**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

**Reportable**

**Case No: JR 48/2020**

In the matter between:

**NATIONAL LOTTERRIES COMMISSION** Applicant

and

**BOITUMELO RACHEL MAFONJO** First Respondent

**ADVOCATE HOR MODISA SC *N.O.*** Second Respondent

**Heard: 25 May 2023**

**Delivered: 23 June 2023**

**Summary:** **Review application in terms of section 158(1)(h) of the Labour Relations Act 66 of 1995. Whether the chairperson's ruling on sanction is consistent with principles of legality. The said ruling fails on legality and is reviewed and set aside. Held: (1) The review application is upheld. (2) Ruling on sanction handed down by the chairperson on 13 December 2019, is reviewed and set aside. (3) The First Respondent is dismissed with immediate effect. (4) There is no order as to costs.**

**(This judgment was handed down electronically by circulation to the parties' legal representatives, by email, publication on the Labour Court's website and released to SAFLI. The date on which the judgment is delivered is deemed to be 23 June 2023.)**

---

**JUDGMENT**

---

**SETHENE AJ**

Introduction

> *"The employee is dismissed from her employment with the NLC which sanction is suspended for a period of ten (10) years on condition that she is not found guilty of any act of misconduct similar to the ones which she was charged and found guilty of."*

[1] The is a classic incongruent ruling on sanction issued in favour of the First Respondent, Ms Boitumelo Rachel Mafonjo (Ms Mafonjo) upon being found guilty of two charges of gross dishonesty (charges 1 and 2) and two charges of breach of contractual obligation (charges 3 and 4) by the chairperson of the internal hearing, the Second Respondent, Advocate H.O.R Modisa SC ("the Chairperson").

[2] Had elementary legal research[1] been conducted, it would have dawned on the chairperson that it is trite law[2] that any misconduct peppered with gross

[1] Regrettably, there is not a single authority cited by the chairperson in his four (4) paged ruling on sanction, let alone reference to Schedule 8 Code of Good Practice: Dismissal- Items 3(4) | (5) and (6) of the LRA to justify suspending the dismissal of Ms Mafonjo for a period of ten years notwithstanding that Ms Mafonjo has been found guilty of two counts of gross dishonest and two counts of breach of contractual obligation.

[2] Central News Agency (Pty) Ltd v Commercial Catering and Allien Workers Union of SA and Another (1991) 12 ILJ 340 (LAC); Anglo American Farms t/a Boschendal Restaurant v Komjwayo (1992) 13 ILJ 673 (LAC); Standard Bank SA Limited v CCMA and Others [1998] BLLR 622 (LC); De Beers Consolidated Mines Ltd v CCMA and Others (2000) ILJ 1051 (LAC); Nedcor Bank Ltd v Frank & Others (2002) 23 ILJ 1243 (LAC); Shoprite Checkers (Pty) Ltd v CCMA and Others [2008] 9 BLLR 838 (LAC); ABSA Bank Limited v Naidu and Others [2015] 1 BLLR 1 (LAC); Toyota SA Motors (Pty) Ltd v Radebe and Others (2000) 21 ILJ 340 (LAC); [2002] 3 BLLR 243 (LAC); Theewaterskloof Municipality v South African Local Government Bargaining Council (Western Cape) and Others (2010) 31 ILJ 2475 (LC); [2010] 11 BLLR 1216 (LC).

dishonesty ought to have elbowed out Ms Mafonjo from the employ of the National Lotteries Commission ("the Applicant"). Lest we forget, chairpersons of internal hearings perform administrative action and in that capacity they have to ensure that their decisions are legally sound so as to avoid burdening this court with employment disputes that in fairness ought to have been finalised at the hearing stage.

[3] Aggrieved by the ruling on sanction of the chairperson, the applicant has approached this court seeking an order setting aside the said ruling on the basis that it suffers from material reviewable defect and pleading that it ought to be substituted by an order summarily dismissing Ms Mafonjo.

[4] This application is duly opposed by Ms Mafonjo who raises two points in *limine* such as the commissioning of the founding affidavit and that there is no application for condonation of the late filing of this review application in terms of section 158(1)(h) of the Labour Relations Act 66 of 1995, ("the LRA"), as amended. Further, Ms Mafonjo states that the chairperson did not commit any irregularity as the sanction is an alternative to dismissal. In sum, Ms Mafonjo prays that this review application must be dismissed with costs. The chairperson filed a notice to abide.

