



THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Not Reportable
Case No: PR201/22

In the matter between:

MABOKO VICTOR HLUNGWANE

Applicant

and

**MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT**

First Respondent

**THE DIRECTOR-GENERAL: JUSTICE
AND CONSTITUTIONAL DEVELOPMENT**

Second Respondent

**GENERAL PUBLIC SERVICE SECTOR
BARGAINING COUNCIL (GPSSBC)**

Third Respondent

THABO MARUPING N.O.

Fourth Respondent

Heard: 29 January 2025

Delivered: 4 February 2025

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date for hand-down is deemed to be 4 February 2025.

JUDGMENT

MAKHURA, J

[1] In these opposed motion proceedings brought in terms of section 145 of the Labour Relations Act¹ (LRA), the applicant seeks to review and set aside the arbitration award which found his dismissal by the first respondent (respondent) to be procedurally and substantively fair. He further asks the Court to reinstate him retrospectively from 13 September 2021, being the date of his dismissal, or to remit the unfair dismissal dispute to the Government Public Service Sector Bargaining Council (GPSSBC) for arbitration *de novo*.

[2] The applicant was charged with and dismissed for the following allegation of misconduct:

‘On or about 31 January 2020, at or near Kimberly Regional Office, you were instructed by the Regional Head that you report on or before 05 February 2020, to your head-quarters at the De Aar Magistrates Office where you are appointed as a Financial Operations Manager, consequently you failed to comply with lawful and reasonable instructions, thereby committing the misconduct of “Gross Insubordination”, as contained in Annexure A of PSCBC Resolution 2 of 1999 as amended by PSCBC Resolution 1 of 2003, Disciplinary Code and Procedure for the Public Service.’

[3] The material facts of the unfair dismissal dispute are uncontroversial and largely common cause. On 19 April 2007, the applicant accepted an offer of employment with the respondent as a Financial Operations Manager (FOM): De Aar Cluster.

¹ Act 66 of 1995, as amended.

His employment was effective 1 May 2007. His place of work was at the De Aar Magistrates Office.

[4] On 18 March 2013, the applicant prepared a memorandum with the following subject - *“Request for the approval to change base as from 01 April 2013”*. This memorandum was addressed to the Regional Head Director. The applicant motivated for a request to change the base so that he could work from the Kimberley Regional Office. The reasons for his request were that his wife was sick, that she was staying alone with the children and that his presence in Kimberley would assist her with emergency issues. Further, he stated that this would assist him to attend to any problems which in turn would prevent stress on his part.

[5] His request to change the base was approved by Rodney Isaacs (Isaacs) in his capacity as the Regional Head: Northern Cape Region. The approval reads as follows:

‘This approval is subject to your performance as this must not deter you to be in your cluster area. Please do discuss with the new director finance on the 1st June 2013. Please take note that this is not a transfer at all.’ [Own emphasis]

[6] On 6 September 2018, the respondent’s Director: Human Resources, Charlene Adams (Adams) addressed an email to the applicant recording that he was appointed to the De Aar Cluster. Adams requested the applicant to provide her with a copy of the letter in respect of his request for a *“permanent transfer”* from De Aar to Kimberley. The applicant was further informed that his appointment, together with three others, was raised and flagged by the auditors.

[7] On 7 September 2018, the applicant responded to Adams’ email. He stated that he would obtain the letter regarding his transfer. The applicant also requested the auditors’ findings for the past five years. In reply on the same day, Adams clarified that there were no findings by the auditors but that the human resource division (HR) was requested by the auditors why he was working from Kimberley

when his letter of appointment indicated that he was appointed for the De Aar Cluster based in De Aar. Adams further explained that HR was directed by National Office to address all HR related matters and that they are correcting matters such as his where an employee was appointed for a position in one area but was carrying out his duties from another area or office. The applicant was also reminded that this issue was previously discussed with him. Adams also informed the applicant that she had found the letter or memorandum of 13 March 2013 which dealt with his request for 'transfer'. The applicant then requested a copy of the memorandum.

- [8] On 28 November 2018, the Acting Regional Head: Northern Cape, De-Alto Plaatjies (Plaatjies), addressed a letter to the applicant. The letter recorded that the applicant was appointed as FOM: De Aar Cluster, based in De Aar Magistrates Office. It further recorded that the approval in March 2013 for him to work from Kimberley office was not a transfer, and that there was no record of approval of a permanent transfer to Kimberley. The applicant was:

'requested to indicate and/or provide a detailed motivation specifically based on operational considerations within [his] scope of Financial Operations Manager: De Aar Cluster as to why [he] should not be compelled to return to the office where [he was] appointed.'

