



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR 237/21

In the matter between:

KELEBOGILE SETHIBELO

Applicant

and

**GENERAL PUBLIC SERVICE SECTOR BARGAINING
COUNCIL**

First Respondent

THABE PHALANE N.O

Second Respondent

DEPARTMENT OF SPORT, ARTS & CULTURE

Third Respondent

Heard: 23 January 2025

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives through email and publication on *Saflii* and the Labour Court's website. The date for hand-down is deemed to be on 26 June 2025

JUDGMENT

TLHOTLHALEMAJE, J*Introduction:*

[1] In this opposed application, the applicant, seeks an order reviewing and setting aside an arbitration award issued by the second respondent (Arbitrator), acting under the auspices of the first respondent (GPSSBC). The award was issued following a referral of a dispute by the applicant after her dismissal by the third respondent (Department of Arts and Culture)('DAC'). The Arbitrator in the award had found that the dismissal of the applicant was procedurally and substantively fair.

Background:

[2] The applicant was employed by the DAC as Deputy-Director General (D-DG): Institutional Governance, with effect from February 2016. On 11 June 2019, she was issued with notices of precautionary suspension and of a disciplinary hearing scheduled for 20 June 2019.

[3] It is common cause that the applicant was dismissed in her absence on 23 July 2019 after she failed to attend the disciplinary enquiry. The dismissal followed upon two allegations of misconduct against her related to attempts to reveal the identity of a whistleblower and insubordination. Aggrieved with the dismissal, the applicant had referred a dispute to the GPSSBC. Following unsuccessful attempts at conciliation, the matter came before the Arbitrator, who had issued the impugned arbitration award.

The arbitration proceedings:

[4] The record in this matter is voluminous in view of the arbitration proceedings having taken place over eight days. What follows is a summary of the evidence led before the Arbitrator.

(i) *Alleged attempts to reveal the identity of a whistleblower:*

[5] In accordance with the notification to attend the disciplinary enquiry, it was alleged that following an investigation conducted by Cliffe Dekker Hofmeyr INC (CDH), the applicant had on 2 February 2017, instructed or alternatively advised the Chief Executive Officer (CEO) of the National Arts Council of South Africa ('NAC'), to *inter alia*, investigate and reveal the identity of the individual within NAC, who had leaked information and made a protected disclosure as defined in section 1 of the Protected Disclosure Act¹ (the PDA). The protected disclosure was made to the Portfolio Committee on Arts and Culture (Portfolio Committee), pertaining to alleged corruption and maladministration within the NAC.

[6] The relationship between the DAC and the NAC² is such that the latter is one of the 25 statutory bodies that operates under the DAC. The NAC's role is to support, develop, and promote the arts in South Africa, particularly through the funding and facilitation of artistic and cultural initiatives. Its mandate under the DAC is essentially to provide financial support to individuals and organisations across various artistic disciplines. The CEO of the NAC is appointed by and reports to its Council. Members of the Council are appointed by DAC, and they report to the Minister through the DDG or Director General (DG).

[7] Flowing from the evidence led at arbitration proceedings, the Arbitrator had accepted that the NAC was an agent and delivery arm of DAC, which funded it and exercised oversight over it. The Commissioner further added that the DAC instructed the NAC on its budget, investigated its expenditure, appointed its Board, and further paid the salaries of its staff members. The CEO of NAC in this case directly reported to the applicant as D-DG at the time.

¹ Act 26 of 2000.

Section 1 provides;

"A "protected disclosure" is defined in section 1 of the PDA to include a disclosure made to an employer in accordance with section 6 of the PDA.

Section 6(1) reads:

'Any disclosure made in good faith -

- (a) and substantially in accordance with any procedure prescribed, or authorised by the employee's employer for reporting or otherwise remedying the impropriety concerned; or
- (b) to the employer of the employee where there is no procedure as contemplated in paragraph (a), is a protected disclosure.'

² Established in terms of the National Arts Council Act 56 of 1997

[8] The Portfolio Committee had in or around December 2016, advised the then Minister of DAC, that it was in receipt of information regarding alleged acts of maladministration and corruption within the NAC. These included irregularities pertaining to the conduct of its CEO in awarding funding to particular projects, and irregular salary increases and bonuses awarded to the CEO and the CFO. It is common cause that this information was also leaked to the media at about the same time.

