REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 226 / 2012

In the matter between:

DEPARTMENT OF CO-OPERATIVE GOVERNANCE,	
HUMAN SETTLEMENTS AND TRADITIONAL AFFAIRS,	
LIMPOPO PROVINCE	**First Applicant**
MEMBER OF THE EXECUTIVE COUNCIL, CO-OPERATIVE	
GOVERNANCE, HUMAN SETTLEMENTS AND TRADITIONAL	
AFFAIRS, LIMPOPO PROVINCE	**Second Applicant**

and

DANIEL SEOPELA N.O.	**First Respondent**
GENERAL PUBLIC SERVICE SECTORAL	
BARGAINING COUNCIL	**Second Respondent**
LEPJANE HARRY FREDDIE MAPHUTA	**Third Respondent**
ANDREW VONGI KOTANE	**Fourth Respondent**

Heard: **7 August 2014**

Delivered: **4 February 2015**

Summary: **Bargaining council arbitration proceedings – review of proceedings, decisions and awards of arbitrators – test for review – section 145 of LRA – requires the arbitrator to rationally and reasonably consider the evidence as a whole and arrive at reasonable outcome – determinations of arbitrator compared with evidence on record – arbitrator's decision irregular and unsustainable and not a reasonable outcome – award reviewed and set aside**

Gross negligence – principles considered – conduct of employee respondents constituting gross negligence – arbitrator's award to the contrary reviewable

Gross negligence – duties of officials in terms of the PFMA – principles considered

Practice and procedure – arbitrator's award irregular in several respects – without such irregularities the award is not a reasonable outcome – award reviewed and set aside

Practice and procedure – conclusion of arbitrator on substance unsustainable – evidence on record then properly considered and determined – award replaced with determination that dismissal fair.

JUDGMENT

SNYMAN, AJ

Introduction

[1] This matter concerns an application by the applicants to review and set aside an arbitration award of the first respondent in his capacity as an arbitrator of the GPSSBC (the second respondent). This application has been brought in terms of

Section 145 of the Labour Relations Act[1] ('the LRA').

[2] The first applicant dismissed the third and fourth respondents on 12 August 2010, each on a charge of gross misconduct in relating to a settlement payment by the first applicant of R15 000 000.00 to a third party. The third and fourth respondents pursued their dismissal as an unfair dismissal dispute, to the second respondent, and the matter came before the first respondent for arbitration on 18 August and 8 November 2011. The first respondent arbitrated the matter, and in an award dated 23 December 2011 handed down at the beginning of 2012, the first respondent determined that the dismissal of the third and fourth respondents by the first applicant was substantively unfair, and directed the first applicant to reinstate the third and fourth respondents subject to a final written warning valid for 12 months. No back pay was awarded. It is this determination by the first respondent that forms the subject matter of the review application now brought by the applicants.

Background facts

[3] From the outset, is must be stated that all the background facts referred to hereunder was actually undisputed evidence before the first respondent. The parties in this matter (including the first respondent as arbitrator) had concluded a written agreement on 24 August 2011, prior to the actual commencement of the arbitration, as to the process which was to be followed by the first respondent in determining this matter. In terms of this agreed process, no *viva voce* evidence was led before the first respondent, but it was agreed that the transcribed evidence led in the disciplinary hearing together with agreed bundles of documents would constitute the evidence before the first respondent on which he would base his determination. It was further agreed that the first applicant and third and fourth respondents would submit and exchange written submissions in support of their

[1] No 66 of 1995.

respective cases. I will now set out what is the uncontested background evidence emerging from this agreed process.

[4] The third and fourth respondents were employed by the first applicant. The third respondent at the time of his dismissal, was the senior manager: housing accreditation and the fourth respondent was the general manager: housing administration and property management. Prior to holding these positions, and in particular in 2005, the third respondent had occupied the position of senior manager: legal services and labour relations and the fourth respondent was the head of housing. In short, the third and fourth respondents were senior managers in the first applicant.

[5] The matter ultimately giving rise to the dismissal of the third and fourth respondents arose in 2003. What had happened is that a contractor engaged by the first applicant, being Nyarhi Developers CC ('Nyarhi') had issued summons out of the High Court under case number 16807 / 2003 against the first applicant for alleged breach of contract, claiming a sum of R24 837 220.00. In addition, the sole member of Nyarhi was one M K Masingi ('Masingi'), was the second plaintiff in these proceedings in which he claimed, in his personal capacity, one sum of R1 095 000.00 he was liable to pay Nedcor Bank for vehicles he bought and another sum of R2 000 000.00 being alleged damage to his creditworthiness.

[6] In terms of the actual contract forming the subject matter of the claim under case number 16807 / 2003, which contract was concluded in July 2000, Nyarhi was contracted to build 500 housing units in Malamulele, and would then sell these housing units, once completed, to persons that qualify as beneficiaries. In addition, Nyarhi would receive a subsidy of R4 100 000.00 from the first applicant in conducting this work. The work was to be completed in 18 months from conclusion of the contract. It appears that Nyarhi did some preparatory work on the

contract for which it was paid R895 000.00. But, in the end, not one housing unit was completed under this contract.

[7] The first applicant filed a plea in the proceedings under case number 16807 / 2003 on 24 November 2003. The gravamen of the first applicant's case was that as a result of the year 2000 flood in Limpopo, the finance for this housing project was allocated to disaster relief and by agreement with Nyarhi, this agreement was terminated and replaced with a new contract for another project entered to on 7 September 2000. In terms of the contract concluded on 7 September 2000, Nyarhi was contracted to construct flood relief housing units for the Levubu / Shingwedzi and the Elim/Hlanganani TLC areas, and once completed these housing units would be allocated to qualifying beneficiaries. In the case of this September 2000 agreement, Nyarhi would receive a subsidy of R16 000.00 for 1085 housing units to be constructed, amounting to R17 360 000.00. According to the first applicant, this contract replaced, *in toto*, the contract forming the subject matter of Nyarhi's claim.

