REPUBLIC OF SOUTH AFRICA

Not Reportable

THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

JUDGMENT

Case no: JR 1531/10

In the matter between:

DEPARTMENT OF EDUCATION: GAUTENG PROVINCIAL GOVERNMENT — **Applicant**

and

PUBLIC SERVANTS ASSOCIATION obo R E APPADU — **First Respondent**

GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL — **Second Respondent**

ADVOCATE R BRACKS (*N.O.*) — **Third Respondent**

Heard: **04 October 2011**

Delivered: **29 January 2013**

Summary: (Review – misconduct – conflict of interest – misconstrued charge – employee guilty. Procedural fairness – no prejudice caused by delays in enquiry – no unfairness).

JUDGMENT

LAGRANGE, J

Introduction

[1] This is an application to review and set aside an arbitration award issued by the third respondent a senior panellist of the arbitration panel of the GP SSBC ('the bargaining council'). The arbitrator had found that the employer had failed to discharge the onus of showing that Mr R Appadu, who was employed as the employer's Chief Security Officer, was guilty of the offence for which he was charged. Accordingly, the arbitrator ordered the employer to reinstate Appadu retrospectively to the date of his dismissal on 1 June 2010.

[2] Because the arbitrator found that Appadu was not guilty of the charge he did not consider his alternative claim that his dismissal was procedurally unfair. Appadu had complained that his hearing was procedurally unfair because the disciplinary proceedings were instituted in July 2007 but only commenced in April 2008 and was concluded the following year in September, thereby compromising his right to a speedy enquiry.

[3] The employer had found Appadu guilty and dismissed him on the following charge:

> *It is alleged that you failed to comply with the Public Service Code of Conduct which requires you as a public service official to serve the public in an unbiased and impartial manner in nature gave undue preferential treatment in the appointment of service providers contracted to provide security services to the Department.*
>
> *The basis of the above allegation is that you are a member of the Central Bridge Trading CC, which you co-owned with Messrs Zeyn Khan and Solomon Mothupi. Available evidence is that during the following period you acted in a biased manner and that you facilitate extension and/or appointed of security contracts for undermentioned business entities with which you shared business interests through your membership of the Central Bridge Trading CC."*

[4] The charge was construed as misconduct in terms of annexure "A" of PSCBC Resolution 2 of 1999. In the charge sheet, five separate entities were identified which Appadu had allegedly preferred and which were linked to his interests in Central Bridge Trading CC ('CBT').

[5] The applicant seeks to set the award aside on the basis that:

5.1 The arbitrator failed to apply his mind to the evidence of two of the employer's witnesses who had testified on the alleged misconduct of Appadu.

5.2 The arbitrator failed to apply the Public Service Code of Conduct concerning conflicts of interest.

5.3 The arbitrator misdirected himself because he assumed that unless it could be proven that Appadu benefited financially from a transaction he was not guilty of the misconduct he was charged with.

[6] Among other things, PSCBC Resolution 2 of 1999 identifies misconduct as the contravention of any prescribed code of conduct for the Public Service. Paragraph 4.4.5 of the Public Service Code of Conduct reads:

> *"An employee does not engage in any transaction or action that is in conflict with or infringes on the execution of his or her official duties.*
>
> *In order to bring about and maintain trust in the public service, all employees are expected to serve in a loyal and dedicated manner. This requires employees not to get involved, either on or off duty, in matters or activities that could:*
>
> *(a) be regarded as being fraud or theft;*
>
> *(b) interfere with the carrying out of their duties;*
>
> *(c) influence the way in which they do their work;*
>
> *(d) influence their objectivity in making decisions;*
>
> *(e) create embarrassment for the stated employer; or*
>
> *(f) be perceived to potentially prejudice or favour certain parties."*

The arbitration

[7] The crucial evidence implicating Appadu was given by Ms M Chipasula and Ms E Brits. Ms Chipasula had been involved in a forensic investigation conducted by OMA Chartered Accountants into irregularities at the security unit of the Gauteng Shared Service Centre (GSSC). Brits was employed as a deputy director in charge of the security unit in which Appadu worked.

[8] The gist of Chipasula's evidence was that Appadu was a co-member of CBT together with Messrs Z Khan and S Mothupi, and that he was involved in the appointment and monitoring of Security service providers including those in which one of his two business partners were members or shareholders of such firms. On the basis of recommendations made by Appadu, contracts were awarded or extended by Brits. The result of her investigation was that there appeared to be biased in the award of the tenders to security providers in that most of the firms contracted were linked to Appadu indirectly through the involvement of his co-members of CBT, though she did agree that in one instance Appadu had not recommended any of the linked firms, but one of them had ultimately been awarded the contract under consideration. Importantly, part of her report showed that during 2006 and 2007 six of these firms benefited from two or more of eleven separate contracts, with an aggregate value of just over R 3 million.