[9] The Portfolio Committee having reported the matter to then Minister, the latter had in or about February 2017, instructed the NAC to conduct investigations into the allegations. The NAC then instituted a forensic investigation into the source of the leak of information, which was conducted by Grant Thornton Forensic Investigators. The 'Grant Thornton report' was issued on 8 February 2017.

[10] In the forensic report, it was established that the leak emanated from the Secretary of the Board of NAC (Ms Makgoka) and was in breach of the NAC's Code of Ethics, Information Technology Policy, and Makgoka's own terms and conditions of employment. Flowing from the same investigations, it was established that the NAC's Communications Manager, Ms Molekwa, was similarly in breach of the same policies. Makgoka was subsequently suspended in August 2018, and subjected to a disciplinary enquiry. She was not found guilty on the charge of leaking information, but was dismissed in June 2018 for alleged negligence and other charges of misconduct.

[11] CDH was at a later stage mandated by the DAC to establish whether there was a *prima facie* case of misconduct against the applicant in the light of the information that was disclosed to the Minister of DAC through the Portfolio Committee. At the core of the CDH's investigations leading to the dismissal of the applicant, was an email that she had sent to the CEO of NAC on 2 February 2017, and prior to the release of the Grant Thornton report on 08 February 2017. The email reads as follows;

'Morning CEO

The information we got suffices but someone from your office phoned the Chairperson of the Portfolio Committee – you need to investigate who leaks information from NAC.

We did not meet the Minister as the Cabinet lekgotla is on but we did prepare a report for him...'

[12] Upon receipt of the email, the NAC's CEO had then forwarded it to various individuals including Makgoka, who had in turn forwarded it to the Portfolio Committee. This had triggered the intervention of the Minister who it is said was concerned that the information to the Portfolio Committee may have been disclosed in accordance with the DAC's Whistleblowing Policies, and thus, the applicant's email to the CEO of NAC may have constituted a breach of that policy.

[13] The investigator, Mr Aadil Patel of CDH in his testimony before the Arbitrator, merely confirmed the findings of the investigations and the recommendations that disciplinary proceedings be instituted against the applicant. This was because her conduct through her email to the CEO of the NAC had exposed the DAC and/or NAC to potential legal and financial risk, in that she sought to reveal the identity of an employee who made a protected disclosure in terms of the PDA, and contrary to the DAC's policies.

[14] In the CDH report dated 13 May 2019, it was also recommended that to the extent that the applicant had according to the DG denied having sent the email to the NAC's CEO on 2 February 2017, and further to the extent that she persisted with her denial, further investigations in that regard should be conducted. It was also recommended that the DAC should investigate how the Grant Thornton investigators were mandated by the NAC to investigate the identity of the whistleblower.

[15] Makgoka in her testimony confirmed that she was the whistleblower and had also met with the Chairperson of the Portfolio Committee regarding alleged maladministration and corruption at the NAC. She had also confirmed having leaked the information to the media. She deemed the disclosures to be confidential. She had testified that even though the applicant was entitled to establish an investigation

into the allegations she had made, the latter's email to the CEO of the NAC, who was herself implicated in the allegations, served as a tip-off to her.

[16] Mr Vusi Mkhize, the DAC's DG had testified that part of the applicant's responsibilities by virtue of her position was to liaise with the CEO of the NAC to ensure the latter's proper administration and governance. To the extent that there were allegations of maladministration in the NAC, the applicant as representative of the DAC with oversight over the NAC, was according to Mkhize, obliged to investigate those allegations, which investigations however did not extend to revealing the identity of whistleblowers.

[17] According to Mkhize, the applicant's response when enquiries were made about her email to the CEO of NAC was that it (email), was merely advisory and not an instruction. Mkhize had testified that the DAC's whistleblowing policy even though applicable between an employer and an employee, equally applied to employees of the agencies that fell under the DAC. He testified that the applicant by seeking to have the identity of the whistleblower revealed, breached that policy.

[18] The evidence led on behalf of the applicant by the CEO of the NAC, Ms Mangope, was that she (Mangope), was not an employee of DAC and merely reported to the Board of the NAC. She testified that the whistleblower, Makgoka, was also not an employee of NAC for the purposes of the PDA. She confirmed having received an email from the applicant on 2 February 2017, and had merely forwarded it to staff members at the NAC for the noting of the instruction by the applicant. At the time, the identity of the whistleblower was not known until 8 February 2017 with the release of the Thornton report, hence the institution of discipline against Makgoka.

