

ARBITRATION AWARD

Panellist: Mr VF Mthethwa
Case No.: GPBC 2168/2014
Date of Award: 10/10/2021

In the ARBITRATION between:

RB Budhoo
(Union / Applicant)

and

DEPARTMENT OF TRANSPORT
(Respondent)

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DETAILS OF HEARING AND REPRESENTATION

1. This is the award in the matter between Roshan Budhoo, the Applicant, and the Department of Transport, the Respondent. The hearing was conducted under the auspices of the GPSSBC in Port Shepstone on various dates in 2016, 2017, 2018 and 2019 as well as virtually on various dates in 2020 and 2021. The Applicant was represented by his counsel, Advocate AR Sukdeo. The Respondent was represented by its attorney, Mrs A Lambert. The parties submitted bundles of documentary evidence which were admitted into evidence and used by both parties. The proceedings were digitally recorded.

BACKGROUND TO THE DISPUTE

2. The Respondent employed the Applicant as a technician, with the job title of Road Superintendent, in 1981. The Respondent charged the Applicant with various counts of fraud as well as with the alternative counts of financial misconduct. He was found guilty on with the alternative counts of financial misconduct and dismissed him. The Applicant appealed against the dismissal but the appeal failed in September 2014. Thereafter, the Applicant referred an unfair dismissal dispute to the GPSSBC. The Applicant challenges the substantive and procedural fairness of his dismissal. He seeks reinstatement retrospectively to the date of dismissal. The Applicant was a Senior Road Superintendent and earned a monthly salary of R12 000.00 at the time of dismissal. The Applicant passed away on 28/08/2021, subsequent to conclusion of the arbitration.

ISSUE TO BE DECIDED

3. I am required to determine whether or not the Applicant was unfairly dismissed; and if so; Decide on an appropriate remedy.

SURVEY OF EVIDENCE AND ARGUMENTS

SURVEY OF EVIDENCE AND ARGUMENT OF THE RESPONDENT

4. The first witness for the Respondent was Mr Vinay Bositsumune. His evidence is briefly that he works at Morar Incorporated. The Respondent appointed Morar Incorporated to conduct an investigation into allegations of irregular expenditure in Port Shepstone, Durban and Stanger. As investigator in the forensic investigation he found several irregularities relating to certain payments which were made at the Port Shepstone Cost Centre. He did not interview the Applicant and Menders. He found

documentary evidence relating to irregularities, on counts 1 to 102 in terms of the amended Charge Sheet, implicating employees for misconduct, namely, Mr V Anirudrha, Mrs Somi, Mr Jagessar, Mr Ramsaran, Mrs de-Villiers, Mr M Marshall, Mr J Naidoo, Mr Dimba and the Applicant. The implicated employees either authorised expenditures or authorised payments. He did not conduct physical inspections to establish whether or not the work was done. He based his findings for the work not done on the absence of delivery notes and/ or inspection certificates. He found various instances of cover quoting, service providers not being invited, photocopies of quotations being used and segregation of duties not observed. He found that a “syndicate” operated at the Port Shepstone Cost Centre.

5. The forensic investigation report recommended disciplinary action against nine or more employees at the Port Shepstone Cost Centre including the Applicant, Mrs Somi, Mr Jagessar and Mr Anirudrha. The employees were allegedly involved in fraud and/ or financial misconduct.
6. The Applicant was involved in various irregular payments which were made to certain service providers as explained in paragraphs 7 to 14 hereunder.
7. The Applicant authorised expenditures without there being any submissions in place. A submission is a record of the need that arises at the Department. An employee who has identified a need compiles a submission and submits this to his/her supervisor for authorisation. Once authorised, the submission is transmitted to the procurement department for actioning. The absence of a submission indicates that no need or requirement arose at the Department. Hence payments in this regard are considered highly irregular. Payments were made when there was no submission made to evidence the need for the particular goods or service. In each and every instance, the Applicant authorised expenditures without any submissions in place. Payments in this regard are considered highly irregular. The Applicant authorised most of these expenditures on the same day. Therefore he must have had sight of the fact that there were no submissions to show that there was a need for the particular service in the Department.
8. From 24 August 2009 to 02 December 2009 the Applicant authorised various expenditures on the same day where the same set of photocopied quotations was attached to the payment documents. Applicant authorised various expenditures on a specific day, and all such payment vouchers contained the same set of photocopied quotations. On 24 August 2009 the Applicant authorised 32 expenditures with the same set of photocopied quotations on the same day. Photocopies of previously used quotations were used in respect of various payments made. The Applicant authorised various expenditures where the same set of photocopied quotations was attached to the payment documents. The Applicant authorised

most of these expenditures on the same day. Therefore he must have had sight of the photocopied quotations being used in the payment documents.

