Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, HELD AT JOHANNESBURG

Case no: JR 220/13

In the matter between:

MAGUMENI PHILEMON MATHEBULA	**First Applicant**

and

GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL	**First Respondent**
SELLO NKURUMAH MOIMA *N.O*	**Second Respondent**
DEPARTMENT OF AGRICULTURE RURAL DEVELOPMENT AND LAND ADMINISTRATION	**Third Respondent**

Heard: 26 and 27 October 2016

Delivered: 19 January 2017

Summary: (Review – misconduct – dismissal upheld on grounds other than those originally raised – award set aside – reinstatement not appropriate – costs of postponement where date agreed upon in pre-hearing case management hearing – costs where court hampered by lack of bundle)

JUDGMENT

LAGRANGE J

Introduction

[1] The arbitration award in this matter was handed down on 8 January 2012. On 19 February 2013 the applicant applied to review the award, approximately one year late. Before the applicant had filed a supplementary affidavit, the third respondent, the Department of agriculture filed its answering affidavit on 25 February 2013.

[2] On or about 14 March 2014, the department filed an application under rule 11 of the Labour Court Rules to dismiss the review application on account of the applicant failing to prosecute his review application within six months in terms of clause 7 of the Labour Court Practice Manual.

[3] On 22 June 2016, the matter was set down for a pre-enrolment hearing. The rule 11 application was withdrawn and the matter was enrolled as the only matter for hearing on 26 October. On perusing the file prior to the hearing, it became apparent that no bundle of documents used in the arbitration had been filed. Although the applicant's attorneys were alerted by the court to this the day prior to the hearing, by the time the matter was heard on 26 October no documents were forthcoming. Instead, the applicant sought to remove the matter from the roll by consent having tendered the costs of the third respondent, the Department of Agriculture (Gauteng). Effectively, this would have meant a postponement of the matter which had initially been enrolled as a result of the prehearing process on the basis that the matter was ready to be heard. The prehearing process effectively gives preference to parties that have asked for the matter to be heard. It also means that applications involving a substantial amount of reading are separately enrolled to give the court an opportunity to dedicate more time to the matter. Where this process is hampered because a record is incomplete, the object of the preferential enrolment is undermined.

[4] So as to limit the prejudice to the applicant as a result of his attorney's failure to ensure that the record was complete, I reluctantly postponed the application to the following day to give him a final opportunity to rectify the

deficiencies in the bundle. Nonetheless, as a mark of the court's displeasure of the applicant not being ready to proceed on account of his attorney's failure to finalise the record, his attorney was ordered to pay the wasted costs of the postponed hearing on 26 October on a punitive basis. Parties afforded preferential dates under the pre-enrolment hearing process must bear in mind that if an application does not proceed on the agreed date it means that parties in another application which was ripe for hearing and could have been heard on that date were denied that opportunity. Where, as in this case, the reason for not proceeding is because it turns out that the matter was not ripe for hearing, the party or the legal representatives at fault should not be surprised to find themselves facing punitive cost orders for squandering the opportunity of a having a preferential hearing at the expense of other parties whose matters could have been heard.

[5] Despite being granted a postponement, when the application was heard on 17 October, the applicant's representative advised the court that the applicant and the respondent did not regard the bundle of documents as necessary for his review application. In keeping with this submission, no bundle of documents was produced as part of the record. Thus, the only record available to the court consists of the arbitrator's award and a transcript of the proceedings, which was also incomplete. An applicant may choose to rely on only so much of a record as it deems necessary, and it is inadvisable simply to file an entire record where, for example, the reviewable defect is apparent on the face of the arbitrator's award. However, an applicant must always bear in mind that it bears the risk of the review application being dismissed if the applicant's assessment of what is necessary falls short of what is sufficient for the court to decide the application on the grounds of review raised.[1]

[6] While it is clear from the applicant's supplementary affidavit that he took the view that the failed efforts to reconstruct the missing portions of the transcribed testimony were not fatal to his review application, it is

[1] See e.g **JG Trading (Pty) Ltd t/a Russells v Whitcher NO & others (2001) 22 ILJ 648 (LAC)** at 650-651, paras [8] – [14].

inexplicable why the bundle of documents used in the lengthy arbitration were not laid before the court as part of the record, leaving the court to surmise from those limited extracts of the documents read into the record what the documents contained. This unnecessarily hampered the court.

The arbitration award

[7] The essence of the charge relating to misconduct is described in the SMS services Handbook as wilfully or negligently mismanaging the finances of the State by making certain transfers to various entities in breach of s 42 of the Public Finance Management Act 1 of 1999 ('the PFMA') and Treasury Regulation 6.5 which directly relates to s 42.