[8] But matters do not end there. Nyarhi issued a second summons against the first applicant 7 June 2004 under case number 14957 / 2004. In this summons, Nyarhi claimed R2 940 900.00, and on this occasion, the claim was based on alleged damages resulting from an alleged breach of another contract concluded on 30 July 2003, between the first applicant and Nyarhi.

[9] In terms of the contract forming the subject matter of the claim under case number 14957 / 2004, Nyarhi was contracted to build 500 housing units in Mufongdi, and also would then sell these housing units, once completed, to persons that qualify as beneficiaries. In this instance, Nyarhi would receive a subsidy of R8 000 000.00 from the first applicant in doing this work. The work was also to be completed in 18 months from conclusion of the contract. And then, similar to the

situation referred to above under the first mentioned claim, not one housing unit was completed under this contract.

[10] The first applicant filed a plea in the proceedings under case number 14975 / 2004 on 27 August 2004. The first applicant once again put forward the same defense, being that as a result of the year 2000 flood in Limpopo, the finance for this housing project was similarly diverted to disaster relief and by agreement with Nyarhi, this agreement was terminated and replaced with the 7 September 2000 contract awarded to Nyarhi, the terms of which are set out above.

[11] By 2005, the Nyarhi claims had become ripe for trial, and was set down for trial on 25 January 2005. The case was however postponed so as to enable the parties to explore possible settlement. On 14 February 2005, Mr E E Mthimunye ('Mthimunye') from the State Attorney (who was instructed to deal with the matter on behalf of the first applicant) wrote to the first applicant, recapping on the merits of the case, setting out the possible risks, and advising on prospects of success. Mthimunye said that he had been informed that the plaintiff would consider any settlement proposal and the first applicant was asked if it would consider 'anything' in settlement. The first applicant answered on 16 February 2005, saying that it was not adverse to settlement negotiations but that it was entirely reliant on the State Attorney's assessment of its defense. The State Attorney then proceeded to facilitate settlement discussions.

[12] The first applicant, pursuant to the contemplated possible settlement of the Nyarhi claims, then established a negotiating team to also fully consider the claims by Nyarhi and, in particular, assess the prospects of successfully defending these claims, or whether the exploration of a settlement would be more prudent. The third and fourth respondents were part of the appointed members of this negotiating team, consisting of 5 senior managers. Specifically, and what was also

required, was a 'final second legal opinion' as prospects of success in defending the claims.

[13] The Nyarhi claims were submitted to Advocate J H Dreyer SC ('Dreyer') for this legal opinion. In a written opinion dated 22 March 2005, Dreyer said that as far as he was concerned, the claims were 'excipiable and bad in law'. Dreyer went further and said: 'It should be emphasized that I do not believe that the merits of the Consultant's case are weak. In my view, the close corporation's claims are going to be difficult to prove.' As to whether settlement would be prudent, Dreyer said: 'Settlement of the matters can therefore not be promoted based on any weakness in Consultant's case. This can only be promoted based on commercial considerations.' Dreyer was clearly referring to the commercial reality of incurring legal costs in conducting the litigation, and his settlement recommendation was one simply aimed at avoiding the incurring of these further legal costs. As to the claims by Masingi personally, Dreyer was of the opinion that these claims were 'spurious' and deserved no consideration. The opinion of Dreyer was also sent to the first respondent and the negotiating team on 23 March 2005.

[14] In addition to the opinion of Dreyer, there was another written opinion provided by Advocate O M Matjila ('Matjila'), who was Dreyer's junior. Similarly, Matjila was of the opinion that 'It needs to be emphasized, to the extent that the defendant proposes to settle the matter, that the latter decision ought not to be motivated by any notion emanating from or suggesting a lack of merit in the defendant's case'. Majila goes further and says that it was difficult to conceive sufficient conduct on the part of the defendant that evinces repudiation needed to substantiate Nyarhi's claims. Majila referred to the Public Finance Management Act and warned that the plaintiff must not be overcompensated considering its provisions. Majila also believed that the claims by Masingi in his personal capacity deserved no consideration. Majila then proceeded to set out several 'pointers' that could be taken into consideration should possible settlement be contemplated.

[15] On 26 April 2005, Mthimunye at the State Attorney again wrote to the first applicant, expressing his concern about political pressure that was being brought to bear to settle this matter at all costs. Mthimunye recorded that a settlement should only be considered for 'economical reasons' and supported counsels' opinions in this regard. Mthimunye recorded that in the light of the facts, he believed that the matter was on face value defendable but some further preparatory work for the matter still needed to be done by the department in the conduct of the case.

[16] In addition to the legal opinions, a quantity surveyor's report from K C Malwashe and Associates Quantity Surveyors was obtained in April 2003. However, these quantify surveyors expressed no view of any kind as to the substance of the claims and were only tasked with estimating possible financial loss suffered by Nyarhi. After applying several assumptions, the quantify surveyors found four possible options of possible losses, ranging between an amount of R9 665 624.82 minimum and R17 437 994.21 maximum. Subsequent investigation revealed that the quantify surveyors were actually provided with incorrect information in the course of preparing their report, severally tainting its value.