Salient background facts

[5] Ms Mafonjo commenced her employment relationship with the applicant as a temporary employee rendering service of a cleaner on 1 March 2003. On or around 1 November 2003, she was permanently employed as Junior Grant Officer. At the time she was charged with misconduct in 11 November 2018, she held the position of Client Liaison Officer in Mafikeng, North West.

[6] Following the disciplinary hearing chaired by the chairperson, on 25 April 2019, Ms Mafonjo was found guilty on the following charges:

**"Charge 1: Gross Dishonesty**

1.1. You are charged with gross dishonesty in that during the period between March 2018 to August 2018, you misused the employer's property for personal and/or another person's gain by amongst others, extracting confidential beneficiary information from the Grant Management Systems, for personal and/or another person's gain, while in the main you knew or ought to have known that it was wrongful of him to do so.

**Charge 2: Gross Dishonesty**

1.2. You are charged with gross dishonesty in that during the period between March 2018 to August 2018, you published or caused to be published confidential information relating to the employer and its beneficiaries to a Third Party while acting outside the official functions in the NLC and in contravention of Clause 6.10, read together with section 2F(1)(c)(d) of the Lotteries Amendment Act.

**Charge 3: Breach of contractual obligation**

1.3. You are charged with breach of contractual obligation in that during the period between March 2018 to August 2018, you failed and/or neglected to report unlawful activities aimed at defrauding the NLC and/or its beneficiaries while it was required of you to do so therefore you contract (sic) is in contravention of section 2F (3) of the Lotteries Amendment Act.

**Charge 4: Breach of contractual obligation**

1.4. You are charged with breach of contractual obligation in that during the period between March 2018 to August 2018, you failed and/or neglected to declare your financial interest to the employer in contravention of clause 15.2 of your employment contract."

[7] Upon receipt of written submissions on aggravating and mitigating circumstances by the applicant and Ms Mafonjo respectively, the chairperson

issued his ruling on sanction on 13 December 2019. In his ruling on sanction, the chairperson stated that it was common cause that Ms Mafonjo is a first offender, a single parent with two children aged twenty-seven (27) years and nineteen (19) years and the latter was studying accounting at the tertiary institution and Ms Mafonjo does not meet the requirements for funding by NAFSAS. Further, the chairperson held that the acts of misconduct were instigated and/or initiated by Mr Thabiso Matemane and a certain Mr Mthimunye. The chairperson further held that that the fact that Ms Mafonjo, although belatedly, reported the relevant information to the ethics officials of the applicant and further testified against Mr Matemane, "the disciplinary proceedings of the NLC must weigh very heavily in favour of the employee". The chairperson went on to say that there is no evidence that Ms Mafonjo financially benefitted from the misconduct or that the "NLC suffered financial loss flowing from the employee's acts of misconduct". In sum, the chairperson held that all these reasons were exceptional circumstances. In the result, the chairperson stated as follows at paragraph 11:

> "[11] In the circumstances, I am of the view that the sanction of dismissal is not an appropriate sanction by virtue of the fact that there exist exceptional circumstances to deviate from the imposition of such sanction. I therefore impose the following sanction:
>
> (i) The employee is dismissed from the employment with the NLC which sanction is suspended for a period of ten (10) years on condition that she is not found guilty of any act of misconduct similar to the ones which she was found guilty of."

[8] This suspended dismissal, which is foreign in labour law but prevalent in criminal law, in particular in the sentencing stage, is the one the applicant seeks this court to review and set it aside and duly substitute it with the order summarily dismissing Ms Mafonjo.

Grounds for review

[9] The applicant pegs its grounds for review on the following pertinent points:

9.1 that the said ruling is irrational and unreasonable given the severity of the misconduct committed by Ms Mafonjo;

9.2 the impact of the misconduct on the feasibility of the subsistence of the working relationship and that Ms Mafonjo has not been considered by the chairperson; and

9.3 Ms Mafonjo showed no remorse but sought to escape accountability by alleging that she acted under duress; there were prospects of human trafficking, unclear state of mind and intimidation.

[10] In the premise, the applicant contends the findings of dishonesty amongst were sufficient enough to have Ms Mafonjo summarily dismissed as an employee.