[8] At the time of the alleged misconduct, the applicant was acting head of Department and, *ex officio*, the accounting officer. Accordingly, he had to fulfil the general responsibilities imposed on an accounting officer in terms of section 38 of the PFMA.

[9] Apart from charges relating to his alleged failure to disclose a personal interest in various entities, the remaining charges concerned an alleged irregular transfer of approximately R 73,000,000 to each of six different entities. By far the largest transfer consisted of R 70 million transferred to a provincial agricultural development agency, the Mpumalanga Agricultural Development Corporation ('MADC'). It was alleged that these transfers were in contravention of section 42 of the PFMA and Treasury regulations 6.5 and without the approval of the Treasury.

[10] The arbitrator found the applicant guilty of all six charges.

Grounds of review relating to the arbitrator's findings on procedural fairness

[11] Most of the applicant's grounds of review in his founding affidavit are devoted to the arbitrator's finding that his dismissal was procedurally fair.

Failure to file heads

[12] His first complaint is that, even though the chairperson of the disciplinary enquiry called for heads of argument he was not afforded an opportunity to file his heads whereas the employer did.

[13] He also argues that the Commissioner failed to raise with him the need for him to produce evidence to show that he was prejudiced by not filing heads of argument and that the Commissioner should not have relied on the absence of any evidence of prejudice as a basis for rejecting his claim that his failure to file heads did not result in any procedural unfairness.

[14] He further criticises the Commissioner for his speculative conclusion that the presiding officer must have made his findings on the basis of the evidence before him without having regard to written argument, especially when the presiding officer had called for written submissions to be made.

[15] The applicant submitted that the arbitrator improperly stated as a general proposition that a failure to file heads of argument did not amount to an act of procedural unfairness.

[16] I do not intend to dwell on the circumstances which caused the applicant not to file heads of argument with the presiding officer, and I accept that the arbitrator was wrong insofar as he might have suggested as a general proposition that not being able to file heads could not be construed as procedurally unfair. On the other hand, it is equally true that an omission in disciplinary procedures, in and of itself, is not sufficient to establish procedural unfairness in the absence of demonstrating the prejudice occasioned by the lapse. In this regard it is noteworthy that on review, he did not advance any specific reasons why his case before the presiding officer suffered on account of him not presenting heads of argument.

Denying the applicant an opportunity to call a witness

[17] The applicant complains that he was prevented from calling an additional witness from the Treasury Department to testify on the interpretation of the sections of the PFMA in circumstances where the chairperson had advised that such a witness should be called. The arbitrator found on the evidence that in fact the applicant had had ample opportunity to call such a witness and that in any event, that witness's evidence concerned a matter of legal interpretation that fell within the expertise of the presiding officer to decide, which are both findings I would agree with on the record.

The arbitrator wrongly concluded that the applicant had not called an expert witness.

[18] The applicant claims that the arbitrator's conclusion that he had failed to call an expert witness when the arbitrator gave him that opportunity at the end of the proceedings based on his complaint that he had been denied the opportunity to lead such a witness in the disciplinary enquiry, whilst at the same time acknowledging later in his award that Tshitangana who did testify for the applicant during the arbitration proceedings was probably the witness the applicant intended to call in the disciplinary hearing. The applicant cites this as illustrating that the arbitrator's award is "a model of inconsistency".

[19] The arbitrator may not have expressed himself clearly, but it is difficult to see how this helps the applicant. The applicant was given the opportunity to call an expert but never did. Moreover, the arbitrator appreciated the import of Tshitangana's evidence. It must also be noted that the applicant testified at the arbitration that he saw no need to call an expert witness during the internal hearing to testify about the interpretation of the relevant statutes as that was a matter for the arbitrator to decide. His complaint at the time was that, when a witness did indicate he was willing to testify, the chairperson did not reconvene the hearing before making his decision. It is difficult to understand why the applicant takes umbrage at the fact that he did not have the opportunity to call the witness in question when he saw no need for such a witness, which he reaffirmed at the arbitration when the arbitrator afforded him a similar opportunity.

[20] The version recorded by the chairperson of the enquiry was that, it was the applicant who asked for a postponement of the hearing to be given an opportunity to call an expert witness and that he agreed to this despite the prejudice to the employer because the applicant at that stage was not represented. The hearing was postponed on 7 May but the applicant was unable to secure the attendance of a witness when the hearing resumed on 12 May. It was at that stage that the arbitrator asked the parties to file heads of argument, but held open the possibility of the missing witness still testifying if the applicant could obtain one.