[17] Also part of the documentary evidence was a report dated 4 May 2005 prepared by the negotiating team itself. In this report, the team stated that the State Attorney and his advocates believed that the department had a proper defense against the claims or at least that Nyarhi would not be able to prove the claims. Reference was specifically made to the counsel opinions referred to above. But, and inexplicably, the team selectively quotes from Dreyer's opinion and seems to negate the real nub of it. And further, worse still, the team proceeds to comment on Majila's opinion *seriatim* on a paragraph by paragraph basis, and in essence in several respects tries to disavow it. It was recommended by the team that the

department should engage Nyarhi in negotiation 'blended in good faith'.

[18] On 18 May 2005, Mthimunye informed the first applicant that the case has again been set down for trial on 25 August 2005, and recommended that the trial should proceed. The first applicant was asked to assist with and participate in the arrangements in order to properly prepare for trial. Mthimunye also briefed counsel for trial. Mthimunye followed up with regard to trial preparation on 6 June 2005. What is clear from all the correspondence emanating from Mthimunye (which I will not all refer to) and sent to the first applicant, is that the State Attorney was ready to proceed to trial and was satisfied with the first applicant's prospects of success in defending the claims. And in particular, the correspondence of Mthimunye was specifically addressed to the addressed to the third respondent.

[19] On 2 August 2005, a third opinion was then obtained, this time from one Mr Vilakazi ('Vilakazi') from Vilakazi Tau Attorneys. Vilakazi in this opinion first dealt with the claim under case number 16807 / 2003 and expressed the view that the defendant's plea needed to be amended, but other than expressing this concern, he said that 'the claimant's case falls on its face' on the merits thereof (referring to Nyarhi's claim). After providing some reasoning for so syaing, Vilakazi concludes that the 'claimant's own case is not well founded', and records that as far as he was concerned, the defendant (current first applicant) has good prospects of success. Vilakazi records: 'Given our view on the strength of the Client's case, we believe that settlement should not be overly accommodating and generous.' Finally, and similarly to the other opinions, Vilakazi believed there was no need to settle Masingi's claims in his personal capacity due to any lack of merit. Vilakazi then considered the claim under case number 14975 / 2004, and in this instance it was his view that the claimant indeed had a strong case, and recommended the first applicant should try and settle this matter before further costs were incurred. In respect of this claim, Vilikazi thus differed from counsels' opinion, but it must be pointed out

that the quantum of this claim was for less than R3 million.

[20] The negotiating team then reported back to the first applicant on 2 August 2005, and presented a formal recommendation as to the conduct of the matter (hereinafter referred to as 'the recommendation'). Reference was made in the recommendation to the legal opinions of Dreyer and Majila, as well as the opinion from Vilakazi. The conclusion by the team was that their analyses revealed that Nyarhi's case and the department's defense were 'highly contestable', whatever this may mean. In other words, the recommendation was that the Nyarhi claims had substance and merit. The opinion was also expressed in the recommendation that the most prudent course of action open to the first respondent was to conclude a settlement in order to eliminate this risk of losing. Importantly, the recommendation recorded that the quantum of the risk was R30 million. The team proposed that the department settle for R15 million. As the team was specifically appointed for the purpose of making such a recommendation, this recommendation was accepted without further ado by all the functionaries in the first applicant.

[21] On 24 August 2005, a settlement agreement was then concluded in terms of which the two actions by Nyarhi was settled on the basis of the payment of a sum of R15 million. It appears that this settlement payment was not disclosed in the first applicant's financial statements, and was discovered in an audit conducted by the auditor general in 2006. In an audit report dated 14 September 2006, this payment was reflected by the office of the auditor general as fruitless and wasteful expenditure not disclosed. This report in turn led a further investigation.

[22] In a letter dated 7 December 2006, the State Attorney wrote that despite the matter being tasked to the State Attorney and being dealt with by it, the settlement agreement was entered into without the involvement of the State Attorney. The

State Attorney said that this settlement was concluded contrary to the opinion of the State Attorney and Counsel. In essence, the State Attorney distanced itself from the settlement.

[23] A comprehensive investigation into the issue of the R15 million settlement was the undertaken in 2008. The project manager in this investigation was Advocate W H Moore SC ('Moore'). A detailed final report was provided by Moore on 30 June 2009. In this report, Moore stated that despite it not being possible to establish whether the settlement was irregular, the conclusion of the settlement was certainly fruitless and wasteful expenditure. Moore said that incorrect information had been provided to the quantity surveyors, and consequently the loss quantification should not have played a role in the final settlement decision. Moore was of the view that there was improper conduct (negligence) on the part of the negotiating team during the process they conducted, which culminated in the settlement. Moore said the following about the recommendation by the negotiating team on 2 August 2005 to settle for R15 million: 'The about turn in respect of the manner of the proposed settlement …. as well as the merits of the LDLGH (referring to the first applicant) case, is astonishing. Furthermore, this new analyses of the merits of the LDLGH case was in clear contradiction to the Advices of Dreyer SC, Maljila and Vilakazi Tau Attorneys.' It was recommended by Moore that disciplinary proceedings be instituted against the third and fourth respondents, being the only members of the negotiating team still employed by the first applicant at that point in time.

[24] Moore also had something to say about the qualifications of the third and fourth respondents. He recorded that the third respondent was in possession of a 3 year legal degree, but had no relevant or appropriate legal experience, and had never been admitted to practice as attorney or advocate or undergone any law school training. As to the fourth respondent, Moore said he had a teaching diploma and no other related experience. The crux of this consideration by Moore was that it was unclear how they could competently make a recommendation that

contradicted three legal opinions. Moore came to the conclusion that: 'Particularly, they recommended a course of action that they knew would result in fruitless and wasteful expenditure in an attempt to settle the matters at all costs.'