9. In various instances the Applicant authorised expenditures in the absence of invitations to quote, showing that suppliers were not invited to quote. The Applicant overlooked that procurement processes were bypassed. This resulted in irregular payments. Exhibit CB6 – Paragraph 5.3 specifies the requirement for quotations to be invited from suppliers. There were various instances where Mr Budhoo authorised expenditures despite there being no invitations to quote, thereby evidencing that suppliers were not invited to quote. The Applicant authorised most of these expenditures on the same day. Therefore he must have had sight of the fact that there were no invitations to quote.
10. There was no segregation of duties. The same official approved expenditure and also authorised payment. In many instances Mr Budhoo did not comply with the requirements for segregation of duties
11. There were delivery notes or inspection certificates to show that a service had been rendered. In many instances, the Applicant authorised expenditure without any evidence that the work had in fact been done. The Applicant authorised most of these expenditures on the same day. Therefore he must have had sight of the fact that there were no delivery notes or inspection certificates.
12. The Applicant had a limit of R2000 for sundry payments in terms of the delegations of authority in Exhibits CB2 and CB3. Despite the delegations the Applicant authorised sundry payments in excess of the R2000 limit. From 03 March 2009 to 20 September 2009 the Applicant authorised 37 sundry payments to Brainwave Projects 1432 CC, Imvusa Trading 1773 CC and Ubala Trading CC totalling R3366 131,84. Each of the said sundry payments were in excess of the R2000 limit.
13. On various occasions the Applicant authorised expenditures in instances where orders were split. Various orders to the same supplier for the same service were compiled on the same dates. The procurement limit at the Cost Centre is R10,000. Procurement in excess of R10,000 is required to be undertaken at the Regional Office. Therefore, orders were split in order to keep the amounts below R10,000. Provincial Treasury Practice Note No. 1 of 2008, paragraph 3.5 of Exhibit CB6, prohibits the deliberate splitting of orders to bypass the prescribed procurement process. 11 orders, involving Ubala Trading CC, were compiled on the same day, 27 October 2009. The orders relate to the same service, thereby evidencing that the Applicant had sight of the fact that the orders were split. There were various instances where the Applicant authorised expenditures in circumstances where orders were split. Various orders to the same supplier for the same service were compiled on the same dates. The

Applicant authorised most of these expenditures on the same day. Therefore he must have had sight of the fact that orders were split.

14. In various instances, from 22 October 2009 to 05 January 2010, the Applicant authorised expenditure while it was clearly visible that orders were compiled subsequent to receipt of invoices from suppliers. The Applicant authorised expenditure totalling R980,163.43, mainly for slack removal, and pothole repairs, where the orders were compiled subsequent to the invoice dates. The authorised expenditure involved Brainwave Projects 1432 CC, DCM Plant Hire and Maintenance, Masiqhame Trading 1027 CC and Ubala Trading CC. This shows that procurement procedures were bypassed since an order has to be issued to a supplier prior to the commencement of any work. The Applicant authorised most of these expenditures on the same day. Therefore he must have had sight of the fact that orders were compiled subsequent to receipt of invoices from suppliers.
15. The second witness for the Respondent was Mr Nad Govender. His evidence is briefly that he is a financial manager stationed at Pinetown Regional office. Morar Incorporated briefed the Department after they concluded the forensic investigation. He was not part of the investigation. It is the responsibility of the regional manager to liaise with Labour Relations at head office regarding discipline. De Villier and Ramsaran were disciplined and they were dismissed. The appeals authority upheld the appeals and substituted the dismissals with final written warnings.
16. He provides high level reporting to the accounting officer. It is not possible for him to report on every transaction that takes place in the region. There are various stakeholders and role players in financial management. In government every official has to understand financial prescripts. He cannot comment whether or not the Applicant was trained in financial prescripts. He could have held informal discussions with finance staff at the cost centre. He does not recall if he had such informal discussions with the Applicant.
17. The third witness for the Respondent was Mr Siboniso Mbhele. His evidence is briefly that the Chief Director at the Durban Regional Office. He was employed in 2002 and became the Chief Director in April 2009. He is responsible for three districts, Port Shepstone, Ethekwini Metro and Ilembe. He oversees road construction and maintenance. He oversees all the activities in the Durban region, including motor vehicle licensing. Port Shepstone specialises mainly in road maintenance. He reports to the Deputy Director General in Pietermaritzburg who reports to the Head of Department.