[21] The applicant claimed that his representative had sent correspondence to the Department of Agriculture after 12 May stating that he had secured the witness and asking to the chairperson to reconvene the hearing to hear the additional evidence. However, from what can be gleaned from the arbitration transcript, the correspondence indicated that the employer would not agree to reconvene the hearing and the chairperson also failed to make a ruling on re-convening the enquiry. Consequently, the deadline for filing heads of argument passed without the applicant's representatives filing any.

The chairperson's failure to allow the applicant an opportunity to give evidence in mitigation

[22] In essence, the arbitrator decided that the gravity of the charges against the applicant was such that it was improbable any evidence he could have offered in mitigation would have made any difference and the other factors that would have to be considered apart from his personal circumstances would not have assisted him.

[23] The applicant argues that the arbitrator failed to appreciate that the failure to allow him an opportunity to lead evidence in mitigation was a gross violation of his procedural rights and that the arbitrator's conclusion on this issue is insupportable. In this respect, the arbitrator seems to have been overly robust in dismissing the chairperson's failure to allow the applicant an opportunity to lead evidence in mitigation despite the gravity of the charges. It is a well recognised and accepted part of fair disciplinary proceedings to allow an employee to give evidence in mitigation before determining a sanction.[2] It is also an explicit requirement in terms of the SMS Handbook which applied to the applicant.

<u>Substantive merits</u>

[24] On the substantive issues decided by the arbitrator, the applicant raised the following issues on review:

Failure to consider evidence of a witness

[2] See e.g ***Eddels SA (Pty) Ltd v Sewcharan*** **(2000) 21 *ILJ* 1344 (LC)** at 11345

[25] Firstly, the applicant claims that the arbitrator failed to consider the evidence of Tshitangana, because he supposedly found that Tshitangana had not testified when in fact he had. This issue has been indirectly alluded to above. On a superficial reading of the arbitrator's award, it might seem that there is such a contradiction, but the assertion made by the applicant is an oversimplification and a gross distortion of the arbitrator's reasoning. It is readily apparent on the face of the award that he took Tshitangana's evidence into account but essentially decided that it was opinion evidence about the interpretation of the PFMA. This view seems to be correct and accords with the applicant's own view that the question of interpreting the statute was a matter for the chairperson to decide. In passing, it should be mentioned that Tshitangana's evidence was not part of the transcribed record before the court.

General allegations of misconstruing or failing to consider evidence

[26] Secondly, the applicant alleges in broad terms that the arbitrator gravely misunderstood the evidence to such an extent that his conclusion was one that no reasonable arbitrator could have arrived at. However, he failed to set out any factual basis for this submission in his founding affidavit. In similar vein, he claimed in his founding affidavit that the decision was unreasonable because the Commissioner failed to apply his mind to relevant evidence and took into account irrelevant evidence such that his decision should be set aside regardless of whether the result could be on the evidence before the arbitrator. In making this claim, the applicant incorrectly characterises the law relating to the consequences of alleged failures to take account of relevant evidence or taking account of irrelevant evidence. The correct approach is set out in more than one decision of the LAC in recent years.[3]

[3] See e.g, Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae) (2013) 34 ILJ 2795 (SCA) at 2801-2 , paragraph [12]:

> "That decision was taken on appeal to the Constitutional Court in Sidumo & another v Rustenburg Platinum Mines Ltd & others and overruled in two respects. First it was held that although a CCMA award involved administrative action it did not fall within PAJA. Second the court enunciated an unreasonableness test that differed from the test adopted by this court, namely, whether the award was one that a reasonable decision maker could not reach. That test involves the reviewing

Arbitrator merely adopted the findings of enquiry chairperson

[27] In his supplementary affidavit, an additional ground of review advanced by the applicant is that, the arbitrator merely confirmed the findings of the chairperson of the enquiry on charges 1 to 6, whereas there was no reason on the basis of the *de novo* proceedings before the arbitrator to reach that conclusion independently on the evidence before him. No factual basis is laid out in the supplementary affidavit for this bald averment and accordingly this ground does not require serious consideration.[4]

Arbitrator failed to consider if the charges for which the applicant was dismissed related to the evidence of the misconduct that was led

[28] Lastly, the applicant raises the complaint that the arbitrator failed to consider if he had been correctly charged and found guilty under section 38 and section 42 of the PFMA. Aside from the procedural issues, this ground forms the crux of the applicant's review on the substantive merits of the award.