[25] On 7 December 2009, the third and fourth respondents were then notified to attend a disciplinary hearing on a charge of gross misconduct. The charge was specifically described as one of "gross negligence' in recommending the settlement of R15 million in the Nyarhi claims, and in doing so, they failed to exercise reasonable care, resulting in fruitless and wasteful expenditure. The disciplinary hearing commenced on 7 April 2010 and continued over several days over the next two months. The hearing was presided over by Mr A M Carrim, an independent third party attorney from Polokwane. In a written finding dated 26 July 2010, Carrim found the third and fourth respondents guilty of the charge against them. After considering submissions on sanction, Carrim recommended the dismissal of the third and fourth respondents in a written finding on sanction dated 12 August 2010, and they were accordingly dismissed.

[26] The first respondent, in his award, in essence accepted the factual matrix as set out above. In short, the first respondent then actually accepted that the third and fourth respondents did commit misconduct in the form of the negligent discharge of their duties on the negotiating team. But, and based on the reasoning that will further be elaborated on hereunder, the first respondent adopted the view that the dismissal of the third and fourth respondents was inappropriate in this instance. This conclusion then motivated the first respondent to find that the dismissal of the third and fourth respondents was substantively unfair, and to award them reinstatement subject to a final written warning and no back pay. It is these conclusions of the first respondent that then gave rise to these review proceedings.

The test for review

[27] The test for review is trite. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[2] Navsa AJ set the threshold test for the reasonableness of an award or ruling as: '…Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?...'[3] Following on, and in *CUSA v Tao Ying Metal Industries and Others,*[4] O'Regan J held: 'It is clear…. that a commissioner is obliged to apply his or her mind to the issues in a case. Commissioners who do not do so are not acting lawfully and/or reasonably and their decisions will constitute a breach of the right to administrative justice.' What the Constitutional Court means in *Sidumo* and *Tao Ying Metal Industries,* is a review test based on a comparison by a review court of the totality of the evidence that was before the arbitrator as well as the issues that the arbitrator was required to determine, to the outcome the arbitrator arrived at, in order to ascertain if the outcome the arbitrator came to was reasonable.

[28] In deciding a review, it is all, in the end, about a reasonable outcome. As was said in *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others*[5]:

> 'The Constitutional Court has decided in *Sidumo* that the grounds of review set out in s 145 of the Act are suffused by reasonableness because a CCMA arbitration award, as an administrative action, is required by the Constitution to be lawful, reasonable and procedurally fair. The court further held that such an award must be reasonable and if it is not reasonable, it can be reviewed and set aside.'

[2] (2007) 28 *ILJ* 2405 (CC).
[3] Ibid at para 110.
[4] (2008) 29 *ILJ* 2461 (CC) at para 134.
[5] (2008) 29 *ILJ* 964 (LAC) at para 96.

[29] Two recent considerations of the *Sidumo* test bears reference. Firstly, the SCA in *Herholdt v Nedbank Ltd and Another*[6] said the following:[7]

> 'In summary the position regarding the review of CCMA award is this: A review of a CCMA award is permissible if the defect in the proceedings fall within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable.'

Secondly, the LAC in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*[8] applied the *Sidumo* test as follows:[9]

> '*Sidumo* does not postulate a test that requires a simple evaluation of the evidence presented to the arbitrator and based on that evaluation, a determination of the reasonableness of the decision arrived at by the arbitrator… In other words, in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions a reasonable decision maker could come to on the available material'

[6] [2013] 11 BLLR 1074 (SCA) per Cachalia and Wallis JJA.
[7] Id at para 25.
[8] [2014] 1 BLLR 20 (LAC) per Waglay JP.
[9] Id at para 14.

[30] In short, and following the ratios in *Herholdt* and *Gold Fields*, what is postulated is a two stage review test. The first stage is to determine if a material irregularity exists in the arbitration award or the arbitration proceedings. This is done by considering the proper evidence as gathered from the review record, together with the relevant principles of law, and then comparing this to the award and reasoning of the arbitrator as reflected in such award. The second stage in the review enquiry only follows if a material irregularity is found to exist, and this entails a consideration as to whether, if this irregularity did not exist, it could reasonably lead to a different outcome in the arbitration proceedings. Put differently, the second enquiry step is simply whether another reasonable decision-maker, in conducting the arbitration and arriving at a determination, in the absence of the irregularity and considering the evidence and issues as a whole, could still reasonably arrive at the same outcome.

[31] Against the above principles and test, the award of the first respondent in this instance must be determined.

The reasoning of the first respondent

[32] As stated above, the first respondent in effect accepted the factual matrix established by the background facts I have summarized above. However, and when it comes to the issue of the recommendation, the first respondent simply does not seem to come to grips with what is the real issue. The first respondent records that 'None of the legal gurus consulted was against the settlement'. Despite this conclusion indeed being correct, it is unfortunately completely misdirected. The issue was never that there should not have been any settlement of any kind. The issue was, as the 'legal gurus' said, that any settlement should only have as its basis what is generally known as nuisance value grounds, or, as Dreyer called

it, 'commercial considerations'. On the evidence, and what counsel specifically said, was that settlement must not be motivated by any considerations that the first applicant's defense to the Nyarhi claims has no substance. In other words, what the first respondent should have considered was not whether settlement per se was ever in issue, but what the legal advisers said about the basis of the settlement. This misconstruing of the real issue unfortunately had a material impact on the ultimate outcome arrived at by the first respondent, which I will deal with hereunder.

