, in doing so you abused your position as Manager: Budget Finance Unit."
3. The procedural fairness of the dismissal was not placed in dispute. However, the substantive fairness of the dismissal was in dispute and only to the extent of the harshness of the sanction. The applicant conceded that she had committed the offence in question.

Issue to be Decided

4. The issue to be decided is whether the sanction of dismissal as meted out against the applicant was an appropriate one in the circumstances. The applicant sought relief in the form of retrospective reinstatement.

Survey of Parties' Submissions and Arguments

The Applicant's Case:

5. Thobakgale submitted on behalf of the applicant that the charge forming the subject matter of this arbitration is only the one on which the applicant was found guilty and dismissed. The applicant does not in any way downplay the seriousness of the charge and had acknowledged her action after a careful and wide consultation. According to her, she was assisting her then spouse like any other person would have done. Her then spouse was not in a position to print or make alteration to a quotation that he had already

submitted to the respondent and had innocently asked the applicant to make a few adjustments and to send it back to him. She had assisted and that was the biggest mistake of her life.

6. The applicant does not contest the material facts of the charges but has shown remorse and taken responsibility for her actions. It was her first offence and first appearance in a disciplinary hearing in her fourteen years of service to the respondent. In terms of the Code of Good Practice found in Schedule 8 of the Labour Relations Act 66 of 1995 Item 3(4) generally it is not appropriate to dismiss an employee for a first offence except if the misconduct is serious and of such a gravity that it makes a continued employment relationship intolerable. Examples of serious misconduct, subject to the rule that each case should be treated according to its own merits, are gross dishonesty, willful damage to property of the employer, willful endangering of the safety of others, physical assault on the employer, a fellow employee, client or customer and gross insubordination. In **De Beers Consolidated Mines Ltd v CCMA & Others (1988)** the Labour Court held that it would be difficult for an employer to re-employ an employee who has shown no remorse. Acknowledgement of wrongdoing is the first step towards rehabilitation. In the absence of a recommitment to the employer's workplace values, an employee cannot hope to re-establish the trust relationship which he himself has broken.
7. The applicant submits that the charge that she was found guilty of was not any of the examples as mentioned in the Code and the respondent has never led evidence of the broken trust relationship and there was no damage suffered by either party as the project was not awarded to the applicant's ex-spouse. The quotation was still going to Marketing Division for further handling and the applicant's ex-spouse was still going to compete with other quotations. The applicant had no direct influence of information about other suppliers. The applicant and her ex-spouse had filled a declaration form stating their relation before the ex-spouse could submit his quotation. At the time of submission of the quote, the submission date had yet to close. The fact of the respondent requesting a quotation did not necessarily mean that the ex-spouse was awarded the deal or contract.
8. At the time of the submission of the quote, the applicant saw nothing wrong with assisting the ex-spouse as she had declared the conflict of interest. She was assisting her ex-spouse on his request and not influencing any decision on awarding of the contract. She admits that she was not aware that helping her spouse in that manner was in contravention of the respondent's rule or policy. If there was doubt about the quotation or suspicion of unfair advantage towards the applicant's ex-spouse, the respondent should have disqualified the said quotation by virtue of connection with the applicant as recommended by the investigating officer.

9. The Deputy Director position is not a senior managerial position but middle management. Therefore, the decision to approve the quantum in question did not lie with the applicant but with other directors within procurement. The applicant has been in the respondent's employ for fourteen years and throughout that period her ex-spouse's business of ten years has never had business with the respondent. There was no malice intended as the Chief Financial Officer, Mohammed Jasat, 's advice was sought while all of this was taking place and had advised that declaration of conflict of interest be made which was done.
10. The sanction was too harsh. The purpose of discipline is not to punish the employee but to correct the behaviour of such or affected employee. The applicant submits in the Sidumo judgment the Constitutional Court listed the factors that commissioners must consider when deciding on the fairness of a dismissal. The factors do not represent a close list and the weighting should be attached to each factor would differ from case to case. The factors are the importance of the rule that was breached, the reason the employer impose the sanction of dismissal, the basis of the employee's challenge to the dismissal, the harm caused by the employee's misconduct, whether additional training and instructions may result in the employee not repeating the misconduct, the effect of misconduct on the employee and the long service record of the employee. It further stated that the absence of dishonesty is a significant factor in favour of the application of progressive discipline rather than dismissal. The chairperson had ignored the length of service of the applicant, that she was a first-time offender, she has a child with special needs, had declared the conflict of interest, the damage suffered by the respondent against the interest of the employee, the CFO advice and otherwise would not have been involved.

11. Thobakgale accordingly argued that the sanction was shockingly harsh and prayed that the applicant be retrospectively reinstated.