[29] In summary, the charges against him were that:

29.1 he breached clause 2 of ANNEXURE a of the Senior Management Service Disciplinary Code of 2003 in that he wilfully or negligently mismanaged the finances of the state in allowing and/or causing the transfer of funds to the following entities in contravention of s 42 of the PFMA and Treasury regulation 6.5:

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court examining the merits of the case 'in the round' by determining whether, in the light of the issue raised by the dispute under arbitration, the outcome reached by the arbitrator was not one that could reasonably be reached on the evidence and other material properly before the arbitrator. On this approach the reasoning of the arbitrator assumes less importance than it does on the SCA test, where a flaw in the reasons results in the award being set aside. The reasons are still considered in order to see how the arbitrator reached the result. That assists the court to determine whether that result can reasonably be reached by that route. If not, however, the court must still consider whether, apart from those reasons, the result is one a reasonable decision maker could reach in the light of the issues and the evidence."

[4] See e.g. ***National Union of Mineworkers & another v Commission for Conciliation, Mediation & Arbitration & others*** **(2010) 31 *ILJ* 703 (LC)** at 711-2, paras [13]-[14]

29.1.1 R 417,400.00 to Kind Lemon Oil Projects between July and August 2006 (charge 1);

29.1.2 R 509,969.00 to Vukuzenzele Beekeeping between May and August 2006 (charge 2);

29.1.3 R 240,031.00 to Vukuzenzele Beekeeping between August and November 2006 (charge 3);

29.1.4 R 1,003,626.00 to Mphatlalatsane Cooking Oil between September and November 2006 (charge 4);

29.1.5 R 804,757.99 to Coromandel Farmers Trust Project between November 2006 and March 2007 (charge 5);

29.1.6 R 70 million to Mpumulanga Agricultural Development Agency ('MADC') between April 2007 and June 2008 (charge 6), and

29.2 he failed to disclose his interest in an entity Itnembe Lase Reg 1997/0420275/23 in or about April 2008 thereby contravening clause 1 of the SMS disciplinary code and two other counts of misconduct relating to this entity, which made up charges 7, 8 and 9 against the applicant.

[30] Clauses 1 and 2 of Annexure A of the SMS Handbook respectively describe the following types of misconduct:

30.1 A failure to comply with, or contravention of an Act, regulation or legal obligation and

30.2 Wilfully or negligently mismanaging the finances of the State.

[31] Section 38 of the PFMA states the general responsibilities of accounting officers:

> 38 General responsibilities of accounting officers
>
> (1) The accounting officer for a department, trading entity or constitutional institution-
>
> (a) must ensure that that department, trading entity or constitutional institution has and maintains-

(i) effective, efficient and transparent systems of financial and risk management and internal control;

(ii) a system of internal audit under the control and direction of an audit committee complying with and operating in accordance with regulations and instructions prescribed in terms of sections 76 and 77;

(iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective;

(iv) a system for properly evaluating all major capital projects prior to a final decision on the project;

(b) is responsible for the effective, efficient, economical and transparent use of the resources of the department, trading entity or constitutional institution;

(c) must take effective and appropriate steps to-

(i) collect all money due to the department, trading entity or constitutional institution;

(ii) prevent unauthorised, irregular and fruitless and wasteful expenditure and losses resulting from criminal conduct; and

(iii) manage available working capital efficiently and economically;

(d) is responsible for the management, including the safeguarding and the maintenance of the assets, and for the management of the liabilities, of the department, trading entity or constitutional institution;

(e) must comply with any tax, levy, duty, pension and audit commitments as may be required by legislation;

(f) must settle all contractual obligations and pay all money owing, including intergovernmental claims, within the prescribed or agreed period;

(g) on discovery of any unauthorised, irregular or fruitless and wasteful expenditure, must immediately report, in writing, particulars of the expenditure to the relevant treasury and in the case of irregular expenditure involving the procurement of goods or services, also to the relevant tender board;

(h) must take effective and appropriate disciplinary steps against any official in the service of the department, trading entity or constitutional institution who-

(i) contravenes or fails to comply with a provision of this Act;

(ii) commits an act which undermines the financial management and internal control system of the department, trading entity or constitutional institution; or

(iii) makes or permits an unauthorised expenditure, irregular expenditure or fruitless and wasteful expenditure;

(i) when transferring funds in terms of the annual Division of Revenue Act, must ensure that the provisions of that Act are complied with;