[19] Mangope conceded that the instruction from the applicant via her email was to investigate the source of the leak of the information to the media and to the Portfolio Committee. She had however contended that she did not act on the instruction as she did not take any from the applicant. She further testified that the disciplinary process initiated against Makgoka had nothing to do with the leaking of information, but was as a result of other allegations of misconduct against her.

[20] The applicant's testimony in disputing the fairness of the dismissal, was that her instruction to Mangope was for her as the CEO of the NAC, to investigate the source of the leaked information and for necessary steps to be taken. She contended that her email was merely meant to enquire about how the leak was caused and further how information within the NAC was to be streamlined. She contended that there was nothing wrong in her email in that the information that was leaked was already in the public domain, and needed to be managed through a response by the CEO of the NAC.

[21] She disputed that Makgoka was an employee of the DAC. Her contention was that the NAC was an independent entity established under a different statute. She conceded that the Board of the NAC was appointed by Minister, and that the DAC exercised oversight over the activities of the NAC as its delivery arm, including its financial matters.

[22] She had testified that because she did not know the identity of the whistleblower at the time her email was sent, she had not broken any rule. This was further so in that a further investigation launched through Grant Thornton in January 2017 into the identity of the person and a report in that regard was issued only after her email to the CEO of NAC. She contended that she had no authority over the employees of the NAC, other than their CEO. According to the applicant, the dismissal of Makgoka had nothing to do with her disclosure. She testified that Makgoka was dismissed for incompetence, and that in any event, the NAC at the time did not even have a whistleblowing policy.

(ii) *The allegations of insubordination/dereliction of duties:*

[23] The applicant was also dismissed for allegedly being insubordinate towards Mkhize, following the latter's instructions to her to perform certain tasks. It is not necessary for this Court to elaborate on the details of this charge in that the Arbitrator had found that the DAC failed to prove the basis thereof since the applicant had substantially complied with the instruction. There is no cross-review in regard to the Arbitrator's findings on this charge, and the Court will not take this issue any further in this judgment.

The challenge to procedural fairness of the dismissal:

[24] As already indicted, the disciplinary hearing against the applicant had proceeded in her absence. Her contention was that this was in circumstances where it was known that she was on authorised leave when the disciplinary enquiry was scheduled for 11 June 2019 and completed. She had further contended that there was an agreement that the enquiry would be postponed.

[25] Mkhize, who had attended the disciplinary enquiry, had testified that upon receipt of the notice of hearing, the applicant had not communicated with the employer about her intended absence. He conceded that the applicant was granted leave on 29 May 2029, but contended that the leave was effectively revoked with the applicant's suspension on 11 June 2019. In the letter of suspension, the applicant was notified that the hearing would take place on 20 June 2019. The hearing was preceded by the applicant having been granted an opportunity to make representations to the intended suspension on 4 June 2019. He further conceded having received communication from the applicant prior to the hearing, but had advised her that she should speak to the initiator of the hearing.

[26] The applicant's version was that she did not attend the enquiry since her leave was authorised for 20 – 21 June 2019. She contended that upon receipt of the notice of her suspension and notification of the hearing date, she had reported that she had a commitment to attend to on 20 June 2019. Her attorneys had further sent communication to the employer about her absence on 20 June 2019, which the employer had not responded to. The applicant had conceded that Mkhize had advised her that she should communicate with the initiator (Mr Mkhonto) about her intended absence. She further contends that she was surprised to receive a call from Mkhonto on the date of the hearing asking her the reason she was not in attendance.

The Arbitrator's findings:

[27] In regards to procedural fairness, the Arbitrator found that at no point did the applicant apply for sick leave as she was suspended. It was found that the applicant

knew that she had to attend the enquiry as she was suspended and not on leave, and that she ought to have sought a postponement, which she did not do. Accordingly, the Arbitrator concluded that the dismissal was procedurally fair.

[28] Regarding the substantive fairness of the dismissal related to the allegation that the applicant sought to reveal the identity of the whistleblower, the Arbitrator concluded that it was not in dispute that the applicant sent an email to the CEO of NAC to investigate the internal source of the leak of information. The Arbitrator had regard to the provisions of sections 1 and 3³ of the PDA and the applicant's contentions that she did not know the identity of the whistleblower at the time, and or that the latter was in any event not an employee of the DAC for the purposes of application of the provisions the whistleblowing policy. The Arbitrator concluded that the evidence of the CEO of NAC, Mangope, lacked credibility since the whistleblower, Makgoka, was subjected to a disciplinary process flowing from her identity being revealed.