[33] When dealing in his award with the obligations that actually rested on the third and fourth respondents, the first respondent fortunately gets it right. The first respondent rejects the contention by the third and fourth respondents that the provisions of the PFMA[10] does not apply to them and that they accordingly did not transgress any rule in terms thereof. The first respondent accepts that the third and fourth respondents were officials in the first applicant, were senior employees, and had 'enormous responsibilities'. The first respondent went so far as to find that the third and fourth respondents were 'trying to escape their own bodies and expect to live outside their bodies' by contending that the PFMA did not apply to them. As ineloquent as this description by the first respondent may be, it is clear to me that what the first respondent is actually saying is that the third and fourth respondents are deliberately trying disavow the application of the PFMA on them. This is an important consideration in deciding this matter, which I will address hereunder.

[34] Having found that the PFMA does find application, the first respondent then deals with the opinions placed before the negotiating team as to the issue of how the Nyarhi claims should be dealt with. The first respondent actually held that the third and fourth respondents 'placed little weight on the opinions which were likely to benefit

[10] Public Finance Management Act 1 of 1999.

the department in their quest to have the dispute settled'. Furthermore, and in dealing with the defense offered by the third and fourth respondents that they were pressurized by the other team members to make the recommendation, the first respondent pertinently rejected this as 'far-fetched' and being unsubstantiated by any evidence. Whilst the first respondent approached the determination of the manner in which the opinions were considered by the team correctly, he unfortunately stops far short of what would ultimately be a proper final determination of this very important issue. What the first respondent says nothing about is the immediately clear and undeniable disconnect between the opinions provided and the recommendation made. As Moore says in his investigation report, there is an inexplicable 'about turn'. In effect, two counsel specifically say the Nyarhi claims have no merit and would be difficult to prove, and that the claims by Masingi personally are so spurious as to not warrant any attention where it came to settlement. But, and despite this, and nothing else to the contrary to rely on, the team recommends that the Nyathi claims have merit, there is a risk for the full value of R30 million claimed (which includes the claims by Masingi personally) and that monetary settlement is really the only option. I consider this to be a fundamental issue, which seems to have entirely escaped the first respondent.

[35] Even if one also considers the opinion by Vilakazi, he was *ad idem* with the two counsels' views, save for the second claim under case number 14957 / 2004 (which was less than R3 million) in respect of which Vilakazi thought Nyarhi did have prospects. Why Vilikazi's opinion was even necessary is beyond me, considering the clear opinion by senior and junior counsel as supported by the State Attorney, who was briefed in and attending to the matter. But even taking Vilakazi's opinion into account on its own, which was given on the very same day as the recommendation, it is entirely inconsistent with substantiating a recommendation of a R15 million settlement. Added to all the above, and as appears from the report by Moore, none of the negotiating team members were in

any event in a position so as to legitimately and properly contradict any external legal opinion, considering their lack of experience and qualification. Finally, even the State Attorney was bypassed in this whole process, who supported the counsels' opinions. In a nutshell, the recommendation to settle for a sum of R15 million made by the team in my view makes no sense of any kind. It has no foundation whatsoever, considering the legal opinions on which it should have been based. I am firmly of the view that at best for the third and fourth respondents, for them to have made the recommendation that they did (as part of the team of course) shows complete indifference to the discharge of their duties in an acceptable and responsible manner and an utter failure to appreciate the consequences of their conduct.

[36] Considering the above, I then have much difficulty with how the first respondent concludes his reasoning on the issue of the recommendation and its consequences. The first respondent finds that it was not possible to say that the recommendation resulted in wasteful and fruitless expenditure. The reasons given by the first respondent for coming to this conclusion, I regret to say, is difficult to comprehend. The first respondent starts off by saying that at least the recommendation caused the matter to be settled. But that is like saying, for example, that at least an employee who negligently failed to secure a gas main only caused part of the factory to blow up and not all of it. The reasoning is preposterous and cannot justify a settlement of R15 million that never should have happened in the first place. It is however the next conclusion the first respondent comes to that bears specific mention, and I am compelled to quote it verbatim as follows: 'It is my view no person is better positioned to say the recommendation was indeed wasteful and fruitless expenditure except the prophet and we are dot dealing with the cases from prophetic offices but we deal with the merits of each case' (sic). I do not understand what this means. If it means that the first respondent found there is no evidence that the recommendation led to wasteful and fruitless expenditure and to

make such a conclusion would be prophetic divination, then this finding not only has no foundation in fact, but would be an entirely irregular and unjustified conclusion. I say this for the following reasons:

36.1 The PFMA defines 'fruitless and wasteful expenditure' as expenditure which was made in vain and would have been avoided had reasonable care been exercised. This is certainly the case *in casu*;

36.2 Considering the complete disconnection that existed between the legal opinions and the recommendation, and especially considering the absence of any explanation or justification for this, one can only conclude that no reasonable care has been exercised in making the recommendation. In my view, it can comfortably be said that the recommendation shows complete indifference to the opinions;

36.3 A pertinent illustration of the mentioned indifference shown can be found in the fact that the recommendation records that the first applicant's risk is for R30 million. But this includes the amount of some R3 million in respect of the claims by Masinga in his personal capacity which all legal opinions unequivocally made clear had no merit at all and was actually spurious;

36.4 Both the auditor general (after conducting an audit) and Moore (after conducting a detailed investigation) determined that the settlement payment was wasteful and fruitless expenditure. There was nothing offered by the third and fourth respondents to gainsay this;

36.5 The recommendation was the direct cause for the R15 million settlement payment. Had the third and fourth respondents exercised proper and due (reasonable) care, such a recommendation simply could not have been

made in the first place. As such, the settlement payment could have been avoided;

