



ARBITRATION AWARD

Panellist/s: T J SONO
Case No.: GPBC 1454/2020
Date of Award: 10 May 2021

In the ARBITRATION between:

PSA OBO JR MODUBU

(Union / Applicant)

and

GAUTENG DEPARTMENT OF INFRASTRUCTURE DEVELOPMENT
(Respondent)

Union/Applicant's representative: MR JOEL NTWAMPI

Union/Applicant's address: _____

Telephone: _____

Telefax: _____

Respondent's representative: MS VALENCIA MASWANGANYI

Respondent's address: _____

Telephone: _____

Telefax: _____

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION

1. This matter was set down before me on 25/02/2021, 08/03/2021 and 09/03/2021 at the offices of Gauteng Department of Infrastructure Development, Diagonal Street, Johannesburg. Mr Joel Ntwampi, an official for the union, represented the applicant, Mr JR Modubu. Ms Valencia Maswanganyi, an employees of the respondent, represented the respondent, Gauteng Department of Infrastructure Development. The applicant submitted a bundle of documents into the record and it was marked bundle A. The respondent submitted bundles of documents into the record and it was marked bundle B1 and B2. The proceedings were recorded.

ISSUE TO BE DECIDED

2. I must determine whether the respondent committed unfair labour practice in disciplining the applicant for allegedly committing a misconduct of contravening a workplace rule.

BACKGROUND

Facts not in dispute

3. Mr Modubu is employed by the respondent as Assistant Director: Property Management. Mr Modubu was alleged to have committed a misconduct in 2016. Following a disciplinary hearing into the alleged misconduct, Mr Modubu was found guilty for contravening clause 3.4, 3.5 and 3.6 of the respondent's Standard Operating Procedure Manual: Leasing of Government Owned Properties ("**SOP**")
4. Mr Modubu was suspended for two months without salary and received a final warning for the alleged committed misconduct. Mr Modubu alleged that the respondent committed unfair labour practice by taking a disciplinary action against him. Mr Modubu prays to the Arbitrator to withdraw the final warning and reimburse his two months' salary. The respondent prays for the dismissal of the unfair labour practice application.

PRELIMINARY ISSUES

5. None

SURVEY OF EVIDENCE AND ARGUMENT

6. It is not the purpose or the intention of this award to provide a detailed transcription of all the evidence placed before me at arbitration. Even though all the evidence was considered, I have only referred to the portion of the evidence that I find to be relevant in making a determination in this dispute.

APPLICANT'S CASE

7. The applicant, Mr Johannes Modubu (**"Mr Modubu"**) testified under oath and stated that he was employed by Bophuthatswana Government in 1981. He indicated that after the new dispensation, Bophuthatswana Government was changed to North West Provincial Government. Mr Modubu testified that his employer then became Department of Public Works, Roads and Transport under the North West Provincial Government. Mr Modubu stated that in 2007, the Department of Public Works, Roads and Transport (North West) was incorporated to Gauteng Department of Public Works, Roads and Transport. He further indicated that there was a split and his employer became Gauteng Department of Infrastructure Development
8. Mr Modubu testified that he is employed by the respondent as an Assistant Director: Property Management. Mr Modubu testified that his duties includes, inter alia, administration of properties within the province, signing of lease agreements, and the inspection of residential and commercial properties. Mr Modubu testified that the respondent charged him for leasing a property belonging to the state. Mr Modubu testified that following his disciplinary hearing, he was found guilty for committing a misconduct. He testified that he was suspended for two months without pay and received a final warning for allegedly committing as misconduct. Mr Modubu indicated that his suspension run from the 1st of December 2020 to the 31st of January 2021. Mr Modubu testified that he was unfairly treated by the respondent because signing lease agreements was one of his duties. Mr Modubu testified that he performed the same function in the North West Provincial Department.
9. Mr Modubu testified that after the Department of Public Works, Roads and Transport (North West) was incorporated to the same department in Gauteng, he was informed in writing that his responsibilities were not going to change or affected. Mr Modubu referred to his appointment letter, bundle A (p.1-4) to indicate that he had the authority to sign and approve leases. A transfer letter, bundle A (p.5) was read into the record. Mr Modubu refereed to the performance agreement he signed with his supervisor Mr

Duncan Dongo and indicated that he was assessed on managing state owned properties, and signing and approving leases. Mr Modubu testified that the respondent found him guilty for contravening clause 3.4, 3.5, 3.6 of the respondent's SOP. Mr Modubu stated that he learned about the existence of the SOP during his disciplinary hearing in 2019. He testified that no one informed him about the existence of the SOP. Mr Modubu testified that the SOP used to charge him was an unsigned document dated 2017. Mr Modubu testified that it was unfair for the respondent to use the 2017 SOP to discipline him.