[11] In resisting this application, Ms Mafonjo contends that the chairperson was correct in his ruling and committed no irregularities. In this regard, Ms Mafonjo prays for the dismissal of this review application with costs.

Points in *limine*

[12] Ms Mafonjo's first preliminary point is that the review application was instituted out of prescribed period of six (6) weeks and therefore, absent an application for condonation, this application is not properly before court.

[13] Ms Mafonjo's contention is incorrect in law and fact. It simply depicts a confusion between a review application instituted in terms of section 145 of the LRA juxtaposed with this review application instituted in terms of section 158(1)(h) of the LRA. The review in terms of section 145(1)(a) and 1A of the LRA sets out a statutory time frame within which the aggrieved party may apply to this court for an order setting aside the arbitration award. The statutory time frame set out in terms of section 145(1)(a) of the LRA is within

six weeks. In this present application, the court is not dealing with an arbitration award but the ruling of the chairperson of an internal hearing that was conducted by an organ of state.

[14] In respect of this review in terms of section 158(1)(h) of the LRA, it is now trite law[3] that there is no statutory time frame prescribed to institute a review application by an organ of state.

[15] The chairperson's ruling on sanction was issued on 13 December 2019. On 28 January 2020, this review application was filed and served. On 30 January 2020, Ms Mafonjo filed and served a notice of intention to oppose. The period complained of by Ms Mafonjo if properly verified did not warrant raising a point in *limine* at all. In the circumstances, the point in *limine* raised by Ms Mafonjo is meritless and is thereby dismissed.

[16] The second point in *limine* raised by Ms Mafonjo is that the applicant's affidavits were invalid as they were commissioned by an attorney who was an initiator in the internal disciplinary hearing. The said attorney is not an instructing attorney of the applicant in this review application. This point in *limine* is pointless if Regulation 7(1) of the Regulations issued in terms of the Justice of the Peace and Commissioner of Oaths Act 16 of 1963. The said Regulation makes it plain that "a commissioner of oaths shall not administer an oath or affirmation relating to a matter in which he has an interest". On behalf of Ms Mafonjo, it could not be demonstrated how the attorney who was an initiator in the disciplinary hearing had any pecuniary interest in this review application when the said attorney was not acting for the applicant in the proceedings before court. In the premise, this point in *limine* is dismissed. (***See Kouwenhouven v Minister of Police and Others 2022 (1) SACR 164 (SCA).***

[3] Member of the Executive Council for Economic Development, Environment and Tourism v Mogahlane (2019) 40 ILJ 315 at para 16; Khumalo v Member of the Executive Council for Education: KwaZulu Natal 2014 (5) SA 579 (CC) at para 42… ***"There is no prescribed time frame for launching a review under section 158(1)(h) of the LRA. The Labour Court Rules further prescribe no time limits for bringing review application…It is generally understood that proceedings under section 158(1)(h) must be launched within a reasonable time…"***

[17] By these flimsy points in *limine*, Ms Mafonjo simply sought to saddle this dispute with unnecessary technicalities which were not dispositive of this review application. The apex court has warned against this approach. In ***City of Tshwane Metropolitan Municipality v Afriforum and Another***[4], Mogoeng CJ had this to say at para 18:

> "Our peculiarity as a nation impels us to remember always, that our Constitution and law could never have been meant to facilitate the frustrations of real justice and equity through technicalities. The kind of justice that our constitutional dispensation holds out to all our people is substantive justice. This is the kind that does not ignore the overall constitutional vision, the challenges that cry out for a just and equitable solution in particular circumstances and the context within which the issues arose and are steeped. We cannot emphasise enough, that form should never be allowed to triumph over substance". (emphasis added)

Analysis and Law

[18] This review application in as much as it solely deals with the ruling on sanction by the chairperson had to be brought to this court as the applicant could not in law rescind or substitute the decision of the chairperson. This is trite law it was explained in ***SARS v CCMA (Kruger)***[5] when the court held at para 41:

> "[41] In my view, the proper starting point for an understanding of the critical controversy is the jurisprudential character of the disciplinary enquiry chair's decision. It is plain that the person appointed to perform that function is clothed with the persona of the employer. The chair's decision is that of the

[4] 2016 (6) SA 279 (CC)

[5] (2016) 37 ILJ 655 (LAC) See also Ntshangase v MEC: Finance KwaZulu Natal and Another [2010] 2 All SA 150 (SCA); [2009] 12 BLLR 1170 (SCA); (2009) 30 ILJ 2653 (SCA).

