



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Reportable

Case no: DA 9/21

In the matter between:

**HOD OF SPORTS, ARTS, CULTURE AND
RECREATION – FREE STATE**

Appellant

and

**NEHAWU obo MC MASEKOA
GENERAL PUBLIC SERVICE SECTORAL
BARGAINING COUNCIL
MARTIN SAMBO N.O.**

First Respondent

Second Respondent

Third Respondent

Heard: 22 September 2022

Delivered: 18 October 2022

Coram: Coppin JA, Kathree-Setiloane et Tokota AJJA

JUDGMENT

COPPIN JA

- [1] This is an appeal, with the necessary leave, against the part of the order of Whitcher J dismissing the application of the appellant (Department) to review and set aside an arbitration award of the third respondent (arbitrator), acting under the auspices of the second respondent (bargaining council) in favour of the first respondent, in respect of the substantive fairness aspect of the Department's dismissal of Ms MC Masekoa.
- [2] At the time of her dismissal on 15 December 2015, Ms Masekoa was employed by the Department as Chief Director: Arts, Culture and Heritage. Her dismissal followed after she had been found in a disciplinary hearing to have committed two counts of misconduct in respect of a business deal she concluded on behalf of her guesthouse, Maisy's Guesthouse, and relating to accommodation for artists participating in the annual arts and culture event (Macufe) initiated and financed by the Department through the Free State Arts and Culture Council (FSACC) and its contracted agent, a consortium, PSS.
- [3] The counts of misconduct were the following: in charge 1, it was alleged that during the period September 2014 to October 2014, while on duty, Ms Masekoa contravened clause 6.1 of the SMS Handbook in that she allegedly failed to exhibit the highest ethical standards in executing her duties as an employee of the Department by doing business with the Department and receiving payment for the Macufe accommodation in the amount of R 288 000,00, paid to Maisy's Guesthouse, and that it constituted a conflict of interests.
- [4] In terms of charge 2 it was alleged that during that same period, while on duty, Ms Masekoa contravened paragraph C 4.5 of the Code of Conduct for the Public Service which states that an employee should not "*engage in any transaction or action that is in conflict with or infringes on the execution of his or her official duties*" – in that her business, Maisy's Guesthouse, was paid the amount of R288 000,00 for services rendered.
- [5] As an alternative to charge 2, it was alleged that during the said period, while on duty, Ms Masekoa conducted herself in an improper, unbecoming and unacceptable manner by doing business that was in direct conflict with her

interests and duties as a programme manager for programme 2 under which the Macufe project resided, and in terms of which her guesthouse was paid the aforesaid amount for accommodation services rendered.

- [6] Paragraph 6 of the SMS Handbook provides that senior managers “*must exhibit the highest ethical standards in carrying out their duties*”, and paragraphs 10.2. C4.5 and C4.6 of the Code of Conduct saddle senior managers with an onus to alert their employer of any actual or potential conflict of interest, be it financial or otherwise. Paragraph C4.5 also provides that no employee is to engage in any action or transaction that is in conflict with or infringes upon the execution of his or her official duties.
- [7] Following Ms Masekoa’s dismissal, the trade union NEHAWU caused an unfair dismissal dispute to be referred on her behalf to the bargaining council. After an unsuccessful conciliation, it proceeded to arbitration before the arbitrator.
- [8] The Department, that bore the onus of proving that the dismissal was procedurally and substantively fair, essentially made a case along the following lines at the arbitration through, *inter alios*, its investigator: (1) the Department had a mandate to support and develop the arts in general and in order to give effect to this, it established the FSACC, a body which resorts in the office of the MEC: Sports, Arts and Culture; (2) Macufe is a project of the FSACC; (3) Mr Ernest Moikangoa, an employee of the Department, who reported to the Director: Arts and Culture, was seconded in 2013 to the FSACC as a coordinator; (4) the funds for Macufe were in a programme managed by the Chief Directorate for Arts, Culture and Heritage and Ms Masekoa was the Chief Director intended to manage the Macufe arts event on behalf of the FSACC, which was awarded to a consortium, PSS; (5) during this annual event, accommodation in Bloemfontein is expensive and not readily available; (6) consequently, the Department would make an advance payment to PSS for it to secure the required accommodation and to attend to the necessary logistics; (7) during September 2014, a quotation from Maisy’s Guesthouse was approved by the FSACC’s subcommittee for

accommodation; and (8) Maisy's Guesthouse, which was owned by Ms Masekoa, was paid an amount of R288 000,00 for the accommodation.