[9] Chipasula was not cross-examined on her evidence by Appadu's representative.

[10] Brits stated that she gave the final approval for the appointment of providers after receiving recommendations from Appadu. She agreed that Appadu did not attempt to bully her into accepting his recommendation, but because she respected his opinion she would normally accommodate his recommendation. At this juncture, it should be mentioned that the arbitrator believed it was a matter of some importance whether or not Appadu forcefully punted his recommendation in discussions with Brits. Brits was also not cross-examined on her evidence.

[11] The last witness for the employer was Mr V Ndlovu, the chairperson of the disciplinary enquiry. The only material part of his evidence for the purpose of these proceedings concerned the delays in the disciplinary enquiry. He agreed that there had been a number of postponements of the proceedings but testified that all of those had been at the request of one of the parties and with the agreement of the opposing party. He rejected the suggestion by Appadu's representative that he should have 'put his foot down' and ensured that the enquiry proceeded to a more speedy conclusion.

[12] Appadu testified that the procedure for awarding contracts was that they would get a request from the building department for security services and he would go out and do a risk analysis to determine the requirements and specifications for the contract. A form requesting the services would then be completed in which the names of possible vendors would be included. Once Brits had approved the recommendation it would go to the GSSC for final adjudication. He gave evidence which showed that the GSSC did not always follow the recommendations made by himself and approved by Brits. He denied that he had any ability to influence the GSSC's decision. Despite persistent questioning, he would not concede that the list of suppliers which he compiled was anything more than a list of possible suppliers and not a list of preferred suppliers, even though it is obvious that some selection process must have been involved.

<u>The arbitration award</u>

[13] The arbitrator accepted that Appadu's superiors were not bound to accept his recommendations but at best for the employer it could be said they trusted him. He agreed that the evidence showed that there was a link between some of the companies and CBT and that Appadu had made suggestions about who had to be appointed. However, the arbitrator held that:

> *"...this is where the applicant's duty ended. Firstly the applicant's suggestions were subject to the approval of Brits and Daniels and if they took their responsibilities seriously they should have*

scrutinised the appointments more carefully to ensure the same companies were not advantaged every time."

[14] He also found that the GSSC made the final appointment and took its decisions independently, which was evidence by the fact that it sometimes ignored recommendations made by Appadu. In the arbitrator's view, the employer had failed to demonstrate that Appadu was able to influence those who had made the final appointment. Consequently, it had failed to discharge the onus of proving him guilty of the offence for which he was dismissed.

<u>The review</u>

[15] The applicant raised a number of grounds of review related to the alleged unreasonableness of the award or to the arbitrator failing to apply his mind to the evidence. In order to decide whether or not the award should be set aside, only one ground of review is decisive in my view. The applicant contends that the arbitrator misdirected himself in interpreting the charge, or alternatively considered irrelevant factors when determining if Appadu was guilty or not. It submits that the issue the arbitrator should have determined was whether Appadu had an impermissible conflict of interest for someone who was in a position to possibly benefit from the choice of Security service providers, especially when he was tasked and trusted to make recommendations on possible recipients of contracts. In order to be found guilty of misconduct under item 4.4.5 of the public service code it was irrelevant that he did not take the final decision.

[16] In treating the power to make the final decision as the decisive factor, the arbitrator had taken into account an irrelevant factor and had misconstrued the nature of the misconduct. I agree. If one considers item 4.4.5 of the code it is readily apparent that much of it is concerned with the potential harm and not the actual harm which can result from an employee having personal interests in the transactions of the employer which might adversely affect the employee's approach to such transactions because the employee might prioritise his or her interests over their employer's.

[17] This is not only a consequence of the public service code, but also part and parcel of an employee's common law duties towards an employer. In ***Phillips v Fieldstone Africa (Pty) Ltd & Another*** **(2004) 25 *ILJ* 1005 (SCA)** the SCA held that where a fiduciary relationship does exist, "... it extends not only to actual conflicts of interest but also to those which are a real sensible possibility."[1] The court also held that a fiduciary relationship can exist not only between senior managers and an employer but between other employees and their employer.[2]

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[1] At 1017,[31]

[2] Viz, at 1019-1020, [34]:

"The South African cases which recognize the duty of an employee to account for profits received in breach of a fiduciary duty (Jones v East Rand Extension Co, Robinson v Randfontein Estates GM Co, Peacock v Marley A 1934 AD 1 and Uni-Erections v Continental Engineering Co Ltd1981 (1) SA 240 (W) at 252H) do not lay down that such a duty can only arise in the relationship of managerial employees to their employers. What Nestadt J in the Uni-Erections case, at 254B, intended in saying -