[29] The Arbitrator also considered the provisions of section 210 of the Labour Relations Act (LRA)⁴, in regard to the definition of an employee and the presumptions under section 200A of the LRA in establishing whether Makgoka was an employee of the DAC for the purposes of application of its policies on whistleblowers.

[30] Against the above provisions, the Arbitrator concluded that in the light of the nature of the relationship between the DAC and the NAC pertaining to the former's oversight over the latter; the instructions issued to it; the interdependence; appointment of Boards and payment of salaries etc, the DAC was the 'broader employer' of Makgoka for the purposes of the PDA, and therefore she was its employee.

³ Section 3 provides;

'Employee making protected disclosure not to be subjected to occupational detriment

No *employee* may be subjected to any *occupational detriment* by his or her *employer* on account, or partly on account, of having made a *protected disclosure*.'

⁴ Act of 1996 (as amended)

[31] The Arbitrator concluded that it followed that the applicant had breached whistleblowing policies in seeking to reveal the identity of the whistleblower. He found that the purpose of her email to the CEO of the NAC was not merely about control of the flow of information, but to assist the CEO in revealing the identity of the whistleblower. Thus, according to the Arbitrator, whether the identity of the whistleblower was unknown at the time was irrelevant, as the CEO was instructed to investigate the her identity, rather than investigate the allegations of maladministration in the NAC.

The grounds of review:

[32] The applicant attacks the findings of the Arbitrator on procedural and substantive fairness of her dismissal. She contends that the Arbitrator failed to apply his mind to the evidence before him, including that she was deprived of a fair opportunity to state her case at the internal disciplinary hearing; had failed to apply his mind to the evidence and the issues for determination; committed gross irregularities and misconduct in relation to the performance of his duties; deprived her of a fair trial of the issues; and arrived at a decision that a reasonable decision-maker could not arrive at.

The review test and evaluation:

[33] The test in review applications of this nature is trite. The impugned arbitration award is tested against all the facts before the arbitrator to ascertain if it meets the test of reasonableness as enunciated in *Sidumo*⁵. In *Duncanmec (Pty) Limited v Gaylard NO and Others*⁶, the Constitutional Court held that unreasonableness would warrant interference only if the impugned decision is of the kind that could not be made by a reasonable decision-maker. It was added that is not the task of reviewing Court to evaluate the reasons provided by the arbitrator with a view of determining whether it agrees with them. In *Makuleni v Standard Bank of South Africa Ltd and*

⁵*Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 IJL 2045; [2007] 12 BLLR 1097; 2008 (2) SA 24; 2008 (2) BCLR 158 (CC)

⁶(CCT284/17) [2018] ZACC 29; 2018 (11) BCLR 1335 (CC); [2018] 12 BLLR 1137 (CC); 2018 (6) SA 335 (CC); (2018) 39 ILJ 2633 (CC) at paras 41 - 43

*Others*⁷, it was further reiterated that at the heart of the exercise is a fair reading of the award, in the context of the body of evidence adduced and an even-handed assessment of whether such conclusions are untenable. Only if the conclusion is untenable is a review and setting aside warranted.

Substantive fairness:

[34] Against the above principles, the first enquiry in this case is whether the Arbitrator's conclusions on the substantive fairness of the dismissal fell within the bounds of reasonableness. At the core of the main allegation against the applicant was that with her email of 2 February 2017 to the CEO of NAC, she sought to reveal the identity of a whistleblower.

[35] The starting point are the provisions of the PDA, which the applicant sought to downplay. In its *preamble*, the purpose of the PDA is to make provision for procedures in terms of which employees in both the private and the public sectors may disclose unlawful or irregular conduct by their employers or by other employees, and to provide for the protection of employees who make such disclosures.

[36] Certain obligations under section 3B of the PDA are imposed on the person or body to whom a protected disclosure was made, including taking a decision as to whether the matter would be investigated; or whether the disclosure will be referred to another person or body if that disclosure could be investigated or dealt with more appropriately by that other person or body.