- [9] The applicant was given until 6 December 2018 to submit the motivation. On 6 December 2018, the applicant again requested a copy of the memorandum of 13 March 2013. The memorandum was provided to him on 12 December 2018. The applicant was informed that management would finalise the matter on 14 December 2018. He did not comply with the request to provide representations or motivation as to why he should not return to De Aar.

- [10] On 25 January 2019, Plaatjies sent a letter to the applicant dated 18 January 2019. The letter noted the applicant's failure to substantively respond to the request for motivation why he should not return to De Aar, and informed him that

he was required to report at the De Aar Magistrates Office by no later than 1 February 2019.

- [11] In response, the applicant questioned the content of the memorandum which approved his move to Kimberley. He questioned what in his view were discrepancies in the handwriting notes of Issacs on the memorandum and requested to be furnished with the original memorandum. He then argued that the rules of natural justice require that both sides be heard before any decision is taken, and that the fact that he performed his work from Kimberley had never hampered his performance. He concluded that:

‘Further be informed that it won’t be possible for me to report at De Aar on the date mentioned in your letter, also take note that I have handed over the matter to my union and lawyer.’

- [12] On 4 February 2019, the applicant lodged a grievance. He raised the same alleged discrepancies in Isaacs’ handwriting on the memorandum, questioned why the respondent was only raising the issue at that stage and not prior and argued again that his performance had not been affected by his move to Kimberley. The applicant continued:

‘It is impossible for me to report to De Aar magistrate office on the 1st February 2019 as instructed due to budgetary constraints.

My family now resides in Kimberley and I have a bonded property and on top of that I have also two children at the University plus other debts, so I don’t have a budget to rent another place in De Aar.

Also take note that I have a sickling wife and alone with the children that is why I requested to change base so that I can attend to any problems and prevent stress which may lead to poor performance.’

- [13] The outcome sought was that he should be allowed to continue working from Kimberley because this had not affected his performance.

- [14] The applicant held a meeting with Ronel de Klerk (De Klerk), the Director: Finance, on 4 February 2019. On 7 February 2019, De Klerk addressed a letter to the applicant advising him that she would not approve the use of a government vehicle to transport him to his headquarters or place of work nor approve any accommodation and meals at his headquarters or cluster offices within a 300km return trip radius. In response, the applicant responded that considering his circumstances, it would be impossible for him to fulfil his duties. He argued that his grievance suspends the respondent's decision for him to report to De Aar Magistrates Office, his place of work.
- [15] On 4 September 2019, Plaatjies addressed a letter to the applicant informing him that his grievance was finalised. The applicant was informed that the findings were that his placement at Kimberley was not approved as a permanent transfer, that this was a temporary transfer approval based on humanitarian grounds at the time and that there was no substance in his grievance. Further, he was informed that his continued placement in Kimberley was "*not in the operational and financial interest*" of the respondent. In conclusion, the applicant was requested to report at De Aar Magistrates Office with effect from 1 December 2019.
- [16] The applicant did not report at the De Aar Magistrates Office as requested. On 3 December 2019, the respondent addressed another letter to the applicant, recording that he had not reported at De Aar as instructed. The respondent however decided to extend the period for him to report at De Aar. Accordingly, the applicant was requested to report at De Aar on or before 13 January 2020 and was warned that "*failure to comply may leave the Department with no option but to consider further action*". The applicant failed to adhere to the request.
- [17] On 31 January 2020, the respondent issued a letter of alleged misconduct against the applicant. The letter recorded that the applicant failed or refused to report for duty at his headquarters with effect from 13 January 2020 per the letter dated 3 December 2019, that this was viewed by the respondent in a serious

light as it was regarded as a failure to adhere to a legitimate instruction. He was requested to provide written reasons why he should not be charged and/or suspended. The applicant responded on 7 February 2020. His response was:

'It is impossible for me to relocate to De Aar as instructed considering that my family now resides in Kimberley since 2013, in order to have a stable family I had to look for accommodation and school for my kids. I have a bonded property and on top of that also two children at the University plus other debts, so such sudden relocation is detrimental not only to my family but also financially as I don't have a budget to rent another place in De Aar.