> employer. Anomalously, an employer that is an organ of state may review itself, an escape mechanism not available to employers in the private sector. But plainly, an employer that is an organ of state cannot unilaterally repudiate its own decision. So much is beyond doubt as a result of the judgments in Oudekraal Estates v City of Cape Town 2004 (6) SA 222 (SCA) at paragraphs 35-37, Benwenyama Minerals (Pty) Ltd Genorah Resources (Pty) Ltd 2011 (4) SA 113 (CC) at paragraph 85, and Ntshangase (Supra)."

[19] The chairperson, clothed with the persona of the employer, knew and ought to have known that the applicant's Disciplinary Policy, categorically states that the recommended sanction for an employee found guilty of dishonesty as the first offence, dismissal is the only prescribed sanction. The said policy makes no provision in any shape or form for a suspended dismissal as pronounced by the chairperson. The same sanction of dismissal is also prescribed for disclosure or passing on of employer's confidential information. In this regard, the chairperson's contention that there were exceptional circumstances not to dismiss Ms Mafonjo is not supported by any clause in the applicant's disciplinary policy, let alone any authority.

[20] The chairperson in his ruling on sanction took into account personal circumstances of Ms Mafonjo. What should this court make of Ms Mafonjo's personal circumstances? The best exposition to this question can be found in the criminal law decision of the appeal court. In ***S v Vilakazi***[6], the Supreme Court of Appeal had this to say when considering the plight of the accused at para 58:

> "The personal circumstances of the appellant, so far as they are disclosed in the evidence, have been set out earlier. In cases of serious crime, the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of 'flimsy' grounds that Malgas said should be avoided."

[6] 2009 (1) SACR 552 (SCA); [2008] 4 All SA 396 (SCA); 2012 (6) SA 353 (SCA)

[21] Ms Mafonjo's children are adults and not minors. For the chairperson to have accorded this personal circumstance as exceptional, lacks merits. For the chairperson to have expected the applicant to keep Ms Mafonjo in its employ with the tag of gross dishonesty on her forehead for ten (10) years assails rationality and legality in every respect. What the chairperson ignored to apply his mind on is that Ms Mafonjo had fiduciary responsibility towards the applicant during the subsistence of the employment relationship.

[22] In 1921, the Appellate Division, being the highest court in the land at the time, had the occasion to adjudicate and pronounce on what it means to be a fiduciary. The Chief Justice at the time was Innes CJ. Innes CJ (as he then was) described a fiduciary relationship in the following terms:

> "Where one man stands to another in a position of confidence involving a duty to protect the interest of that other…"[7]

[23] In explaining the principle of a fiduciary duty, Innes CJ further held as follows:

> "The principle underlies an extensive field of legal relationships. A guardian to his ward, a solicitor to his client, an agent to his principal affords examples of persons occupying such positions. As pointed out in Aberdeen Company v Blaikie Bros, the doctrine is to be found in civil law (D18.1. 34.7.) and must of necessity form part of every civilised system of jurisprudence."[8]

[24] In clear terms, a civilised system of jurisprudence should have no room for any dishonest employee to continue to reap the benefits of any institution funded by the tax payer. The applicant has no confidence in the continued employment of Ms Mafonjo and that is justifiable. In ***Humphries and Jewell (Pty) Ltd v Federal Council of Retail and Allied Workers Union and Others***,[9] the Labour Appeal Court held that the employment relationship is one of trust, mutual confidence and respect and that this is the very essence

[7] Robinson v Randfontein Estate Gold Mining Co 1921 AD 177
[8] Ibid at page 178
[9] (1991) 12 ILJ 1032 (LAC) at 1037F-H. See also ***SAPPI Novoboard (Pty) Ltd v Bolleurs*** (1998) 19 ILJ 784 (LAC)

of a master-servant relationship. In the absence of facts showing that this relationship was not detrimentally affected by the conduct of Ms Mafonjo, it is unlawful to compel the applicant, to continue with the employment relationship.