[37] In this case, whether Makgatho had made a disclosure was not in dispute. Whether that disclosure was protected as defined is not for the Court in this application to determine. That disclosure to the Portfolio Committee and the Minister resulted in investigations. It was further not in dispute that the applicant had caused the email to be sent to the CEO of NAC on 2 February 2017 after the disclosure was made.

⁷(JA125/2021) [2023] ZALAC 4; (2023) 44 ILJ 1005 (LAC); [2023] 4 BLLR 283 (LAC) at para 4

[38] Irrespective of the interpretation that the applicant sought to impute to her email, its plain reading (*'The information we got suffices but someone from your office phoned the Chairperson of the Portfolio Committee – you need to investigate who leaks information from NAC'*), clearly demonstrates that she sought the CEO to investigate who had leaked the information to the Chairperson of the Portfolio Committee. By implication, she sought the identity of the person who had leaked the information to be revealed, and invariably, the identity of the whistleblower. This was not a mere instruction in the normal course of her duties in overseeing the NAC, for the CEO of NAC to investigate the allegations made by Makgoka. The email went beyond that enquiry.

[39] There is nothing in the email that suggests that the applicant merely sought or instructed Mangope to investigate the allegations of malfeasance within the NAC as made by Makgatho. If this was her intention, that could have been made clearer in her email. Equally so, it is irrelevant whether the CEO saw nothing wrong with the email or had not acted on the instruction. In any event, the applicant by virtue of her position and oversight of the NAC had issued the instruction. Of equal irrelevance is the applicant's contention that at the time that the email was sent to the CEO of NAC the identity of the whistleblower was not known until the release of the Grant Thornton report on 8 February 2017. Clearly her email of 2 February 2017 indicated her intentions notwithstanding the release of the Grant Thornton report six days later. The fact however remains that the applicant sought to have the identity of the whistleblower revealed, rather than have the nature of the allegations investigated.

[40] There is further no doubt that Makgatho's disclosure was considered serious enough by the Portfolio Committee and worthy to be referred to the then Minister of the DAC, who had in turn instructed that investigations be conducted into the matter. It followed that under the provisions of section 4 of the PDA, and to the extent that Makgatho was identified and may have been subjected to any occupational detriment as defined under section 1 of the PDA, this had indeed exposed the DAC and the NAC to liability under Section 4 of the PDA. These provisions states that any employee who has been subjected to or may be subjected to an occupational detriment in breach of section 3 of the Act may approach any court having jurisdiction, including the Labour Court, for appropriate relief or pursue any other

process allowed or prescribed by any law. Of course, seeking to reveal the identity of the whistleblower was indeed prejudicial to both the DAC and the NAC in the light of the provisions of section 4 of the PDA.

[41] Central to the applicant's defence was that Makgatho was not an employee of the DAC for the purposes of its whistleblowing policy and liability under section 4 of the PDA. She further takes issue with the Arbitrator's conclusions that the DAC was the 'broader employer' of the employees of the NAC.

[42] Under section 1 of the PDA, an '*employee*' means *any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration, and any other person who in any manner assists in carrying on or conducting the business of an employer*. This definition is replicated in section 213 of the LRA. It is however not clear from the arbitration award what the import and relevance of the provisions of section 200A of the LRA was to the overall determination of whether Makgatho was an employee, particularly in view of the exceptions provided in section 200A (2) of the LRA.

[43] An '*employer*' on the other hand in the PDA, is defined as *any person who employs or provides work for any other person and who remunerates or expressly or tacitly undertakes to remunerate that other person; or who permits any other person in any manner to assist in the carrying on or conducting of his, her or its business*.

[44] For the purposes of determining this dispute in so far as the status of Makgatho was concerned, of relevance in my view is the definition of '*organ of state*' in the PDA, which means any *inter alia, department of state or administration in the national sphere of government, or any other functionary or institution when exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or exercising a public power or performing a public function in terms of any legislation*. The provisions of section 8(1) of the Public Service Act⁸ ("the PSA") further in my view puts the status of Makgatho and others within the NAC to rest, as they clearly provide that "*The public service shall consist of persons who are*

⁸ Act 103 of 1994

employed in posts on the establishment of departments, and additional to the establishment of departments” A “*department*” on the other hand is defined in section 1 of the PSA to mean “*a national department, a national government component...*”.

[45] A final important provision is section 7 of the PDA, which provides that any disclosure made in good faith to a member of Cabinet is a protected disclosure if the employee’s employer is an individual appointed in terms of legislation by a member of Cabinet or a body, the members of which are appointed in terms of legislation by a member of Cabinet, or an organ of state falling within the area of responsibility of the member concerned.