(j) before transferring any funds (other than grants in terms of the annual Division of Revenue Act or to a constitutional institution) to an entity within or outside government, must obtain a written assurance from the entity that that entity implements effective, efficient and transparent financial management and internal control systems, or, if such written assurance is not or cannot be given, render the transfer of the funds subject to conditions and remedial measures requiring the entity to establish and implement effective, efficient and transparent financial management and internal control systems;

(k) must enforce compliance with any prescribed conditions if the department, trading entity or constitutional institution gives financial assistance to any entity or person;

(l) must take into account all relevant financial considerations, including issues of propriety, regularity and value for money, when policy proposals affecting the accounting officer's responsibilities are considered, and when necessary, bring those considerations to the attention of the responsible executive authority;

(m) must promptly consult and seek the prior written consent of the National Treasury on any new entity which the department or constitutional institution intends to establish or in the establishment of which it took the initiative; and

(n) must comply, and ensure compliance by the department, trading entity or constitutional institution, with the provisions of this Act.

(2) An accounting officer may not commit a department, trading entity or constitutional institution to any liability for which money has not been appropriated."

(emphasis added)

[32] Section 42 of the PFMA deals with the transfer of assets and liabilities under certain circumstances:

> "42 Accounting officers' responsibilities when assets and liabilities are transferred
>
> (1) When assets or liabilities of a department are transferred to another department or other institution in terms of legislation or following a reorganisation of functions, the accounting officer for the transferring department must-
>
> (a) draw up an inventory of such assets and liabilities; and
>
> (b) provide the accounting officer for the receiving department or other institution with substantiating records, including personnel records of staff to be transferred.
>
> (2) Both the accounting officer for the transferring department and the accounting officer for the receiving department or other institution must sign the inventory when the transfer takes place.
>
> (3) The accounting officer for the transferring department must file a copy of the signed inventory with the relevant treasury and the Auditor-General within 14 days of the transfer."

(emphasis added)

[33] Treasury regulations 6.5 states:

> "6.5 Transfer of functions [Section 42 of the PFMA]
>
> 6.5.1 Where a function is to be transferred between votes during a financial year, the relevant treasury must be consulted in advance, to facilitate any request for the resulting transfer of funds voted for that function in terms of section 33 of the Act. In the absence of agreement between the affected departments on the amount of funds to be transferred, the relevant treasury will determine the funds to be shifted.
>
> 6.5.2 Should the Minister of Public Service and Administration or a Premier of a province make a determination regarding the transfer of a function between departments in terms of the Public Service Act, 1994, that determination must accompany a request for the transfer of funds as per paragraph 6.5.1. Should the Minister of Public Service and Administration

or a Premier approve a function transfer after the finalisation of the adjustments estimates, it must be dealt with on a recoverable basis.

6.5.3 Before seeking formal approval from the Minister of Public Service and Administration or the Premier of a province for any transfer of functions to another sphere of government, the transferring accounting officer must first seek the approval of the relevant treasury or treasuries on any funding arrangements.

6.5.4 The transfer of functions to provinces and municipalities must be dealt with in terms of the annual Division of Revenue Act and the Local Government Municipal Finance Management Act (MFMA), 2003 (Act No. 56 of 2003)."

[34] Treasury regulation 8.4.1 which the applicant referred to states:

"**8.4 Transfers and subsidies (excluding Division of Revenue grants and**

other allocations to municipalities) [Section 38(1)(j) of the PFMA]

8.4.1 An accounting officer must maintain appropriate measures to ensure that transfers and

subsidies to entities are applied for their intended purposes. Such measures may include-

(a) regular reporting procedures;

(b) internal and external audit requirements and, where appropriate, submission of

audited statements;

(c) regular monitoring procedures;

(d) scheduled or unscheduled inspection visits or reviews of performance; and

(e) any other control measures deemed necessary."

[35] The arbitrator found the applicant not guilty of charges 7, 8 and 9 and it is not necessary to consider these further. In relation to charges 1 to 6, it is clear from paragraph 11.8 of the arbitrator's award that he was alive to the issue of the different provisions of the PFMA

[36] As the department's main witness, Mr Goqo, a forensic auditor, had testified that both sections 38 and 42 were applicable to the charges and should not be read in isolation. The witness had further testified that what was at issue was both the unauthorised transfer of funds and secondly the fruitless and wasteful expenditure which the applicant had failed to prevent despite his obligation to make sure that public funds were properly utilised.