I am appointed as Financial Operations Manager in the De Aar Cluster whereby I am serving thirteen offices, six in close proximity of Kimberley. I applied for relocation of base from De Aar to Kimberley and it was approved by the Regional Head.

There was no meaningful consultation on the matter considering that I have been based in Kimberley on an approved application for more than six years.'

- [18] The applicant was charged on 1 July 2020 and called to attend a disciplinary hearing on 17 July 2020. The hearing was concluded in December 2020. The applicant was dismissed on 12 February 2021. His appeal was dismissed on 13 September 2021. He referred an unfair dismissal dispute to the GPSSBC.
- [19] The arbitration proceedings were held between March and June 2022. At arbitration, the respondent called Isaacs, De Klerk and Adams, all of whom participated in the attempts to get the applicant to move back to his place of work in De Aar per his appointment letter and/or contract of employment. The applicant testified and called another witness, Molefi Ndweni.
- [20] The evidence led by the witnesses is not different to the summary of the material facts above. The respondent's material evidence was that the applicant was appointed to work at De Aar Cluster, based in De Aar Magistrates Office, that in March 2013, he requested, for reasons relating to his wife who was allegedly sick, to be based in Kimberley, that his request was approved based on

humanitarian grounds and that the approval for him work in Kimberley was temporary and did not amount to a transfer. Further, the respondent's evidence was that despite numerous requests, the applicant refused to report for duty at De Aar.

- [21] The applicant's case was that he was permanently transferred to Kimberley and that the respondent was required to consult him before it takes the decision to transfer him back to De Aar. Further, the applicant expressed that it was impossible for him to move back to De Aar because his performance was not affected by his placement in Kimberley, he had purchased a house in Kimberley in 2019 which he was paying a bond for and he did not have the budget to move to De Aar and rent another house. The applicant also repeated the reasons he used in 2013, that his wife was sick and they had two children.
- [22] On 8 July 2022, the commissioner dismissed the applicant's unfair dismissal claim. The applicant takes no issue with the procedural fairness findings in these proceedings. He challenges the decision that his dismissal was substantively fair. In summary, the challenge against the award is that he is not guilty of the misconduct of insubordination and that the commissioner failed to take his personal circumstances into account when considering sanction. Mr Van den Berg, appearing for the applicant, submitted that even if the applicant is guilty, the insubordination is not gross or sufficiently serious to warrant a sanction of dismissal.
- [23] Insubordination is defined as a wilful and serious refusal to obey a lawful and reasonable instruction or where the conduct of an employee poses a deliberate or wilful and serious challenge to the employer's authority.² It is trite that not every case of insubordination automatically leads to dismissal.³ Therefore, whether the act of insubordination is serious or gross to warrant a sanction of

² *Palluci Home Depot (Pty) Ltd v Herskowitz and others* (2015) 36 ILJ 1511 (LAC); [2015] 5 BLLR 484 (LAC) (*Palluci*) at para 19; *Masscash (Pty) Ltd t/a Jumbo Cash & Carry v Mtsotsoyi and others* (2023) 44 ILJ 162 (LAC); [2022] ZALAC 117 (*Masscash*) at para 27.

³ *Wasteman Group v SAMWU* [2012] ZALAC 10; [2012] 8 BLLR 778 (LAC); *Palluci* at para 22.

dismissal is a question of fact, to be established and determined from the facts and evidence of each case.

- [24] The evidence overwhelmingly established that the applicant was guilty of insubordination. This insubordination was, based on the documentary and oral evidence, persistent and gross. The applicant at times ignored the respondent's letters. However, despite the respondent's overly sympathetic approach, the applicant was undeterred in his defiance, raising unnecessarily technical issues which delayed the finalisation of the issue by more than one year.
- [25] The issue of a possible move back to De Aar was clearly within the contemplation of the applicant as early as September 2018 (if not at the time when he requested to work from Kimberley) when the respondent enquired into the circumstances of his apparent indefinite or unexplained continued work from Kimberley. The respondent made attempts in November and December 2018 for the applicant to motivate why he should not move back to De Aar. These attempts were in vain.
- [26] On 25 January 2019, the respondent issued an instruction for the applicant to move to his headquarters and report at De Aar on 1 February 2019. The applicant's response was a suggestion that the respondent had manufactured the memorandum of 13 March 2013 which approved his move to Kimberley.
- [27] The applicant later lodged a grievance claiming that the move back to De Aar was impossible due to his commitments, budgetary constraints, sick wife, children and bond house. The applicant had no regard to the operational and financial challenges that were brought about by his continued stay in Kimberley. He was specifically informed that his continued stay in Kimberley was not in the operational and financial interest of the respondent. His continued stay in Kimberley required the respondent to pay for his transportation to De Aar where he is required to be in terms of his contract of employment, and to pay for his accommodation and meals. When the respondent refused to cover these wasteful expenses in February 2019, the applicant said that he would not be able

to carry out his duties. The applicant expected the respondent to continue incurring all these expenses for him to report for duty in accordance with the terms of his contract of employment.