[46] Against these definitions, there cannot be any substance to the contention that employees of agencies of a department are not its employees. These employees are as part of a departmental agency, employed additional to the establishment of a department, and are clearly part of a national government component. Departmental agencies are not independent entities in the strict sense of the word irrespective of the statute under which they were established, in the light of their intrinsic connection to the departments under which they were established.

[47] In the light of the above provisions, it was common cause that Makgatho was employed by the NAC, which was a statutory body falling within the area of responsibility of the Minister. The label attached to the employment relationship between the DAC and Makgatho by the Arbitrator as that of a ‘*broader employer*’ is in my view neither here nor there. Against the above-mentioned provisions, it was irrelevant whether Makgatho’s contract of employment was with the NAC for the purposes of the whistleblowing policy of the DAC. It was equally irrelevant that the NAC at the time of the protected disclosure did not have a whistleblowing policy. What mattered is that she had made a disclosure to the Portfolio Committee and to the Minister, and she therefore remained protected under the provisions of section 3 of the PDA.

[48] Just to dispel any doubt, if the NAC did not at the time have any whistleblowing policy, the DAC’s policy axiomatically found application to the employees of the NAC by virtue of the latter’s intrinsic association and exercise of

control over it. This approach as correctly pointed out on behalf of the DAC, is in line with the principle set out in *Phaka & others v Bracks & others*⁹.

[49] In the light of the above, it follows that the Arbitrator's decision on substantive fairness based on the material placed before him, and irrespective of his reasoning in coming to that decision, clearly fell within a bound of reasonableness, and there is no basis for any interference with it.

Procedural fairness:

[50] To recap, it was common cause that the applicant had applied for leave on 29 May 2019, which was granted for between 20 – 21 June 2019. Prior to taking leave, she was on 11 June 2019 served with notices of suspension and the disciplinary enquiry scheduled for 20 June 2019. When she did not attend the disciplinary enquiry on the basis that she was on approved leave, she was dismissed in her absence.

[51] The DAC relied on *Solidarity & another v Public Health and Welfare Sectoral Bargaining Council & others (Solidarity)*¹⁰ for the proposition that since the applicant was on suspension and therefore deemed to be rendering her services, she cannot be regarded as being absent with permission. It was further added that even though leave was granted, that approval was reversed with the issuing of the notices of suspension and the disciplinary enquiry. The DAC's contention in further justifying the dismissal was that upon her being served with the notices of suspension and disciplinary enquiry, she did not request any postponements.

[52] Section 188(1)(b) of the LRA requires that a dismissal must be effected in accordance with a fair procedure, and Item 4 of Schedule 8 of the Code of Good

⁹ [2015] 5 BLLR 514 (LAC) at para 31

¹⁰ [2013] 4 BLLR 362 (LAC) at para 20, where it was held that;

"When an employee is placed on suspension on full pay, he/she does not have the freedom to seek other employment while on suspension because he/she remains an employee who is bound to the terms and conditions of his/her employment contract, save that he/she is excused from rendering certain services. Therefore, an employee who is on suspension must be deemed to be rendering his/her services and cannot be regarded as being absent with permission for purposes of s 17(5) of the PSA."

Practice spells out what procedural fairness of a dismissal entails. In *McGregor v Public Health and Social Development Sectoral Bargaining Council and Others (McGregor)*¹¹ it was held that irrespective of the gross nature of the misconduct in question, employees are entitled to fair labour practices and procedurally regular dismissals¹².

[53] In *Old Mutual Life Assurance Co SA Ltd v Gumbi*¹³(*Gumbi*), it was held that an employee is entitled to a pre-dismissal hearing, and that the principle of *audi alteram partem* was central to employment relationships, with the aim of promoting justice and fairness at the workplace¹⁴. It was further added that the right to a pre-dismissal hearing imposes upon employers nothing more than the obligation to afford employees the opportunity of being heard before employment is terminated by means of a dismissal; that should the employee fail to take the opportunity offered in a case where he or she ought to have, the employer's decision to dismiss cannot be challenged on the basis of procedural unfairness¹⁵; and further that it was the duty of the employee to ask for a postponement of the hearing if he/she was unable to attend due to illness¹⁶ or some other justifiable reason.