[37] The arbitrator concluded that transfers of funds were made to the six entities in question without the necessary authorisation and that the grant funding to those entities constituted fruitless and wasteful expenditure. He also concluded that there were no follow-up measures to ensure that the funds which were transferred were properly utilised. Further MADC had been 'appointed' before tender procedures had been completed and the applicant merely rubberstamped the arrangements. The arbitrator considered the defence of the applicant that section 42 of the PFMA under which he was charged relates to the transfer of functions from one Department to another. However, the arbitrator was of the view that in view of the seriousness of the misconduct just described, that it was not sufficient for the applicant to simply defend himself on the basis that he was charged under the wrong section namely section 42 as opposed to section 38 of the PFMA. Consequently, he found that the dismissal was substantively fair.

[38] It is readily apparent from the evidence that the transfer of funds from the Mpumalanga Department of Agriculture to the entities mentioned in charges 1 to 6 did not concern a transfer of assets and liabilities of the kind that occurs when functions are transferred from a Department to another department or entity as contemplated in section 42 of the PFMA read with clause 6.5 of the Treasury regulations. Clearly the grant payments entailed the transfer of funds but it is an artificial construction of those transfers to equate them with a transfer of assets under the statutory provisions mentioned. Rather, they were simply grant payments. Similarly, the payment made to MADA which was for services rendered by MADA was not a transfer of assets in the sense envisaged by s 38 of the PFMA.

[39] Thus it would appear that, insofar as the charges of mismanagement of state finances were confined to the contravention of s 42 and of the PFMA and Treasury Regulation 6.5, those were not the appropriate provisions to use to describe the nature of the wilful or negligent financial mismanagement the department wanted to hold him responsible for.

[40] If one has regard to the evidence of the forensic auditor Mr D Goqo, he testified *inter alia* that funds were transferred to the entities mentioned in charges 1 to 5 without a proper evaluation of the project being conducted beforehand, which was contrary to s 38(1)(a)(iv) of the PFMA. Also, the payment of R 70 million to MADC was not authorised by the Treasury and payments were made to projects that were not functioning. Further, he testified that there were no supporting documents relating to the funds transferred and that MADC was appointed without an open tender process being followed and without appointment procedures being completed. MADC was also paid without rendering any services. Payments to the Kind Lemon project were made despite the absence of supporting documents and contrary to the terms of the grant. Moreover payments were made despite the fact the project was non-functional. The applicant had not ensured that the utilisation of the funds was properly monitored and reported on.

[41] Goqo sought to argue that all the transactions covered by the charges fell under s 42 of the PFMA but struggled to explain how the transactions were transfers pursuant to a transfer of functions between government entities which required Treasury approval in terms of Treasury regulation 6.5. Although he was adamant that the projects mentioned in charges 1 to 6 were found to be non-functioning when they were investigated, and that this meant that wasteful and fruitless expenditure had been occurred, he conceded that the applicant had not been charged with authorising or permitting fruitless and wasteful expenditure. He did testify that in relation to the Kind Lemon project, there was no evidence that the items which the transfer of R 417,000 was to cover had been procured.

[42] Ms Sithole, the head of the Department also testified. She took over the reins from the Applicant in 2008 who was acting in the post at the time.

She confirmed that the applicant's responsibility as accounting officer was to ensure that systems were in place to ensure that grant moneys had been utilised for the purpose intended. In relation to the payment to Coromandel, that payment was for services rendered to MADC and should only have been made following a proper tender process, because that payment was made to Coromandel not as a grant payment to Coromandel in its capacity as a beneficiary but as a payment made for services rendered to MADC, in Coromandel's capacity of a service provider. Moreover, the payment should have been made to MADC and not directly to Coromandel. She accepted that the application for grant funding for the Kind Lemon project had been approved by the Department's bid committee but maintained that there should have been a competitive bidding process followed which was not done. It was unclear from her evidence whether the competitive bidding process related to the application for grant funding itself or to the procurement of services and suppliers by the Kind Lemon project who would be paid out of the grant raised from the Department.

[43] In relation to the payment to the Kind Lemon project there were no supporting documents attached to the letter from the Chief Financial Officer motivating payment of the grant and the applicant as the accounting officer ought not to have approved the payment without the documents and no supporting documents could be found. When the beekeeping project was investigated it was found that no feasibility study had been conducted prior to the funds being transferred. The applicant failed, not because he did not anticipate the failure of this and other projects which received grants, but because he did not take measures to ensure that the expenditure was not fruitless, such as ensuring that a clear project management plan existed. It was his duty to ensure that these measures were in place, not that he had to perform those tasks personally.

[44] From her testimony it seems that when the projects were investigated there was either no supporting documentation or insufficient documentation to identify if the funds had been utilised for the intended purposes. The documentation available consisted of the motivation for the

grants in question, but what was lacking was evidence of how the grant was actually spent and the projects were unable to provide proper records of how money had been spent.