[25] The chairperson, correctly found that Ms Mafonjo guilty of two counts of gross dishonesty. On these two counts alone, Ms Mafonjo's misconduct was very serious. It is the kind of misconduct that warrants no lesser sanction than dismissal. The Labour Appeal Court had this to say about dismissal:

> "Dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in a particular enterprise. That is why supermarket shelf packers who steal small items are routinely dismissed. Their dismissal has little to do with society's moral opprobrium of a minor theft; it has everything to do with the operational requirements of the employer's enterprise." [10]

[26] No matter the employee's years of service[11], the authorities cited above, clearly show that it should be the end of the road for Ms Mafonjo as the trust relationship between her and the applicant cannot be sustained in the presence of gross dishonesty. To keep Ms Mafonjo's dismissal suspended for ten (10) years assaults the principle of parity.

[27] In employment law, the employer must treat its employees fairly and consistently. Consistency denotes that for like offences, or similar acts of misconduct, employees must not be treated differently. That principle is commonly referred to in labour law as the parity principle. In this case, if the chairperson's ruling on sanction were to stand, the applicant's workplace may spell doom and have dire consequences.

[10] De Beers Consolidated Mines Ltd v CCMA (2009) BLLR 995 (LAC) at para 1058E-G

[11] Miyambo v CCMA and Others (2010) 31 ILJ 2031 (LAC). Employee had 25 years' service and a clean disciplinary record and the court found that dismissal was fair.

[28] The legal principle applicable to consistency is best set out in Item 7 (b)(iii) of the Code of Good Practice: Dismissal which guides employers to abide by parity principles.

[29] In ***ABSA Bank v Naidu and Others***[12], the Labour Appeal Court (LAC) held as follows:

> "It is trite that the concept of parity, in the juristic sense, denotes a sense of fairness and equality before the law, which are fundamental pillars of the administration of justice. In the Australian decision, *Green v The Queen*, it was said that the parity principle is an aspect of the systemic objectives of consistency and equality before the law the treatment of like cases alike, and different cases differently".

[30] The LAC in ***SACCAWU and Others v Irvin and Johnson (Pty) Ltd***[13], had this to say when dealing with the application of consistency in disciplinary proceedings:

> "In my view too great an emphasis is quite frequently sought to be placed on the principle of disciplinary consistency, also called the parity principle. There is really no separate principle involved. **Consistency is simply an element of disciplinary fairness. Every employee must be measured by the same standards**." (emphasis added)

[31] In the conspectus of what is set out above, the chairperson's ruling on sanction is bound to open the flood gates of anarchy. This court is compelled to close flood gates of anarchy for the rule of law is a precious priceless currency to be preserved in every ventricle fibre of this beloved country.

[32] In the premise, and guided by section 158(1)(h) of the LRA, which in essence is a legality review, the decision of the chairperson fails on legality as adverted above. The chairperson, having properly considered the evidence presented to him in mitigating and aggravating circumstances, ought to have

[12] [2015] 1 BLLR 1 (LAC) AT para 35
[13] (1999) 20 ILJ 2302 (LAC) at para

summarily dismissed Ms Mafonjo. There is nothing compelling this court to remit the ruling on sanction back to the chairperson.

Conclusion

[33] For all the above reasons, the application for review succeeds.

[34] Understand: legal research must not be compromised at the altar of expediency for it is an essential lawyering skill. It is the cornerstone of legal practice. Those privileged to preside over disciplinary hearings must know that theirs is to serve justice without fear, favour, bias and prejudice. They must not lower their guards for justice always needs valorous helpers. For the sake of the rule of law, a chairperson of an internal hearing ought to be fearless. The pursuit of justice needs stout-hearted men and women.

[35] In the result the following order is made:

Order

1. The review application is upheld;

2. The ruling on sanction handed down by the second respondent on 13 December 2019, is reviewed and set aside and is substituted by the following order;

   a. Ms Boitumelo Rachel Mafonjo is hereby dismissed with immediate effect.

3. There is no order as to costs.

SMANGA SETHENE

Acting Judge of the Labour Court of South Africa

Appearances:

| | |
|---|---|
| For the Applicant: | Adv S Saunders |
| | (Heads of Argument drafted by Adv P Maharaj-Pillay) |
| Instructed by: | Cliffe Dekker Hofmeyr Inc |
| | |
| For the Respondent: | Adv BG Mashabane |
| | |
| Instructed by: | Moloko Phooko Attorneys |