[54] As I understood the applicant's case, the disciplinary proceedings commenced in her absence in circumstances where Mkhize, who was present in that enquiry, failed to disclose to the chairperson that he (Mkhize) had approved her leave. The record of the disciplinary hearing¹⁷ reflects that prior to proceeding in the applicant's absence, the Chairperson had recorded that after Mkhonto had called the applicant to establish her whereabouts, the latter's explanation was that she was on leave.

[55] The chairperson had further recorded that he could not however find any proof of approved leave. This was however in circumstances where Mkhize was

¹¹ (CCT 270/20) [2021] ZACC 14; (2021) 42 ILJ 1643 (CC); [2021] 9 BLLR 861 (CC); 2021 (5) SA 425 (CC); 2021 (10) BCLR 1131 (CC)

¹² At para 48

¹³ (211/2006) [2007] ZASCA 52; [2007] 4 All SA 866 (SCA); [2007] 8 BLLR 699 (SCA); 2007 (5) SA 552 (SCA); (2007) 28 ILJ 1499 (SCA)

¹⁴ At paras 4 - 8

¹⁵ At para 8

¹⁶ At para 29

¹⁷ Page 228 of Vol 3 – Part 3 of the Record (CCMA Arbitration File)

present in the enquiry but had nonetheless failed to disclose to the chairperson that indeed the applicant was granted leave for 20- 21 June 2019, which he (Mkhize) had approved on 29 May 2029¹⁸. At a minimum, Mkhize was obliged to disclose the true set of facts before the Chairperson, and then it would have been up to Mkhonto as Initiator, to persuade the Chairperson of the enquiry that the suspension trumped over the approved leave, and that the enquiry ought therefore to proceed in her absence.

[56] From the record of the disciplinary enquiry as summarised above, it is apparent that the Chairperson proceeded on a wrong premise that the applicant was not at any stage granted authorised leave. This issue based on the evidence was ignored by the Arbitrator. In fact, the Arbitrator appear to have agreed that the applicant was not granted leave. This was however not the case on the evidence.

[57] The issue of whether the suspension revoked the approved leave is not even borne out in the notice of suspension as issued by Mkhize. Inasmuch as it is accepted that an employer may legitimately revoke authorised leave, it is my view however that when an employee is suspended whilst on leave, it must nonetheless be made clear to that employee that such leave is revoked for whatever reason because of the suspension. This is so in that authorised leave is in any event a right arising from the terms and conditions of employment or the Basic Conditions of Employment Act (BCEA)¹⁹. Accordingly, a mere suspension in the circumstances such as in *casu*, without the approved leave having been formally revoked, cannot lead to a conclusion that the employee ought to have assumed that the authorised leave was revoked. A suspension of an employee is a right of discipline within the prerogative of an employer, whilst an approved leave is a right emanating from a contract or even the BCEA which cannot be withdrawn by an employer.

[58] Equally so, it is my view that reliance by the DAC on *Solidarity* is misplaced, as the facts are clearly distinguishable in that in the latter case, the issue was whether an employee that was placed on suspension could seek alternative employment whilst on suspension. In this case however, the applicant was granted

¹⁸ Page 224 of Vol 3 – Part 3 of the Record (CCMA Arbitration File)

¹⁹ Act 75 of 1997

approved leave, which ought to have been formally revoked with the subsequent suspension. There cannot in the circumstances be an automatic revocation of a contractual or statutory right.

[59] The DAC was correct in pointing out that to the extent that the applicant believed that her approved leave took precedent and that she could not attend the enquiry due to prior commitments she made when her leave was approved, all that she needed to do in line with *Gumbi*, was to seek a postponement, rather than simply not attending the enquiry. Inasmuch as this might be the case, the difficulty the DAC is faced with however is that first, it has already been concluded that the Chairperson of the hearing was not informed that approved leave was granted. A second consideration is that correspondence²⁰ was sent to Mkhize on 26 June 2019 by the applicant's attorneys of record, in which it was recorded that there was an agreement following upon a meeting on 11 June 2019 with Mkhize, the Initiator and the Labour Relations Manager, that the disciplinary enquiry as scheduled would be postponed. There does not seem to have been a response to this correspondence.