36.6 Therefore, the recommendation can be nothing else but the direct cause of wasteful and fruitless expenditure.

[37] The final part of the first respondent's reasoning relates to the nature of the recommendation. According to the first respondent, the recommendation is just that. It is not binding and need not be followed. The first respondent reasons that it was up to the MEC and HOD to follow the recommendation or not, and since they chose to follow it, it was them who committed wasteful and fruitless expenditure even if it existed. But in the same breath, the first respondent says that the third and fourth respondents were indeed negligent because they made a recommendation that was 'questionable'. The first respondent however concludes that this failure by the third and fourth respondents was not gross negligence, but just ordinary negligence. I cannot accept this kind of reasoning. It negates the very reason why a specific team was appointed to attend to a specific and important issue. Mr Laka, who represented the third and fourth respondents, in any event conceded, when I asked him, that the recommendation made by the team played a 'critical role' in the decision to settle for R15 million. But even without this concession, the reasoning of the first respondent is simply unsustainable for the simple reason that the MEC and HOD in reality had nothing else to base their decision on, other than the recommendation. That after all was why the team existed. The MEC and HOD followed exactly, to the letter, what the team recommended. There was no further consideration or debate. In fact, all the requisite approvals were granted at the foot of the recommendation document itself. The simple point has to be – was it not for the recommendation there would not have been a settlement for R15 million.

[38] Mr Laka argued that the MEC and HOD were free to reject the recommendation. But this kind of argument again loses sight of the very purpose behind the appointment of a five man team specifically tasked to come up with a final appropriate solution in the Nyarhi claims. With the matter being on the steps of Court, the MEC and HOD had to know whether they should fight, or beat a dignified retreat in the form of a proper settlement. The team was tasked to get opinion, consider all options, and propose a solution. Considering the case was set down for trial on 25 August 2005, along with the considerable pressure being applied by the State Attorney as to what to do about the trial, it is highly unlikely that the MEC and HOD would have rejected any recommendation made by the team, especially considering it was only finally made some three weeks before trial. It is my view that considering this context, there was an even greater responsibility on the team to make a proper recommendation, especially considering the bypassing of the State Attorney. The only reasonable conclusion has to be that whatever the team recommended, the MEC and HOD would follow.

[39] As stated above, the first respondent accepted that the PFMA applies to the third and fourth respondents. The first respondent however unfortunately failed to have proper consideration to the fact that the third and fourth respondents unjustifiably sought to disavow the application of the PFMA to them. Such failed approach of the third and fourth respondent in my view had to in itself have a consequence in determining this matter. In this respect, I consider this to be a deliberate attempt by the third and fourth respondents to negate the clear duty that rested upon them to safeguard the financial interests of the first applicant, because they know the consequences of their failure. Section 57 of the PFMA provides as follows as to the responsibilities of officials in public entities:

> ‘An official in a public entity —
>
> *(a)* must ensure that the system of financial management and internal control

established for that public entity is carried out within the area of responsibility of that official;

(b) is responsible for the effective, efficient, economical and transparent use of financial and other resources within that official's area of responsibility;

(c) must take effective and appropriate steps to prevent, within that official's area of responsibility, any irregular expenditure and fruitless and wasteful expenditure and any under collection of revenue due;

(d) must comply with the provisions of this Act to the extent applicable to that official, including any delegations and instructions in terms of section 56; and

(e) is responsible for the management, including the safe-guarding, of the assets and the management of the liabilities within that official's area of responsibility.'

And then in terms of section 81(3) of the PFMA:

> 'An official of a public entity to whom a power or duty is assigned in terms of section 56 commits an act of financial misconduct if that official wilfully or negligently fails to exercise that power or perform that duty.'

There can be no doubt that the third and fourth respondents are officials of the first applicant, as the first respondent himself accepted. The third and fourth respondents were specifically tasked to deal with the Nyarhi claims, in line with the duties as set out above. Therefore, and once the PFMA thus applied, it follows that the negligent failure by the third and fourth respondents to comply with these duties must be misconduct. This the third and fourth respondents in my view knew was the case, and tried to avoid. In itself, this is bordering on dishonesty.

[40] Based on all the above circumstances and considerations, the misconduct at hand is far more than just ordinary negligence, as the first respondent finds.

Considering the complete lack of consideration of the legal opinions by the negotiating team (including the third and fourth respondents), I am convinced gross negligence in fact exists, as such failure can only be tantamount to a complete failure to take proper care, and failure to consider the actual consequences of the recommendation (being that it would result in fruitless and wasteful expenditure). In deciding what constitutes gross negligence, the Court in *Transnet Ltd t/a Portnet v Owners of the MV Stella Tingas and Another*[11] said:

> '…. it is not consciousness of risk-taking that distinguishes gross negligence from ordinary negligence. …. If consciously taking a risk is reasonable there will be no negligence at all. If a person foresees the risk of harm but acts, or fails to act, in the unreasonable belief that he or she will be able to avoid the danger or that for some other reason it will not eventuate, the conduct in question may amount to ordinary negligence or it may amount to gross negligence (or recklessness in the wide sense) depending on the circumstances. …. even in the absence of conscious risk-taking, conduct may depart so radically from the standard of the reasonable person as to amount to gross negligence …. It follows that whether there is conscious risk-taking or not, it is necessary in each case to determine whether the deviation from what is reasonable is so marked as to justify it being condemned as gross .... *Dicta* in modern judgments, although sometimes more appropriate in respect of *dolus eventualis,* similarly reflect the extreme nature of the negligence required to constitute gross negligence. Some examples are: 'no consideration whatever to the consequences of his acts' (*Central South African Railways v Adlington & Co* 1906 TS 964 at 973); 'a total disregard of duty' (*Rosenthal v Marks* 1944 TPD 172 at 180); 'nalatigheid van 'n baie ernstige aard' or ''n besondere hoë graad van nalatigheid' (*S v Smith en Andere* 1973 (3) SA 217 (T) at 219A - B); 'ordinary negligence of an aggravated form which falls short of wilfulness' (*Bickle v Joint Ministers of Law and Order* 1980 (2) SA 764 (R) at 770C); 'an entire failure to give consideration to the consequences of one's actions' (*S v Dhlamini* 1988 (2) SA 302 (A) at 308D)."