18. He received suspicious costs reports such as splitting of orders. He then asked the Chief Financial Officer to engage forensic auditors. The forensic report identified certain officials who had authorised irregular payments. They were the Applicant, Mr Marshall, Ms de Villiers, Mrs Somi, Mr Dimba, Mr Anirudrha, and Mr Naidoo. Mr Marshall was dismissed and he subsequently passed away. Disciplinary processes were commenced in respect of all the identified officials. An appeal outcome is pending in respect of Mrs de Villiers and Mr Ramsaran. A decision was taken not to discipline Mrs Somi, Mr Jagersse and Anirudrha. In respect of Mrs Somi the decision not to discipline was taken because she was a new manager and because of the level of involvement. She joined the Port Shepstone Cost Centre in July 2009 but the syndicate identified in the forensic report started before that. Therefore she was not part of the syndicate. Her level of involvement was different. Other officials' involvement was revealed to be of a serious nature. Mrs Somi, Mr Jagersse and Vishal are still working for the Department. They made representations to the Department pertaining their disciplinary matter. In respect of Mr Anirudrha, Mr Govender and Mr Stevenson told him to authorise the payment even though they appeared irregular. In terms of supply chain management processes the Department has to pay for goods and services if it has benefited from the services. Thereafter, disciplinary action may be taken. Mr Anirudrha joined the Port Shepstone Cost Centre in around April 2009, long after the syndicate had started operating. He also reported suspicious invoices to the regional office. Mr Jagersse only approved one payment. He was not part of the cover quoting.
19. Morar Incorporated was appointed to investigate the irregular payments. Thereafter the Department conducted its own investigation to establish if there are grounds to take disciplinary action. Mr Vicky Singh was appointed to conduct the investigation. He was appointed because of his experience. Mr Singh held regular meetings with him, the Labour Relations unit and auditors to report back regarding the investigation. After the final meeting the Department took a decision to take disciplinary action against certain officials. The investigation report submitted by Mr Singh was enough for the Department not take disciplinary action against Mr Anirudrha, Mrs Somi and Mr Jagersse. Mr Dimba, Mr Jay Naidoo and another official resigned. Their matters are being pursued criminally. Civil claims have also been instituted against them. Attempts have been made to freeze their pensions and the court has ruled in favour of the Department.
20. The Applicant was a senior foreman. His duty was to ensure that road maintenance was done properly. The Applicant reported both to Mrs Somi and Mr Marshall since they were directly in charge of the technical component. Mr Henk Mendes was the Cost Centre Manager. Mr Mendes experienced various challenges which affected service delivery, such as absenteeism and alcoholism. He asked Mr Mendes to join them at head office and Mrs Somi replaced him at the Port Shepstone Cost Centre towards the

end of 2009. The Applicant signed the delegation of authority to accept level 7 of authority. Level 7 of authority is a supervisory position, and not an entry level position. It would be unusual for the Applicant to be given only the last page of the delegation. It would have been a unique situation if he was given only one page. The Applicant is well versed in English and he would have asked what the last page referred to. The Applicant would not have signed the last page if he had a problem with the content of the delegation. The originals of the delegations of authority are kept by the officials to whom the authority is delegated. Therefore the Applicant should have the original of his delegation of authority. They return copies of the whole document to Finance at the regional office. This is audited. Delegations are the first thing the auditors look for. Therefore they are hot documents.