- [28] The grievance was lodged simply to delay his move back to De Aar. When the grievance was dismissed, the respondent was still in my view overly sympathetic when it decided to give the applicant three months to report for duty in De Aar. This was again ignored by the applicant. Once again, without any request from him, the respondent extended the period until 13 January 2020 to comply with its request. Once again, the request or instruction was ignored and disregarded.
- [29] The respondent issued a letter of misconduct against the applicant and invited him to make written representations why he should not be charged. The applicant responded on 7 February 2020. At this stage, the insubordination had already happened on 1 December 2019 and 13 January 2020. This was after he was given three months from September 2019 to 1 December 2019 and another month and half to 13 January 2020.
- [30] The above facts established a wilful, deliberate and persistent defiance of a reasonable and lawful instruction. The applicant was a Financial Operations Manager. The operational and financial difficulties were explained to him and as a manager, with full knowledge that he was appointed to render services in De Aar Magistrates Office and that his move to Kimberley was temporary, the respondent should not have been placed in the position that it was placed by the applicant's defiance. The applicant was aware that his temporary relocation did not even appear on the respondent's official record as it was not a transfer.
- [31] One of the applicant's main criticisms of the award is that the commissioner did not engage in an analysis of the evidence to show how he arrived at his ultimate decision that the dismissal was fair. The commissioner had comprehensively summarised the evidence of each witness. He has analysed the evidence though it would appear not to the satisfaction of the applicant. In my view, the applicant's criticism ignores the fact that the review test is outcome based. Regardless, the

applicant did not show how the commissioner's failure to engage in an analysis of the evidence as suggested would have changed the ultimate decision that the dismissal was fair. In *Masscash*, the Labour Appeal Court (LAC), dealt with a similar argument as follows:

'In the context of the established facts that Mr Mtsotsoyi wilfully and persistently defied a reasonable instruction of his employer over a period spanning some six weeks, the Labour Court's conclusion that Mr Mtsotsoyi complied with the instruction and was not grossly insubordinate is clearly wrong.

The Labour Court furthermore held that in concluding that the dismissal was an appropriate sanction, the arbitrator only had regard to the fact that Mr Mtsotsoyi did not accept his wrongdoing and show any remorse and ignored other relevant factors such as that Mr Mtsotsoyi had a clean record. While the arbitrator does not mention this fact in the award, it is not clear from the Labour Court's reasoning how this omission would have changed the outcome of the arbitration award, having regard to the totality of the evidence that served before the arbitrator.⁴

[32] The record that served before the commissioner establishes that the insubordination was gross. The applicant had persisted with this defiance for an unreasonably long period and had sufficient time to reconsider his decision. His seniority, the nature of the position, the failure to show remorse further heightened and aggravated the misconduct and overshadowed his clean record and long service.

[33] The commissioner had identified the issue, considered the evidence and determined the issue that was before him. Whatever defects the applicant alleged, he has failed to show that they had a distorting effect on the commissioner's ultimate decision. Applying the trite and stringent test for review of arbitration awards⁵, I am not persuaded that the applicant has made out a

⁴ *Masscash* at paras 41 - 42.

⁵ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (Sidumo)* [2007] ZACC 22; (2007) 28 ILJ 2405 (CC) at para 110; *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and others* (2008) 29 ILJ 964 (LAC); [2008] 3 BLLR 197 (LAC) at para 100; *Herholdt v*

case to upset the award. The commissioner's decision falls within the band of reasonableness. The review application stands to be dismissed. The respondent did not press the issue of costs. I will therefore not award costs.

[34] In the premises, the following order is made:

Order

1. The review application is dismissed.
2. There is no order as to costs.

M. Makhura
Judge of the Labour Court of South Africa

LABOUR COURT

Appearances:

For the Applicant: Mr JP van den Berg

Instructed by: Haarhoffs Incorporated

For the 1st & 2nd Respondents: Ms MP Olivier of The State Attorney, Kimberley

LABOUR COURT