[9] Ms Masekoa's defence was essentially the following: (1) she had disclosed her ownership of the guesthouse to the Department in her annual declaration of interest; (2) during September 2014, she had been approached at the workplace by Mr Danny Moleko and someone, who according to her, merely identified himself as "Ernest", who said that they were from a private company and were looking for accommodation for the Macufe festival; (3) in response to their request and in her private time, she collated quotes from other guesthouses, including her own, into one, under the name of Maisy's Guesthouse, which Mr Moleko and Ernest collected from her home, the quote was addressed to "Ernest/Danny Moleko"; (4) while admitting that the funds for the Macufe project "resided in" a programme of funds managed by the Chief Directorate for Arts, Culture and Heritage and that she was the Chief Director, she maintained that it was a transfer fund that comes into and leaves the directorate, that the funds were already ring-fenced and that there is a once off transfer out of the directorate to the FSACC; that its use is outsourced and does not fall within the mandate; (5) she denied having any knowledge of the tender awarded to PSS and denied that she had a working relationship with the FSACC or PSS; and (6) she alleged that she had no knowledge of Ernest's links with the Department at the time and maintained that she only became aware subsequently that he was an employee of the Department.

[10] The arbitrator seemingly accepted Ms Masekoa's version and found that the charges against her had not been proved. The arbitrator also found that her dismissal had been procedurally unfair, allegedly because the chairperson of the disciplinary enquiry had not given her an opportunity to adduce evidence in mitigation of the sanction. The arbitrator accordingly ordered Ms Masekoa's retrospective reinstatement with back pay.

[11] In response, the Department brought an application to review and set aside the arbitrator's award. It contended essentially that the arbitrator's findings of procedural and substantive unfairness were not reasonable.

- [12] In respect of the procedural fairness point, Whitcher J held that the arbitrator had *“grossly misdirected itself when he found that the dismissal was procedurally unfair”*, because, as the arbitrator himself found, there was nothing wrong with the way the Department had conducted the disciplinary hearing.
- [13] In respect of the substantive fairness issue, Whitcher J essentially found that the arbitrator’s award in that regard fell within the bounds of reasonableness and that *“ultimately, it was not unreasonable for the arbitrator to find that there was no conflict between Masekoa’s official position and her guesthouse concluding business with PSS.”*
- [14] In arriving at a conclusion on the substantive fairness issue, Whitcher J reasoned as follow:
- ‘... Another arbitrator may perhaps come to a different conclusion but I cannot conclude that the decision reached by the appointed arbitrator is one that a reasonable decision-maker could not reach. In my view, the result is capable of justification given the following facts: 16.1 There is no suggestion in the evidence that Masekoa use the position or knowledge of the Macufe funds to hawk her business to PSS. It is an undisputed fact that Ernest Moikangoa and Danny Moleko approached, and invited. 16.2 She was not involved in and had no influence in the decision-making of [the] FSACC or PSS or how the funds for Macufe were used. 16.3 Masekoa’s claim, that, at all times, in her mind, she had been doing business with a private company (PSS) not [the] applicant is not highly implausible. In fact, there is no evidence that she knew PSS was the so-called implementing agent of FSACC. 16.4 Even so, at the time, there was no law prohibiting SMS members from doing business with the State. The public service regulations banning civil servants from doing business with the State came into effect at the end of August 2016 was a transitional arrangement enabling public servants who were doing business with the State to either resign from the public service or relinquish their business interests by a certain date, failing which disciplinary action would follow. 16.5 The evidence does not demonstrate that Masekoa looked no further than their own guesthouse. It was undisputed that the quotation provided was in fact (behind-the-scenes) a correlated quotation from various other guesthouses, and that these guesthouses were paid from the payment

received by Masekoa's guesthouse. 16.5 the situation in Bloemfontein was unique. On applicant's own version, accommodation during Macufe was scarce and expensive. Logistically and financially, Masekoa's guesthouse would in all probability have been approached in the ordinary course. Finally, and connected to this, is [the] applicant's own suggestion that no unethical conduct would have arisen if Ernest Moikangoa and Danny Moleko had directly approached the guesthouse. I do not see how this fundamentally differed to them approaching the owner of the guesthouse. The same result would in all probability have arisen.'

[15] The appeal is directed only against Witcher J's order in respect of the substantive fairness aspect. There is no cross-appeal in respect of the finding regarding procedural fairness.