21. Emergency work is work which would put the public at risk if it is not done immediately, for example collapsing of a bridge or a grader stuck in the middle of the road denying the public access to facilities. Authority to do emergency work is granted by the Head of Department in order to shorten the procurement process.
22. The Applicant was found guilty of authorising irregular expenditure. The chairperson of the disciplinary hearing made the decision to dismiss the Applicant based on the evidence placed before him. Corruption in government is quite serious and it erodes the trust between the electorate and government. It leads to shortages in term of service delivery. If corruption is not dealt with decisively it is promoted. The Department has to ensure value for money with what it does. Other officials have to see that there are consequences for committing misconduct.
23. The fourth witness for the Respondent was Ms Sibongile Portia Somi. Her evidence is briefly that she is the Control Industrial Technician. She has been the Cost Centre Manager at Port Shepstone since 01/07/2009. She has around 20 years' service with the Department.
24. She was not charged with misconduct. She authorised payments but she was not involved in irregularities. She would do random inspections and once she was satisfied the work has been done she would sign to authorize the expenditure. She checked and signed. Supply Chain Management (SCM) clerks invite quotations. That is not her job. Rotation of suppliers is SCM's duty. She did random spot checks on pothole repairs. She does not check all the sites since her area is vast. Officials under her do the checks. She was not involved in cover quoting. Mr Singh called her and told her to return to the office. She informed Mr Singh she was far from the office. Then Mr Singh said it was fine he would talk to her staff. Thereafter she became aware that officials had been served with suspension letters.

25. The fifth witness for the Respondent was Mr Vishal Anirhudra. His evidence is briefly that he is Acting Chief Administration Clerk at the Port Shepstone Cost Centre. He has around 21 years' service with the Department. In approving payments you check what is captured on the system against the payment documents. If it is correct then you authorise payment. He was not charged with misconduct. You ensure if all the signatures are there. He checked, found everything to be correct and then authorised payment. He authorised payments for Brain Wave, Invusa trading CC and Ubala trading CC. On 06/04/2009 he raised a query with an email to Mr Stevenson and copied Mr Govender at the regional office regarding certain suspicious payments. Mr Stevenson replied and instructed him to authorise payment. He agrees that, in terms of what is written on page 2 of Exhibit BB he committed misconduct. He signed a settlement agreement regarding the misconduct and he was warned it was confidential and not to disclose such agreement to other employees. In around 2007 all staff underwent training on the Public Finance Management Act 1 of 1999 (PFMA), Regulations and Practice Notes. He saw the Applicant in that training. He recognised him since they were from the same office. He trained staff under him on the PFMA .However he did not train the Applicant. Mrs de Villiers would verbally authorise him to authorise payments on her behalf if she would be on leave. He does not go on site to do the inspection.

SURVEY OF EVIDENCE AND ARGUMENT OF THE APPLICANT:

26. The Applicant testified in support of his case. His evidence is briefly that he had been employed by the Respondent as a Senior Road Superintendent in 1982. His duties involved the monitoring of road constructions and maintenance. He worked under the direct supervision of Mr Menders, from whom he took verbal instructions.
27. In 2008 there was a huge flood which damaged roads and bridges in the greater South Coast Area. The department then put a business plan in place with the assistance Rural Road Transport Forum (RRTF). Instructions were given that repairs should be done on the damaged roads and bridges. Mr Menders gave him verbal instructions to authorize the expenditure after inspecting that the work had been done.
28. He authorized expenditures for various counts in terms of the Disciplinary Enquiry Charge Sheet, marked "L". There were shortages of staff at the Port Shepstone Cost Centre. He was not trained in the PFMA. He only realised that his authorisation of the expenditures that he authorized amounted to misconduct after the Department instituted disciplinary action against him. Prior to that he thought what he was doing was correct, in line with the instructions given by Mendes. He believed what he did was

legitimate because it was a norm prior to 2008. It was done with all service providers exclusive of service providers mentioned in the forensic report.

29. He conducted inspections on site and recorded the measurements on a manuscript page which he submitted to the payment section. The payment section would compare the measurements with the service providers' invoices and their own measurements. There was no such document as the inspection certificate to be completed after each inspection was conducted on site.