[11] 2003 (2) SA 473 (SCA) at para 7.

> It follows, I think, that to qualify as gross negligence the conduct in question, although falling short of dolus eventualis, must involve a departure from the standard of the reasonable person to such an extent that it may properly be categorised as extreme; it must demonstrate, where there is found to be conscious risk-taking, a complete obtuseness of mind or, where there is no conscious risk-taking, a total failure to take care ….'

Applying the above ratio in *Stella Tingas in casu*, the conduct of the third and fourth respondents would therefore be gross negligence because it demonstrates a complete failure to take care and give consideration to the consequences of their actions, in making the recommendation. The fruitless attempts by the third and fourth respondents to distance themselves from their statutory duty aggravates the failure.

[41] A further judgment of relevance is that of *Nampak Corrugated Wadeville v Khoza*[12]*,* in which case the employee party was charged and dismissed for gross negligence in that he had failed to take proper care of equipment for which he was responsible. The Industrial Court found that the employee was negligent but could not find gross negligence to exist, on a basis similar to the approach of the first respondent *in casu*. The LAC disagreed with the Industrial Court and held:

> '…The probable explanation for his conduct, in these circumstances, is simply that he deliberately neglected to perform his duties. Consequently, I do not share the view of the Industrial Court that the evidence against Khoza was so circumstantial that it could not be used to explain his conduct. It was Khoza who had to furnish that explanation. In the absence of any credible explanation, the inference that he deliberately neglected to perform his duty is irresistible. This finding by the employer cannot be faulted.'

I consider the same reasoning to applicable in the current proceedings before me, especially in the absence of any proper explanation by the third and fourth

[12] (1999) 20 ILJ 578 (LAC) at para 35.

respondents which could justify why the recommendation had been made in the form it was and why there was such a disconnect with.

[42] I also take guidance from the judgment in *Stoop and Another v Rand Water*[13], which dealt with circumstances comparable to the matter *in casu*. The judgment dealt with the approval by officials in a public entity employer of irregular invoices. One of the officials, one Buckle, sought to answer the misconduct he had been accused of, by saying that he was not approving the invoices but simply 'noting' them. The Court said the following, in upholding the dismissal of the officials:[14]

> 'Buckle's version that he was simply noting also begs the question: What was he noting? Was he also 'noting' the glaring irregularities that are so glaring that it is plain to see? Even if he was only 'noting', why did he not once query an invoice?
>
> Lastly, Buckle's version is inconsistent with general accounting principles, practice in the PFMA environment and common sense. …. At the very least, he should have said something about the blatant irregularities yet month after month, year after year, he allowed these irregular invoices to proceed to the finance department for payment. It also makes no commercial sense merely to 'note' an invoice. Furthermore, when a person signs an invoice, he must reasonably believe that others could rely on his signature or hold him accountable. ….'

The Court also dealt with the issue that actual payment was then made in terms of these invoices and said:[15]

> 'I am satisfied that the respondent has establish that Buckle and Stoop had caused the losses. Had they not acted fraudulently, the respondent would not have made the overpayments to SWR on the strength of the fraudulent invoices. I am, therefore, satisfied that there is a causal link between the breach and the

[13] (2014) 35 ILJ 1391 (LC).
[14] Id at paras 113 – 114.
[15] Id at para 118.

damages suffered by the respondent. I am also satisfied that there exists both a factual and legal cause for the loss suffered.'

Applying the same kind of reasoning as that adopted in *Stoop*, referred to above, the third and fourth respondents must have known that the recommendation to settle for R15 million and the reasons given for that recommendation, was entirely at odds with the legal opinions. If the third and fourth respondents did not wish endorse this recommendation they should have raised a complaint or formally distanced themselves from it. The third and fourth respondents, considering the task specifically bestowed on them, must have known that this recommendation was in breach of the provisions of the PFMA. And finally, this recommendation was the cause for the settlement payment being made and thus causing wasteful expenditure incurred by the first applicant of R15 million. The same as was the case in *Stoop*, the third and fourth respondents' dismissal was justified.

[43] In summary therefore, I find that the following conclusions made and reasoning adopted by the first respondent, in his award, to constitute gross irregularities:

43.1 The conclusion of the first respondent that counsel and the attorney was not adverse to settlement and this to some extent justified the conduct of the third respondents because all that happened is that the matter was settled, was irregular. As I said, it was never about a difficulty with settlement per se, but it was about on what basis settlement should be considered. In this regard, and in particular, all the legal opinions confirmed that the matter should only be settled on a commercial basis and not on the basis that the first applicant's case had no merit;

43.2 The fact that the first respondent failed to give proper consideration to the unjustified attempts by the third and fourth respondents to distance themselves from their duties under the PFMA, is irregular;

43.3 The failure by the first respondent to have proper regard to the complete disconnect between the legal opinions and recommendation ultimately made by the third and fourth respondents, without any explanation for it, is irregular;

43.4 The conclusion by the first respondent that there was no evidence that the recommendation resulted in fruitless and wasteful expenditure, is irregular. The recommendation was certainly the direct cause of the existence of fruitless and wasteful expenditure;

43.5 The finding that the conduct of the third and fourth respondent did not constitute gross negligence is irregular; and

43.6 The view of the first respondent that the MEC and HOD was not obliged to follow the recommendation, because the recommendation was just a recommendation, as some basis of exoneration of the third and fourth respondents, is irregular. As I have said, was it not the recommendation, the settlement would not have happened at R15 million.