[16] An aspect of the appellant's mandate as the provincial Department is to support and develop the arts and artists, in general, in the Free State province. In order to give effect to this mandate, it established the FSACC, a juristic person, which in terms of section 3 of the Free State Arts and Culture Council Act¹ (Arts and Culture Act) has as its object the provision of opportunities for persons to practice, develop and promote the arts and to encourage excellence in the expression and performance of all art forms.

[17] In terms of section 5 of the Arts and Culture Act, the powers of the FSACC includes the provision of financial support, advice and information to such persons in order to attain its objects. The FSACC also has the power to establish committees, including an accommodation committee, which it may perform its function and it resides in the office of the MEC for Sports, Arts and Culture in the Free State. The same MEC is the political head of the Department.

[18] The PSS consortium was appointed through a tender to assist with the promotion of the Macufe project, which is part of the Department's and the FSACC's initiatives relating to the development of artists in the province. The

PSS was essentially responsible for commission-orientated transactions, such as ticket sales, revenue and booking of artists for the annual event.

- [19] In order to financially assist the FSACC with this operation, public funds were budgeted for in the Department and allocated for the arts, culture and heritage projects under the so-called, 'programme 2', which was managed by the Chief Directorate for Arts, Culture and Heritage in the Department. Ms Masekoa was the Chief Director and accordingly had control over programme 2.
- [20] One of the responsibilities of the accommodation subcommittee of the FSACC was to find and secure accommodation for the artists that were to perform at the annual Macufe event. Mr Ernest Moikangoa, who was employed in the Department, had been seconded to the steering committee of the FSACC to render administrative support and to secure accommodation for the artists.
- [21] It is established on the evidence that Mr Moikangoa had approached Ms Masekoa to secure accommodation for artists and that she was willing to assist in that regard. She owned her own guesthouse, Maisy's Guesthouse, and was a member of an association of guesthouses in the area. In her annual declaration of interests to the Department, Ms Masekoa declared her interest in a guesthouse with the registered name ROWCO.
- [22] It is further established on the evidence that, following her discussion with Mr Moikangoa, Ms Masekoa caused the quotation for the accommodation of 80 artists to be presented to the FSACC's subcommittee on accommodation for acceptance and it was accepted.
- [23] On or about 15 September 2014, Ms Masekoa's guesthouse presented invoices for payment, but in October 2014 a payment dispute had arisen between Ms Masekoa and her daughter Ms Ntakazo, who also owned a guesthouse, Little Venice, which was a participant in Ms Masekoa's venture, and this triggered an investigation by the Department.
- [24] As part of her *modus operandi*, Ms Masekoa collected quotations from all the guesthouses in the area that wanted to participate in the venture, including Little Venice, and compiled one quotation which was presented as if it

emanated from Maisy's Guesthouse only. The quotation also creates the impression that this was the guesthouse that was to be appointed to provide accommodation and to whom payment was to be made in an amount of R 288 000,00, whereas, in truth, other guesthouses had also participated in this venture. The investigation led to the charges of misconduct being brought against Ms Masekoa.

[25] The charges essentially allege that Ms Masekoa's conduct in securing the accommodation contract for her business was in breach of the rules in the SMS Handbook and the Code of Conduct for the Public Service which were essentially directed at regulating situations where employees of the Department, such as she, encounter conflicts between their personal interests and the interests of the Department, and were aimed at avoiding such conflicts.

[26] The question that arose crisply for determination was whether there was a conflict or potential conflict between Ms Masekoa's interest as an employee of the Department, specifically as Chief Director that was responsible for the proper management of the Macufe funds, and her personal interests as owner of Maisy's Guesthouse. Further, if there was such a conflict, whether Ms Masekoa complied with her ethical duties as required by the Handbook.

[27] Employees have a duty of good faith towards their employers. They are required to advance the employer's interest and not their own in situations where their interests and that of the employer may clash². A typical example of such a conflict would be where an employee who conducts a business, or who in his personal capacity and for his own benefit, enters into a deal relating to the employer's business. In *Robinson v Randfontein Estates Gold Mining Co Ltd*³ Innes CJ expressed the position as follows:

'Where one man stands to another in a position of confidence involving a duty to protect the interests of that other, he is not allowed to make a secret profit at the other's expense or place himself in a position where his interests

² See, *inter alia*, J Grogan 'Workplace Law' 13th ed. at p 193 and the cases cited there.
³ 1921 AD 168 at 177-178.

conflict with his duty. The principle underlies an extensive field of legal relationship... the doctrine is to be found in the civil law (Digest 18.1.34.7), and must of necessity form part of every civilised system of jurisprudence.¹⁴