ANALYSIS OF EVIDENCE AND ARGUMENTS:

30. Section 192(2) of the Labour Relations Act, 1995 (Act No. 66 of 1995) (the "LRA") requires the employer to prove that the dismissal was fair. In addition, section 138(6) of the LRA enjoins a commissioner to take into account any relevant code of good practice that is relevant to a matter being considered in the arbitration proceedings. Furthermore, section 188(2) of the LRA requires any person who is considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure to take into account any relevant code of good practice. I accordingly took into account the Code of Good Practice: Dismissal in Schedule 8 to the LRA (the 'Code') since the Applicant was dismissed for misconduct.
31. The Applicant breached the SCM prescripts in the manner described by Mr Bositsumune in paragraphs 7 to 14 above. The Applicant admits that he authorised the payments which are now shown not to comply with the procedures prescribed by SCM prescripts. He submits that he acted in accordance with the instructions of his supervisor, Mr Mendis. Therefore the Applicant breached the SCM prescripts. He accordingly breached rules of the workplace as contemplated in item 7(a) of the Code.
32. The Applicant avers that he never received training on the PFMA and therefore he does not know the SCM procedures. On the other hand Mr Anirudhra insists that he saw the Applicant at a PFMA training. However, Mr Anirudhra himself concedes that he did not train the Applicant on the PFMA. In addition, Mr Govender does not recall having a discussion of the financial prescript with the Applicant, as he normally did with staff at the Port Shepstone Cost Centre. Based on this evidence I find that the Respondent has not proved that the Applicant was aware of the SCM prescripts that he breached. I accordingly find that the Applicant was not aware of the rule as envisaged in item 7(b)(ii) of the Code.
33. The Applicant submits that the Respondent applied discipline inconsistently in dismissing him since Mr Anirudhra, Mrs Somi and Mr Jagersse were not even charged with misconduct. These three

comparators also authorised irregular payments. Therefore the circumstances of the comparators are mostly similar to those of the Applicant. In *Ethekwini Municipality v Hadebe* (DA17/14) [2016] ZALAC 14 the court held that unless the employer can rationally justify treating one employee differently, it must act consistently. Therefore, in this situation, the Respondent has a duty to rationally justify, or explain, the differential treatment of the three comparators.

34. Mrs Somi authorised irregular payments but she was not disciplined. In addition, Mrs Somi conducted random inspections. This means she did not conduct inspections for every payment that she authorised. The Respondent submits that Somi was not disciplined since she was a new manager, she was not involved in the syndicates and she only authorised two irregular payments. While Mrs Somi was a new manager, she had around 20 years' service with the Department. Being a new manager was sufficient to exonerate Somi. However the Applicant was not a manager at all, not even a new one, but he was dismissed. No matter how strong the suspicion may be, there is no evidence to prove that the Applicant was part of a syndicate either. Mrs Somi signed a secret agreement with the Respondent. In terms of the agreement the Respondent withdrew the civil action which it had instituted against Mrs Somi to recover the loss it sustained as a result of the irregular payments that he had authorised. The Respondent had instituted civil action against Mrs Somi. This shows the Respondent did not regard her as innocent, yet the Respondent did not discipline her. Therefore the Respondent has not been able to justify the reason for not taking disciplinary action against Mrs Somi.
35. Mr Anirudhra authorised irregular payments on the instructions of Mr Stevenson, an administration clerk at the regional office. Mr Anirurhudra is an acting chief administration clerk. It is therefore difficult to understand why he took this instruction from someone who is not senior to him in terms of rank. He authorised irregular payments but no disciplinary action was taken against him or Mr Stevenson. The justification or explanation provided by the Respondent is that he was instructed by Mr Stevenson to authorise these irregular payments. The Respondent, per the evidence of Mr Mbhele, submits that the irregular payments had to be authorised since the service had already been rendered. The practice is that irregular payments would be authorised and thereafter the implicated officials are disciplined. However, it was never explained who was disciplined for these irregular payments. Mr Anirudhra also signed a secret agreement with the Respondent. In terms of the agreement the Respondent withdrew the civil action which it had instituted against him to recover the loss it sustained as a result of the irregular payments that he had authorised. The Respondent sued Mr Anirudhra for financial losses caused by the irregular payments that he authorised. Yet Mr Anirudhra was not disciplined. Therefore the explanation given by the Respondent for not disciplining Mr Anirudhra is not reasonable.