[45] In dealing with the difficulty of the absence of a charge of fruitless and wasteful expenditure, Sithole sought to explain that the fruitless and wasteful expenditure was simply another consequence of the applicant not complying with s 42 of the PFMA.

[46] The applicant's answer to this was that, service level agreements with reporting mechanisms had been drawn up in relation to all the projects. He did not directly address the absence of supporting documents for each payment. In relation to the huge transfer of R 70 million to MADC In any event, he consistently maintained that the breaches of the PFMA and Treasury regulations mentioned in the charges were of no relevance to the transfers made. The applicant claimed he had authorised the payments in terms of s 38(1)(j) of the PFMA and Treasury Regulation 4.8.1.

[47] Ms Sithole explained that even if s 42 of the PFMA was not applicable to the transactions in question, the applicant was not excused from ensuring that proper financial procedures were followed. The charge relating to payment of Coromandel Farmers Trust concerned a failure to ensure that proper procurement procedures had been followed before payment to Coromandel as a service provider to MADC was approved. The applicant claimed that he had authorised payment for Coromandel's services to be made to MADC and not directly to Coromandel. MADC had presented an invoice to the Department for the services rendered by Coromandel. He was unaware that the payment had been made directly to Coromandel. The applicant claimed that if he had known this had happened he would have investigated the matter.

[48] Throughout the testimony of the Sithole and Goqo, they were consistently challenged on how the charges framed under s 42 of the PFMA and Treasury regulation 6.5 did not apply to the transfers that were the subject matter of the charges and that the alleged misconduct they wanted to hold the applicant accountable for was not set out in the charges against him. Neither of them could explain why charges had not been framed under s

38 of the PFMA if that was the gravamen of the complaint against the applicant. The arbitrator simply dismissed the applicant's defence that the Department had framed the charges incorrectly and was satisfied that he was nonetheless guilty of serious misconduct even if the grounds of misconduct were different.

[49] It is well established that disciplinary proceedings are not criminal proceedings and a degree of latitude is permissible in interpreting the ambit of disciplinary charges. Thus in *Woolworths (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others*[5] the LAC reiterated the approach usually adopted in cases where there is alleged unfairness arising from the framing of the charge:

> "[32] Unlike in criminal proceedings where it is said that 'the description of any statutory offence in the words of the law creating the offence, or in similar words, shall be sufficient',the misconduct charge on and for which the employee was arraigned and convicted at the disciplinary enquiry did not necessarily have to be strictly framed in accordance with the wording of the relevant acts of misconduct as listed in the appellant's disciplinary codes, referred to above. It was sufficient that the wording of the misconduct alleged in the charge-sheet conformed, with sufficient clarity so as to be understood by the employee, to the substance and import of any one or more of the listed offences. After all, it is to be borne in mind that misconduct charges in the workplace are generally drafted by people who are not legally qualified and trained. In this regard I refer to the work of Le Roux & Van Niekerk where the learned authors offer a suitable example, with which I agree:
>
> 'Employers embarking on disciplinary proceedings occasionally define the alleged misconduct incorrectly. For example, an employee is charged with theft and the evidence either at the disciplinary enquiry or during the industrial court proceedings, establishes unauthorised possession of company property. Here the rule appears to be that, provided a disciplinary rule has been contravened, that the employee knew that such conduct could be the subject of disciplinary proceedings, and that he was not significantly prejudiced by the incorrect characterization, discipline

[5] (2011) 32 ILJ 2455 (LAC)

> appropriate to the A offence found to have been committed may be imposed.'
>
> [33] To my mind, the misconduct charge against the employee was framed in such a manner as to have sufficiently embraced most of the specific acts of misconduct listed in the appellant's 'Honesty Code of Conduct' and the 'Disciplinary Code: Policy Amended 15/5/2000',which I have referred to above."[6]

(emphasis added – footnotes omitted)

[50] The essential issue is whether the employee would have been prejudiced in the conduct of their defence. In this instance, the applicant was found guilty of the charges as they were framed. He then conducted his defence confident that there was no way in which the transfers he authorised could be construed as transfers forming part and parcel of a transfer of functions as envisaged in s 42 of the PFMA read with Treasury Regulation 6.5. It is obvious that this was the charge he attempted to meet and that the employer laboriously tried to squeeze its case against him within the four corners of the charge. Failing that it resorted to holding him liable for misconduct under s 38 of the PFMA. The arbitrator acquiesced in allowing the scope of the charges to be materially extended to embrace misconduct under s 38 of the PFMA.