The Respondent's Case:

12. Mudau restated the charges and submitted that the applicant had elected to plead not guilty to those charges but admitted to all of their elements. The Code of Conduct for Public Servants enjoins the applicant to refrain from favouring relatives and friends in work-related activities. In casu, the applicant abused her position in favour of her husband. She received the quotation from him, altered it upwards and sent it back to him and we submitted it as his own work. Similarly, the Code of Conduct requires the applicant to be honest and accountable in dealing with public funds and use the public service's property and other resources effectively, efficiently and only for authorized official purposes. It is undisputed that in casu the applicant altered Ayandza's quotation using her official computer and scanned it back to her husband using the public service's property- the scanner. Her defense was that she was not aware that making a copy or using the respondent's facility was an offence since it was common practice at CIPC to

use the facility of the respondent. Her ignorance of the law is no excuse as held in **S v De Blom 1977(3) SA 513 (A)**.

13. The applicant held a managerial post and a position of trust. She ought to have known her basic rules of engagement as in the Code of Conduct. She ought to have known that certain conduct is still unlawful regardless of whether it is common practice or not. She was employed in a position of responsibility where she was entrusted with the responsibility to manage the budgets and expenditure of the respondent. The trust relationship between the applicant and the respondent has broken down irretrievably. In **Lahee Park Club v Garrat (1997) 9 BLLR 1137 (LAC)** it was held that is an entirely a reasonable stance for an employer to adopt that it wishes to terminate its relationship with the employee who has breached the trust reposed in her and who acted arbitrary. The respondent has lost all the trust and faith in the applicant. In **Visser v Standard Bank of SA Ltd** with an employee of sixteen years dismissed for breaching confidentiality and misrepresenting facts in a meeting with subordinates and accordingly charged with dishonesty, the commissioner was not convinced that Visser was guilty of serious misrepresentation. The commissioner stated that the decision on an appropriate sanction in any individual case is a discretionary act that must be exercised in good faith after considering relevant facts and excluding irrelevant ones. On the facts the employer's argument could not succeed but the award stated that an employer is not required to retain a person in employment if the evidence discloses that a continued employment relationship had been irreparably damaged and that the more senior the position, the greater the need for high levels of trust relationship.

14. The dismissal of the applicant should be confirmed as her misconduct is very serious in that she was a senior person in the respondent's organization. Government is beset by cancer of corruption where procurement practices are corrupted by some public servants for their own benefit or the benefit of others. The citizens of South Africa are tired of the greed such as this one by the applicant and demand tougher actions be taken to fight this scourge. The applicant must have been aware of the amount budgeted for this tender and by agreeing to assist her husband, her conduct was not too different from insider trading.

15. Mudau accordingly submitted that the sanction of dismissal should stand and is fitting the applicant's conduct, the interests of the respondent and the public at large.

16. In reply, Thobakgale submitted that though the charges before the chairperson were two, the applicant was acquitted on the second charge which flew from the main charge. The applicant does not contest the Code of Conduct but that the dismissal was harsh for the offence. She was merely assisting her ex-spouse and had declared her conflict of interest in that regard. While she was in a managerial position, she did not

and could not have had an influence on the quotation or other quotations. She was not in the section that sought the quotations and was not part of the decision-making and had declared her conflict of interest.

17. It is far-fetched that the respondent argues corruption in relation to this matter where the applicant declared her conflict of interest, was not involved in the sourcing of quotations, her ex-spouse was never awarded business and she did not benefit in this instance. The chairperson should have entered a plea of guilty when the applicant admitted to the elements of the offence and should have considered the applicant's remorse in that regard.

Analysis of Parties Submissions and Arguments

18. The issue to be decided is whether the sanction of dismissal as meted out against the applicant was an appropriate one in the circumstances. The applicant sought relief in the form of retrospective reinstatement. The applicant conceded that she had committed the offence in question but challenged the appropriateness of the sanction. I have considered the submissions and arguments of the parties in their entirety and those outlined above are the essence thereof.

19. Item 2 of the Code of Good Practice: Dismissal (Schedule 8) of the Labour Relations Act 66 of 1995 (as amended) (the LRA) provides, inter alia, that "... whether or not a dismissal is for a fair reason is determined by the facts of the case, and the appropriateness of dismissal as a penalty. Item 3 (2) provides that the courts have endorsed the concept of corrective discipline. Item 5 also provides that when deciding whether or not to impose a penalty of dismissal, the employer should in addition to the gravity of the misconduct consider factors such as the employee's circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself. Item 7(b)(iv) provides that any person determining whether a dismissal for misconduct is unfair should consider if a rule or standard was contravened, whether or not dismissal was an appropriate sanction for the contravention of the rule or standard.

20. It is accordingly clear taking from the above that a dismissal is not applied mechanically but that for an employer to reach a decision to terminate an employee's employment must have considered certain factors. This is despite whether the offence has been committed. Employers are accordingly enjoined to consider the appropriateness of the sanction of dismissal by taking into account the employee's length of service, previous disciplinary record, personal circumstances, the nature of the job as well as the circumstances of the infringement itself.