36. Mr Jagersse was not charged for authorising irregular payments. The justification or explanation not disciplining Jagersse is that he only authorised one irregular payment. This is not reasonable explanation for disciplining Mr Jagersse at all after he had committed misconduct.
37. In *Assmang (Pty) Ltd T/A Khumani Mine v CCMA, Mohlala, Teteme & NUM* Labour Court Johannesburg, JR 2416/15 (24 May 2018) the court reiterated that the element of consistency on the part of an employer in its treatment of employees is not the only factor to take into account in the determination of the fairness of a dismissal. In the present matter the Applicant had a clean disciplinary record in around 32 years of service. He was not aware of the procedures prescribed by SCM prescripts. I have taken into account these factors together with the fact that other employees who authorised irregular payments were not even charged with misconduct, let alone dismissed. I therefore find that dismissal was not an appropriate sanction and that the dismissal was, as a result of that, substantively unfair.
38. I find no procedural unfairness in the dismissal of the Applicant.
39. I accordingly find that the Respondent has not shown, in accordance with section 192(2) of the LRA, that the dismissal of the Applicant was fair.
40. Given the fact that reinstatement is the preferred remedy in unfair dismissal matters and given that the Applicant wanted to return to his position with the Respondent, I find that reinstatement would be just and equitable in the circumstances. I find that the reinstatement is to operate retrospectively to the date of dismissal. The Applicant is accordingly entitled to back-pay in the amount of R 972 000.00 (Nine Hundred and Seventy Two Thousand Rand), calculated at his monthly rate of pay of R 12 000.00, plus general annual salary increments. The said back-pay and general annual salary increments are for the period of 81 months between the date of dismissal, namely September 2014, and the date on which the contract of employment would be terminated by death of the Applicant, namely 28 August 2021.
41. In *Estate Late W G Jansen van Rensburg v Pedrino (Pty) Ltd* (2000) 21 ILJ 494 (LAC) the Labour Appeal Court found that while the LRA applied to 'employers' and 'employees', nothing prevented the benefits arising from an employment contract to accrue to a deceased employee's estate. The court went on to find that there is no difficulty in 'extending the principle of allowing an executor to recover wages to any other benefit that would have accrued at the time of the employee's death'. The court referred to reinstatement of a deceased employee as 'partial reinstatement', since the deceased employee is reinstated but only until his death.

42. In *National Union of Mineworkers of South Africa obo Fohlisa and Others v Hendor Mining Supplies (a division of Marschalk Beleggings (Pty) Ltd)* [2017] 6 BLLR 539 (CC), the Constitutional Court confirmed the legal position in respect of the reinstatement of deceased employees in that it ordered the reinstatement of the deceased employees until the dates of their respective deaths.
43. On the strength of the above judgments, I accordingly find that the reinstatement of the Applicant is to be effective from the date of dismissal in September 2014 up to the date of his death on 28/08/2021.

AWARD

44. The Applicant, ROSHAN BUDHOO, is found to have been unfairly dismissed by the Respondent, DEPARTMENT OF TRANSPORT.
45. The Respondent is ordered to re-instate the Applicant in its employ on terms and conditions similar to those that governed the employment relationship immediately prior to his dismissal, within fourteen days of the council issuing this award to the parties. The re-instatement is to operate retrospectively to September 2014 and must be effective up to his death on 28/08/2021.
46. The Respondent is further ordered to pay back-pay to the estate of the deceased Applicant, against the production of letters of executorship or authority by the executor or executrix, in the amount of R 972 000.00 (Nine Hundred and Seventy Two Thousand Rand) plus 6 years of general annual salary adjustments, minus such deductions as the employer is in terms of the law entitled or obliged to make, by no later than 31 November 2021.
47. No cost order is made.

A handwritten signature in black ink, appearing to be 'Roshan Budhoo', written over a horizontal line.

Signature: _____

Panellist: Mr VF Mthethwa
Sector: General Public Service