10. Under cross-examination: Mr Modubu reiterated that he had the authority to sign and approve leases. He stated that signing a lease agreement was tantamount to approving it. Mr Modubu stated that he had signed a lot of leases. A version was put to Mr Modubu that he did not have the authority to sign and approve leases. He disagreed with the version.
11. Mr Frans Malebye ("**Mr Malebye**") testified under oath and stated that he is an employee of the respondent and that he is placed at Garankuwa regional office. He testified that Mr Modubu is responsible for overseeing the stated owned properties around Tshwane. Mr Malebye testified that Mr Modubu is responsible for leasing state properties around Tshwane. He further indicated that Mr Modubu is responsible for signing leases. Mr Malebye testified that he is not familiar with the respondent's SOP.
12. Under cross-examination: Mr Malebye stated that is employed by the respondent as a Senior Admin Clerk. He indicated that Mr Modubu signed and approve a lease agreement for a house he is staying in. He conceded to a version that he is not performing the same duties as Mr Modubu and reiterated that he (Mr Modubu) has the authority to approve leases.

RESPONDENT'S CASE

13. Mr Christopher Makhubela ("**Mr Makhubela**") testified under oath and stated that he is employed by the respondent as Acting Director: Labour Relations. He testified in detail about how the Office Of The Premier learned about Mr Modubu's alleged misconduct and the process that was adopted by the respondent in dealing with the matter. The crux of his testimony was that the respondent complied with the Collective Agreement: Disciplinary Code and Procedure for the Public Service ("**Collective Agreement**"). He also testified that the respondent did not delay in finalizing the disciplinary process. He indicated that the dispute about non-compliance with the Collective agreement was a dispute of interpretation and application of the same Collective Agreement. He further stated that the dispute should be heard at PSCBC because it is the custodian of the agreement.

14. Under cross-examination: Mr Makhubela reiterated that if the applicant believes that the respondent misinterpreted the Collective Agreement, the applicant must refer the matter to the correct forum, PSCBC. He indicated that the respondent did not deviate from the Collective Agreement.
15. Mr Jaco Viljoen ("**Mr Viljoen**") testified under oath and stated that Mr Modubu was his subordinate for 18 months. He indicated that Mr Modubu's responsibilities included office management and looking after some properties belonging to the state. Mr Viljoen testified that he signed a performance with Mr Modubu for the performance cycle 2016/2017. He indicated that according to their performance contract/agreement, Mr Modubu was not responsible for signing and approving state properties. He testified that the regional office was not authorized to sign and approve leases. Mr Viljoen testified that he is not authorized to sign and approve leases and that there is no way that Mr Modubu who is employed as an assistant director can have such authority. Mr Viljoen indicated that the function of signing and approving leases was taken away from regional offices in 2008 and that it was centralized in the head office in Johannesburg
16. Under cross-examination: A version was put to Mr Viljoen that a rule that Mr Modubu was charged against was not in existence in 2015. He said that he does not know.
17. Ms Thulisile Khumalo ("**Ms Khumalo**") testified under oath and stated that the leasing allocation committee has the authority to approve lease applications. She testified that once a lease application is approved by the committee, an agreement is signed by the Head of Department ("**HOD**"). She testified that the regional office does not have any authority to sign a lease agreements for state properties.
18. Under cross-examination: Ms Khumalo reiterated that lease agreements are signed and approved at the head office. Ms Khumalo stated that she is familiar to the respondent's SOP.
19. Ms Thina Mavhungu ("**Ms Mavhungu**") testified under oath and stated that she is employed by the respondent as Acting Chief Director: Removal Assets Management. Ms Mavhungu testified that the respondent's HOD and Chief Financial Officer ("**CFO**") are the only two officials authorized to sign and approve leases. She testified that Mr Modubu does not have the authority to sign and approve leases. Ms Mavhungu testified that the respondent uses the SOP to manage leases. She testified that the SOP has been in existence since 2013 though it was not signed. Ms Mavhungu testified that she does not have the authority to sign and approve leases.
20. Under cross-examination: Ms Mavhungu indicated that she does not remember if the SOP was discussed with the employees at Garankuwa regional office. Ms Mavhungu reiterated that the SOP has been in existence since 2013

ANALYSIS OF EVIDENCE AND ARGUMENT

21. Section 186(2)(b) of Labour Relations Act 66 of 1995 as amended provides that “unfair labour practice means an unfair act or omission that arises between an employer and an employee involving unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee”
22. It is a trite law that the onus to establish existence of a decision that constitutes an unfair labour practice as provided in section 186(2) of Labour Relation Act 66 of 1995 as amended, rest on the applicant to prove the claim on balance of probabilities. In **Department of Justice V Commission for Conciliation, Mediation and Arbitration and Others**, the court stated that “An employee who complains that the employer’s decision or conduct in not appointing him/her constitutes an unfair labour practice, must first establish the existence of such decision or conduct. If that decision or conduct is not established, that is the end of the matter. If that decision or conduct is proved, the enquiry into whether the conduct was unfair can the follow. This is not one of those cases such as dispute relating to unfair discrimination and dispute to freedom of association where if the employee proves the conduct complaint of, the legislature requires the employer to prove that such conduct was fair and lawful and, if it cannot prove that unfairness is established. In cases where that is intended to be the case, legislation has said so clearly. In respect of item 2 (1) (b) matters, the act does not say so because it was not intended to so.
23. In this case, the applicant had to show that the conduct or decision of the respondent is one that falls within the definition of unfair labour practice. The applicant had to prove the existence of unfair labour practice on the balance of probabilities. It must be taken in cognisance that what is fair depend upon the circumstance of a particular case and essentially involves a value judgement.
24. It is common cause that Mr Modubu was charged and found guilty for contravening clause 3.4, 3.5 and 3.6 of the SOP for leasing of government owned properties without following procedure. It is common cause that Mr Modubu was suspended for two months without salary and received a final written warning. Mr Modubu testified that he had the authority to sign and approve leases for properties belonging to the respondent. He testified that his authority was expressed in his appointment letter and performance agreements. Mr Modubu’s testimony was disputed by the testimonies of the three witnesses called by the respondent. Mr Viljoen who was Mr Modubu’s supervisor at some point indicated that Mr Modubu did not have the authority to sign and approve leases. Mr Viljoen indicated