21. The circumstances of the infringement involve a consideration of the how the offence was committed. In other words, under what conditions did the employee commit the offence. The question to be answered is

whether there is anything that, despite the commission of the offence, excuse the employee from a harsher sanction. If the answer is in the negative, the sanction of dismissal is appropriate and vice versa. In this case the circumstances of the infringement do not point out to any malice or bad intention or dishonesty on the part of the applicant. The applicant had assisted her ex-spouse in altering the quotation in situations where she had no clue about quotations of other bidders where it could be said that she was manipulating the quotation to give her ex-spouse a competitive edge or advantage over other bidders. She merely assisted her ex-spouse to alter the quotation at his request. It would have been different if she had had insight of the quotations of other bidders and on that basis altered her ex-spouse's quotation to give him a competitive advantage. She had merely sought to assist her ex-spouse to alter a quotation without any inside information that could have suggested a dishonest act on her part.

22. It is further to be noted that she had so assisted her ex-spouse in circumstances where it was not a secret to CIPC that she had a relationship with the ex-spouse. The relationship was declared as part of the declaration on conflict of interest and the respondent knew of that relationship. It would have been malicious and dishonest on her part if she had not declared the relationship. This was not the case. She was open about the relationship, and it could have been the respondent who should have advised her of her limitations in terms of assistance to her ex-spouse. In events where employees have declared their conflict of interest, it is up to the employer to issue conditions under which the employee who has declared has to deal with the business of the person she relates to in terms of bids solicited by the employer. I do not find anything in the submissions that suggests that the respondent had set limits to the applicant in terms of how she had to deal with her ex-spouse regarding the request for quotation in question. Accordingly, the circumstances under which she assisted him could not, in fairness, point to malice on her part regarding her assistance to her ex-spouse.

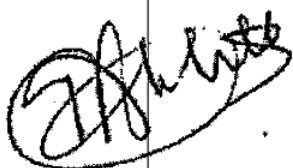
23. While I agree that the applicant held a managerial position, I cannot agree that her action was such that it destroyed the trust employment relationship. She declared her conflict of interest to the respondent on this bid, was not privy to the quotations of other bidders and did not act to influence the decision through the altering of the quotation and was not influential in this quotation process. It would have been different if her action was one meant to influence the decision-makers by giving her ex-spouse competitive advantage over other bidders. She innocently assisted her ex-spouse like any other spouse would have done under the circumstances. While her position involves budgets, nothing points to the fact that she knew the intricacies of the budget for the request for quotation process in question. The request for quotation emanated from another section and she had no clue about budget limits for this request. It would be different if she did as her actions would have amounted to a dishonest attempt to influence the process in favour of her ex-spouse and thus indirectly benefiting therefrom.

24. It is also worth to be noted that the applicant has a clean disciplinary record. Her personal circumstances are very critical. She is now unemployed with a child with special needs. The special needs of the child require money to ensure that the child survives in life as a human being. The comfort of the child provides a better life for the child and the parent. It would be unfair that this child suffers hugely because of a genuine mistake that was committed by her mother in the extenuating circumstances as mentioned above. The personal circumstances and other factors as mentioned call for fairness in terms of reinstatement of the applicant into the same or similar position. She had served the respondent for 14 years with an unblemished disciplinary record and has shown genuine remorse for her otherwise innocent mistake. To hold this against her to an extent that she is denied a livelihood in her circumstances will constitute gross unfairness.
25. Based on the foregoing, I find that the dismissal of the applicant was substantively unfair. Had there been a proper and careful consideration of the factors as I have considered above in relation to the offence and the applicant, the applicant would not have been dismissed. I am well aware that the applicant had committed a mistake to which, at least, should be seen in the order that I award regarding the request for retrospectivity of the reinstatement. Though her hands are not clean, they are not entirely muddied. Had she exercised her discretion of doing things differently, for example, by asking her ex-spouse to visit a printing shop for the quotation alteration, she would not have been in this situation. Dismissal was too harsh a sanction in these circumstances and a written warning should have been sufficient.
26. I find that the applicant's reinstatement should not be retrospective but that she should be compensated for only three months with a written warning valid for six months from the date of this award.

APPROVED

Award

27. The dismissal of the applicant was substantively unfair.
28. The sanction of dismissal was a harsh one in the circumstances.
29. The respondent is ordered to reinstate the applicant into the position she occupied as at the time of her dismissal and to pay her R272 660.76 (i.e. R90 886.92 x 3 months = R272 660.76) into her bank account as known to the respondent by no later than 29 November 2021.
30. The applicant must return to work at the respondent where she worked as at the time of her dismissal on 02 November 2021 at 08h00.



MJ Mohlala

CCMA Commissioner PT