[51] I am mindful of the arbitrator's dilemma when it became apparent that issues of the applicant's accountability would have been better addressed under s 38 and that under that provision there was a much stronger case for him to answer than under the charges on which he was originally dismissed. But this is not a case in which the inappropriate drafting of the charge on which the employee was found guilty is an insignificant issue.

[52] The problem is that the charge was not framed sufficiently widely to cover most infractions the applicant might have been guilty of in relation to the transactions in question. If anything, the charge was very narrowly and specifically framed. The other difficulty is that the charge was framed with particular statutory provisions in mind and there was no reason for the applicant to have supposed that this included a broader claim that he must

[6] At 2467-8.

be prepared to defend himself against alleged breaches of other specific provisions of PFMA as instances of financial mismanagement or negligence.

[53] The employer proceeded to dismiss the applicant on the basis of those narrowly framed charges, when it could easily have amended and broadened their scope at any stage during the internal disciplinary proceedings. It might be the case that the employer could have argued that it was apparent from the course of the enquiry that the charges the applicant faced were broader in ambit than the way they were framed, but from the limited material available to the court, it is apparent that even in the course of disciplinary enquiry, the thrust of the case was that the employer insisted the applicant's conduct amounted to a breach of s 38 of the PFMA and Treasury Regulation 6.5. The central bone of contention between the parties at the enquiry was whether the employer's interpretation of those provisions was applicable to the facts, not whether the applicant was, in the alternative, guilty of other misconduct under s 38 of the PFMA.

[54] In the circumstances, it is clear that the arbitrator misconstrued his role which was to consider if the applicant was guilty of the charge for which he was dismissed, on the basis of having made the transfers contrary to the provisions of s 42 of the PFMA and Treasury Regulation 6.5. In widening the enquiry and entertaining distinctly additional charges the arbitrator acted impermissibly and effectively also exceeded his jurisdiction. Insofar as he reaffirmed the applicant was guilty of the charges 1 to 6, and did not rely on an expanded notion of the misconduct the applicant was guilty of, this conclusion cannot constitute a plausible interpretation of the evidence in relation to the nature of the charges.

[55] While his finding of guilt must be set aside on this basis, I am not of the view that the applicant should be reinstated as a remedy for his substantively unfair dismissal. He himself testified without much evidentiary basis that he believed he was the victim of a conspiracy. It is difficult to see how the trust relationship between him and the department could persist in the circumstances. In relation to the appropriate

compensation, I am not satisfied that the applicant comes out of the arbitration untainted. A few examples might be mentioned which give rise to a serious sense of disquiet about his conduct as accounting officer. He never sought to explain how the actual expenditure of the grants made was monitored and seemed content to rely on the fact that formal undertakings concluded with the various projects in terms of which they were supposed to act in a financially accountable fashion. He never explained why the projects handling of the funds was not closely monitored in practice or why there seemed to be an absence of supporting documents for expenses met with the grant funding advanced to those projects.

[56] I also accept that there was some procedural unfairness which occurred when the presiding officer decided the outcome of the enquiry without first clarifying that he would no longer wait for the parties to try and agree on the admission of the evidence of the applicant's additional witness on the interpretation of the PFMA, or without making it clear that he was not going to hear such evidence and would simply deliver the outcome on the basis of the evidence coupled with written submissions of the parties. He also should have made his intentions clear about the hearing of additional evidence in mitigation or aggravation before handing down his verdict and sanction and this was unfair.

[57] In all the circumstances, I believe six months' remuneration is adequate compensation for the applicant's unfair dismissal.

[58] The considerable difficulties the court has had in deciding this matter in the absence of a bundle of documents makes it fair and equitable in my view that the applicant should not be entitled to his costs.

Order

[59] The arbitration award of the second respondent dated 8 January 2012 issued under case number GPBC 573/09 is reviewed and set aside except in so far as the arbitrator found the applicant not guilty of charges 7 to 9.

[60] The arbitrator's finding that the applicant's dismissal was substantively and procedurally fair is substituted with a finding that his dismissal was

substantively and procedurally unfair and an order that the third respondent must pay the applicant six months' remuneration calculated as at the date of the applicant's dismissal as compensation for his unfair dismissal, within 15 days of the date of this judgment.

[61] In the event the parties cannot agree on the applicant's rate of remuneration at the date of his dismissal, either party may apply to the court for the court to determine the rate.

[62] No order is made as to costs.

Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	M Mnyatheli instructed by P L Samuels Attorneys
THIRD RESPONDENT:	P L Dikolomela instructed by Morathi Mataka Attorneys