[28] Given Ms Masekoa's position as Chief Director in charge of programme 2, where the funds for the Macufe event originally came from, it is, unlikely in the extreme, if not improbable, that she did not know that annually during that event in Bloemfontein accommodation for participants in the event was in high demand and therefore scarce and expensive. It is also equally unlikely, if not improbable, that she did not know that the amounts that were eventually to be paid to service providers for the accommodation originally emanated from the programme administered by her and were to be applied diligently by the FSACC and its implementing agent, if any, in this case PSS, or that PSS was the implementing agent of the FSACC, or at least that Mr Moikangoa was an employee of the Department and coordinator of the FSACC specifically for the Macufe event.

[29] Ms Masekoa's defence in terms of which she tried to distance herself from the Department, her employer, was that she thought that she was dealing with a private entity, PSS, and did not know that it was linked to the FSACC, was contrived in order to deal with what Ms Masekoa must have known was a conflict of interest situation. Given her very senior position, it is unlikely that she did not have intimate knowledge of how the Macufe event was arranged, funded and paid for and what the source of that payment was.

[30] There was indeed a potential conflict, if not an actual conflict, between the interests of the Department in relation to the utilisation and preservation of the Macufe funds, in particular and in respect of the accommodation of artists, and Ms Masekoa's interests as business owner of Maisy's Guesthouse. In the latter capacity, Ms Masekoa had a duty to the guesthouse to realise a good profit out of that business deal. While the Department's interest, albeit through

¹⁴ See also *Volvo (Southern Africa) (Pty) Ltd v Yssel* [2010] 2 BLLR 128 (SCA) at paras 13 and 16 where it was held that "while certain relationships have come to be clearly recognised as encompassing fiduciary duties there is no closed list of such relationships." In that particular case it was held to apply to an employment relationship.

the FSACC and PSS, which Ms Masekoa was to advance, was to keep the expenditure as low as possible.

[31] Even though there is no rule which expressly and specifically prohibited Ms Masekoa from doing business with the Department, in terms of the SMS Handbook she was required to disclose to the Department such actual or potential conflict of interests, and to take steps to avoid such conflict.⁵

[32] That Ms Masekoa declared her financial interest in a guesthouse in her annual declaration of interest to the employer was not sufficient to constitute compliance with the duty imposed upon her by chapter 6 paragraph 10 of the SMS handbook. The accommodation deal was a specific incident of potential conflict, or actual conflict, of interests that Ms Masekoa was obliged to bring to the attention of her employer, disclosing all details, and she had to take steps to avoid the conflict. That she did not do.

[33] The situation was aggravated by her attempts to justify the deal as one that she thought she was concluding with a private company, and by effectively eliminating competing quotations by other guesthouses in the area and submitting one quotation purporting to emanate from her guesthouse only. A reasonable arbitrator would have found accordingly.

[34] While it is correct that courts of appeal and of review will not easily interfere with factual findings of an arbitrator, those findings are not cast in stone and may be interfered with if they are irregularly or unreasonably arrived at⁶. In this instance, the arbitrator and the court *a quo* appears to have made the same errors in respect of crucial factual issues and not to have taken into account, all of the evidence, including Ms Masekoa's unique position in relation to the Macufe event.

⁵ See Chapter 6, paragraph 10 of the SMS Handbook.

⁶ See, *inter alia*, *Minister of Safety and Security & Another v Madikane & Others* (2015) 36 ILJ 1224 (LAC) at para 48.

[35] The transgression was serious enough to justify Ms Maseko's dismissal. She was in a position of trust and breached that trust.⁷

[36] It follows that the appeal must succeed. Taking the facts, the law and fairness into account, a costs order is not appropriate. There shall therefore be no costs order.

[37] In the result, the following is ordered:

Order

1. The appeal is upheld;
2. The order of the Labour Court is set aside and substituted with the following order:

- "1. The award of the third respondent, acting under the auspices of the second respondent, dated 30 April 2018 in case GPBC88-2017 is reviewed and set aside and substituted with the following order: 'The applicant's claim is dismissed'."
2. There is no costs order."

P Coppin
Judge of the Labour Appeal Court

Kathree-Setiloane and Tokota AJJA concur in the judgment of Coppin JA.

⁷ See '*Workplace Law*' *supra* fn 3 at p 193 and the cases cited there.

APPEARANCES:

FOR THE APPELLANT:

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FOR THE FIRST RESPONDENT:

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LABOUR APPEAL COURT