that the function of signing and approving leases was centralized in the head office since 2008. It is common cause that Mr Modubu was placed at Garankuwa regional office. The testimony of Mr Viljoen was corroborated by the testimony of Ms Khumalo who testified that the function of signing and approving leases was centralized at the head office in Johannesburg.

25. Ms Mavhungu testified that the CFO and HOD are the only officials authorized to approve and sign leases. Mr Viljoen testified that he does not have the authority to sign and approve leases and that there was no way that such authority can be vested in an assistant director. Ms Mavhungu also testified that she does not have the authority to sign and approve leases. Mr Viljoen and Ms Mavhungu testified that Mr Modubu did not have the authority to sign and approve leases. On the other hand, Mr Malebye stated that Mr Modubu was authorized to sign and approve leases. Mr Malebye stated that Mr Modubu approve a lease for a house he is staying in. Mr Modubu referred to his appointment letter and performance agreement to indicate that he had the authority to sign leases. His testimony was rebutted. What was of a great concern to me was that both the appointment letter and the performance agreements do not give Mr Modubu the authority to sign and approve leases
26. On the basis of the evidence place before me, it cannot be correct to say that Mr Modubu had the authority to sign and approve leases. Ms Mavhungu and Mr Viljoen are both seniors to Mr Modubu and they both testified that they do not have such authority. The most probable version is that Mr Modubu did not have the authority to sign and approve leases.
27. It is common cause that the alleged misconduct was committed in 2016. Mr Modubu testified that he was charged and found guilty for contravening a rule that was not in existence in 2016. The respondent submitted an SOP during the proceedings to prove that the rule existed. Ms Mavhungu testified that the SOP has been in existence since 2013. Ms Khumalo also indicated that she was familiar to the SOP. The SOP submitted by the respondent was an unsigned draft document, dated 2017. Ms Mavhungu indicated that the 2013 SOP was amended by the 2017 SOP. What was of a great concern was that the respondent requested the Arbitrator to adjourn the process (arbitration) and allowed it to submit the 2013 SOP. After an agreement between parties the process was adjourned with a hope that the respondent will make the old SOP available. The respondent failed to make the 2013 SOP available. Mr Modubu testified that he learned about the existence of the SOP during his disciplinary hearing in 2019.
28. I am persuade to believe on the balance of probabilities that the respondent's SOP did not exist in 2016. Grogan J in his book Dismissal (2010, p.149) stated that "it is generally accepted that employees may be disciplined for contravening rules only if they knew, or ought to have known of the existence of the rules. This follows logically from the requirement that employees cannot be seen to have committed

misconduct if they did not know, or could not reasonably have known beforehand that the employer regarded his or her action as misconduct". Under cross-examination, Ms Mavhungu indicated that she cannot remember if the SOP was discussed with the employees at Garankuwa regional office.

29. Mr Modubu was charged and found guilty for contravening clause 3.4, 3.5, and 3.6 of the SOP. The employer failed to prove that the SOP was in existence in 2016. The respondent relied on the SOP that came into existence in 2017. Even if I am convinced that Mr Modubu did not have the authority to approve leases, it cannot be correct to say that an employee can be disciplined for breaking a rule which started to exist a year later. I therefore find that Mr Modubu was charge and found guilty for contravening a rule which did not exist in 2016.
30. Mr Joel Ntwampi, the representative to Mr Modubu, indicated that there was a procedural defect in carrying out the disciplinary hearing but he failed to lead evidence to that effect. For that reason, I will not deal with the procedural defect (procedural fairness)
31. In light of the evidence place before me, I am persuaded to conclude on the balance of probabilities that there was indeed an act of unfairness and for this reason, an unfair labour practice was committed by the respondent.

AWARD

32. I found on the balance of probabilities that the respondent committed unfair labour practice as intended in section 186 (2)(b) of Labour Relations Act as Amended
33. The respondent is ordered to withdraw the final written warning
34. The respondent is ordered to reimburse the two months' salary (lost during the suspension period) to Mr Modubu by no later than 30 June 2021
35. There is no order as to cost



Name: **TEBOGO SONO**

(GPSSBC) Arbitrator