[60] An undisputed version that an agreement existed to postpone the proceedings in my view negates any inference that the applicant wilfully absented herself from the enquiry. It follows that the Arbitrator failed to apply his mind to the totality of the evidence inclusive of the record of the internal disciplinary enquiry, in concluding that the applicant had effectively wilfully elected not to attend the enquiry. It therefore follows that the dismissal of the applicant was procedurally unfair, and that the Arbitrator's findings to the contrary was not based on the facts and the law, thus falling outside the bounds of reasonableness.

[61] In *McGregor*, it was also held that generally speaking, procedural unfairness in a dismissal is not insignificant and invites compensation to ensure that dismissals take place with the "sensitivity and care" properly required when the fate of people's livelihoods is at stake. The Constitutional Court also acknowledged that to the extent that procedural unfairness is established, an award of compensation is aimed "to give meaning to the right not to be unfairly dismissed; to discourage a 'shotgun

²⁰ Page 225 of Vol 3 Part 3 of the Record

approach' to dismissals"; and, "to recognise the right of an employee to be heard before action is taken against them, and an acknowledgement of an employee's worth as a person"²¹

[62] Further in *McGregor*²², it was held after a consideration of various authorities, that in making an award of compensation for procedural unfairness, considerations to be taken into account include *inter alia*, the nature and extent of the deviation from the procedural requirements, and that the more serious the employer's deviation from what was procedurally required, the stronger the case is for the awarding of compensation. A further consideration was whether or not the employee was guilty or innocent of the misconduct; if he was guilty, whether such misconduct was in the circumstances of the case, not sufficient to constitute a fair reason for the dismissal.

[63] The deviation from the procedural requirement resulting in the applicant being dismissed in her absence in my view was not minor. The gross nature of the deviation was compounded by the chairperson of the enquiry having been misled as to whether the applicant was on approved leave or not. Equally so, the fact that an agreement, which did not appear to be disputed, was reached between the applicant's attorney of record, Mkhize and the Initiator to postpone the disciplinary hearing. Had the Arbitrator applied his mind to these glaring facts, clearly a just and equitable compensation to vindicate the applicant's rights to a fair procedure ought to have been granted.

[64] The Court equally accepts that the applicant through her conduct exposed the DAC and the NAC to potential liability under section 4 of the PDA. One can only surmise as to the reasoning behind the applicant's quest to have the identity of the whistleblower revealed, when the latter had made serious allegations of malfeasance within the NAC, necessitating the intervention of the Portfolio Committee and the Minister. The applicant's conduct and the subsequent charges in my view, bar the undisputed finding on the charge of gross insubordination, was clearly gross and deserving of a dismissal. Her refusal to acknowledge her wrong-doing let alone show

²¹ At para 35

²² At paras 33 - 41

any form of contrition at the arbitration or in these proceedings is a further factor to be taken into account when determining compensation.

[65] Against the full voluminous record that is before the Court, and the time periods since the dismissal, the Court therefore is in a position to substitute the part of the award related to procedural fairness rather than remitting the matter to the GPSSBC for a hearing before another Arbitrator. Accordingly, in the light of the gross nature of the misconduct in question, the gross deviation from procedural requirements and the applicant's extreme failure to acknowledge any wrong-doing, it is therefore concluded that a compensation amount equivalent to four months' salary at the rate of the applicant's remuneration at the time of her dismissal, is deemed to be just and equitable under the circumstances.

[66] I have further had regard to the requirements of law and fairness in regards to costs. Clearly the applicant was within her rights to challenge the arbitrator's award and given the findings on procedural fairness and the relief awarded in that regard, I am of the view that the facts and circumstances of this case warrant that each party be burdened with its own costs.

[67] Accordingly, the following order is made;

Order:

1. The arbitration award issued by the second respondent under case number GPBC 1446/2019 is reviewed and set aside only in respect of the findings on procedural fairness. The review application in regard to the substantive fairness of the dismissal is dismissed.
2. That portion of the arbitration award in regard to procedural fairness is substituted with an order that;
 - (i) The dismissal of the applicant was only procedurally unfair.
 - (ii) The Third Respondent is ordered to pay to the applicant, compensation equivalent to four (4) months' salary, calculated at her rate of pay as at 23 June 2019.
3. There is no order as to costs.

E. Tlhotlhemaje
Judge of the Labour Court of South Africa

Appearances:

For the Applicant: P Kirstein, instructed by Marius Scheepers & Co
Attorneys

For the Third Respondent: K Mvubu, instructed by the Office of the State
Attorney, Pretoria