But do these irregularities then render the ultimate outcome in this matter to be an unreasonable outcome, this enquiry being the second part of the review test?

[44] In my view, there can be no doubt that the gross irregularities referred to render the entire outcome in this matter to be unreasonable. Was it not for the existence of these irregularities, the first respondent simply could not have reasonably arrived at the conclusions that he did. I say this because once these irregularities are taken out of the equation, then the only reasonable outcome has to be that the third and fourth respondents were indeed guilty of gross negligence and that they

had earned their dismissal. In short, I consider this to be case because once the existence of gross negligence and not just ordinary negligence is accepted, proper consideration is given to the duties and obligations of the third and fourth respondents in respect of which they failed, proper consideration is given to completely and entirely inexplicable and unjustified disconnect between the legal opinions and the recommendation made, and finally that the recommendation was actually the *sine qua non* for the settlement of R15 million, the only reasonable outcome is that dismissal of the third and fourth respondents was justified. Any conclusion to the contrary is reviewable.

Conclusion

[45] Therefore, and based on the reasons set out above, I conclude that the first respondent's award simply cannot be sustained. This compels me to review and set aside the award of the first respondent as being a gross irregularity and following on, an award a reasonable decision maker could not come to in the circumstances.

[46] Having reviewed and set aside the award of the first respondent, I see no reason to remit this matter back to the second respondent again for determination *de novo* before another arbitrator. As stated above, the factual matrix in this matter was actually uncontested, and the evidence submitted was done by agreement. None of this will change going forward. There is simply no reason why I cannot finally determine this matter, now, and both parties, when this matter was argued, actually agreed that this was the appropriate course of action.

[47] In addition, the misconduct dates back to 2005, the disciplinary proceedings and dismissal to 2010, and the arbitration to 2011. It is in my view unpalatable to have all of this start over and be considered again, now in 2015, if this matter is indeed

remitted back to the second respondent. It is a constitutional imperative that employment disputes must be speedily resolved. I will refer to what several Constitutional Justices said, starting with Skweyiya J in *Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal*[16] where the learned Judge said: '… the importance of resolving labour disputes in good time is thus central to the LRA framework. ….'. Similarly, and in *Aviation Union of SA and Another v SA Airways (Pty) Ltd and Others*[17], Jafta J held: '….Speedy resolution is a distinctive feature of adjudication in labour relations disputes ….'. And in *National Education Health and Allied Workers Union v University of Cape Town and Others*[18] Ngcobo J said: 'By their very nature labour disputes must be resolved expeditiously and be brought to finality so that the parties can organize their affairs accordingly. They affect our economy and labour peace. It is in the public interest that labour disputes be resolved speedily …'. In such hallowed company, I feel entirely justified in concluding that this matter must now finally come to an end.

[48] I am fortified in my consideration that this matter must be finally determined by the fact the further conduct of this matter, all over again, would be done at taxpayers' expense. Being mindful of the very statutory provisions with regard to wasteful expenditure, I am of the view that arbitration *de novo* would be nothing more than wasteful expenditure. I am not going to put an already strained provincial fiscus through this expense again.

[49] I, therefore, intend to substitute the arbitration award of the first respondent with an award that the third and fourth respondents' dismissal was substantively fair, and thus be upheld.

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[50] This then only leaves the issue of costs. In terms of the provisions of section

[16] (2014) 35 *ILJ* 613 (CC) at para 42.
[17] (2011) 32 *ILJ* 2861 (CC) at para 76.
[18] (2003) 24 *ILJ* 95 (CC) at para 31.

162(1) and (2) of the LRA, I have a wide discretion where it comes to the issue of costs. I must confess that I am somewhat conflicted where it comes to costs. The applicants succeeded in Court, which motivates a costs award in their favour. I however also consider the responsible and actual amicable and co-operative manner in which the arbitration was conducted by both the parties, especially the fact that evidence was placed before the first respondent as agreed evidence. Had the first respondent then simply did that which he was supposed to do, and reasonably determined the matter, then all of the litigation in this matter would not have been necessary. Therefore, and although the applicants were successful, I do not intend to burden the third and fourth respondent with a costs order, especially considering the opportunity afforded to me to bring this matter finally to an end. I accordingly exercise my discretion as to costs in this matter by making no order as to costs.

Order

[51] In the premises, I make the following order:

51.1 The applicants' review application is granted.

51.2 The arbitration award of the first respondent, being arbitrator Daniel Seopela, which is dated 23 December 2011 and issued under case number GPBC 344/2010, is reviewed and set aside.

51.3 The arbitration award is substituted and replaced with an award that the dismissal of the third respondent (L H F Mathutha) and the fourth respondent (A V Kotane), by the first applicant, was substantively fair.

51.4 There is no order as to costs.

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Snyman AJ

Acting Judge of the Labour Court

APPEARANCES:

For the Applicant:	Advocate G I Hulley
Instructed by:	Verveen Attorneys
For the Third Respondent:	Advocate A P Laka SC
Instructed by:	Rammutla-At-Law Attorneys