'[i]t seems to me some circumspection is required in applying it [the ''Palmer principle'] to the case of master and servant',

is made clear by his comments which followed:

'Innes CJ in Palmer's case referred to the difficulty in deciding whether the profits were made ''in the course or by means of the agency' or whether the agreement complained of was ''a subsidiary contract'. It will not assist to canvass the facts of that case. Each matter has to be decided on its own particular facts. In my opinion the profits made have not been shown to be directly or indirectly connected with Rousseau Junior's employment or earned by virtue of his position as an employee. Had his position D been that of a salesman canvassing for erection work, the position might have been different. His duties were merely those of an estimator whose task it was to calculate what defendant would charge its customers.'

The learned judge was clearly intent to reiterate the need to determine from the facts of each case whether a duty exists which carries with it a duty of disclosure, emphasizing that the lowlier or more restricted in discretion the position held the less likely that the facts will support such a conclusion. (See also Sibex Construction (SA) (Pty) Ltd & another v Injectaseal CC & others1988 (2) SA 54 (T) at 65F-G.) <u>That dictum, it seems to me, provides no support for the submission that an employee is per se to be approached on a different basis from any other supposed fiduciary whose relationship with another is being examined</u>.

See New Zealand Netherlands Society Oranje Inc v Kuys [1973] 1 WLR 1126 (PC) ([1973] 2 All ER 1222) at 1129 (WLR). As La Forest J said in Hodgkinson v Simms:

'<u>It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence, should not be considered closed</u>.'

The learned judge also referred with approval to the judgment of Wilson J in Frame v Smith [1987] 2 SCR 99 (SCC) at 136 which suggests that relationships in which a fiduciary obligation has been imposed are marked by three characteristics: (1) scope for the exercise of some discretion or power; (2) that power or discretion can be I used unilaterally so as to effect the beneficiary's legal or practical interests; and (3) a peculiar vulnerability to the exercise of that discretion or power. <u>I agree that that analysis is helpful in the identification of such a relationship although not decisive. It can be applied in the employment context as easily as to relationships giving rise to more obvious duties of trust.</u>"

[18] In Appadu's case he was not a mere ball-bearing in the machinery of decision-making, but played a role in identifying potential recipients of state contracts. It is true that his recommendations were not binding and the ultimate decision rested with others, but that did not mean he was without influence. Brits confirmed that she trusted his recommendations, which means she placed reliance on them. The question which really needed to be asked is: would any of the decision-makers higher up in the chain of command have been more wary of those recommendations if they had known who his business associates were? It is difficult to believe that anyone would have viewed his recommendations as neutral if they had known about his connections. It is the potential which his personal interests held for colouring his recommendations which is identified in item 4.4.5 of the code.

[19] I am satisfied that the arbitrator fundamentally misconstrued the nature of the charge which caused him to decide that it was necessary for the employer to prove that AR's recommendations were decisive. Had he focused instead on the potential bias which AR's interests might have created he would not have acquitted him of the charge. Consequently, the arbitrator's finding that Appadu's dismissal was substantively unfair, on the basis that he was not guilty, must be set aside.

[20] It follows also from the above, that the issue of procedural unfairness, which the arbitrator did not determine because of his conclusion on substantive fairness, must be considered. Appadu relied on the often heard principle, 'justice delayed is justice denied'. However, the chairperson's evidence was that postponements in the hearing itself were at the request of the parties and were not opposed at the time. Further, no evidence was tendered by Appadu as to how he had been prejudiced by the delay in the conduct of his defence. I am satisfied in the circumstances, that Appadu was not unfairly prejudiced by delays in the process and find that his dismissal was procedurally fair.

(emphasis added)

Remedy

[21] While it is clear the award cannot stand, this is not a case in which it is easy for the court to simply substitute its view of whether dismissal was appropriate or not. Evidence on the record of mitigating and aggravating factors is scarce on the record, and this is not a case in which the court has the necessary evidentiary material to decide the matter. Reluctantly, I must refer the matter back for the determination of whether or not AR's dismissal was substantively fair.

Order

[22] In the circumstances:

22.1 The third respondent's finding that Mr Appadu was not guilty of the offence for which he was dismissed is set aside and substituted with a finding that he was guilty as charged.

22.2 The dismissal of the third respondent was procedurally fair.

22.3 The second respondent is directed to set the matter down for a hearing before an arbitrator other than the third respondent to determine the substantive fairness of the dismissal, based on the existing record and any additional evidence the parties may lead in mitigation or aggravation.

22.4 The first respondent must pay the applicant's costs.

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R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	W Mokare, SC instructed by the State Attorney
FIRST RESPONDENT:	T Ntshebe of Thabang Ntshebe Attorneys