GPSSBC

GENERAL PUBLIC SERVICE SECTOR BARGAINING COUNCIL

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ARBITRATION AWARD

Panelist/s: Lufuno Ramabulana
Case No.: GPBC205/2016
Date of Award: 13/02/2021

In the ARBITRATION between:

Mr. Loyiso Luzuko Marasela

(Union / Applicant)

And

Gauteng Department of Roads & Transport

(Respondent)

Union/Applicant's representative: Ms Pumla Nkosi

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INTRODUCTION AND REPRESENTATION

1 This arbitration concerns the alleged unfair dismissal of the applicant Mr Loyiso Marasela, he challenges both the procedural as well as the substantive fairness of his dismissal. The arbitration was held under the auspices of the GPSSBC.

2 It was not disputed that the GPSSBC has jurisdiction to deal with his case and the following are also not in dispute.

2.1 That the Applicant was employed as a Chief Director earning R1 058 145, 00.

2.2 That the Applicant was dismissed by the Respondent on the 30th of November 2015.

2.3 That the referral to the GPSSBC was made on time.

3 The Applicant, Mr Loyiso Marasela attended all his arbitration meetings, both parties were represented by legal practitioners as detailed on the cover page of this award.

4 The arbitration only properly started on the 21st of January 2020. Before this date there were other sittings, but nothing really happened in these sittings except that the Applicant initially only challenged the procedural aspect of his dismissal. At the process that commenced on the 21st of January 2020, he now changed this position and challenged his dismissal on both procedural and substantive grounds.

5 The arbitration proceedings started at the GPSSBC and due to the Corona Virus pandemic where access to the offices of the GPSSBC were restricted, the respondent legal representative offered their offices and we continued with the hearing until completion on the 25th November 2020.

6 I wish to express my gratitude and thanks to both parties and their legal representative for their professional conduct at this arbitration, their submissions which helped the arbitration greatly and the respondent’s representative who provided this process with a venue when we greatly needed it. They helped to ensure that this arbitration is finalized earlier than it would have taken considering the international pandemic. All the corona-virus precautions were observed at the offices of Msikinya Attorneys & Associates.

7 The entire arbitration was recorded mechanically and I also took personal notes for future reference and for the purposes of writing the award. The records have been passed on to the GPSSBC for their own safekeeping and for future references.

ISSUES IN DISPUTE

8 As already stated the applicant's case is one of alleged unfair dismissal on both procedural and substantive grounds.

9 The procedural ground has an unusual element in that he was dismissed in absentia (the proper context of his absences is detailed in this arbitration).

10 I prefer to say unusual because, though this kind of dismissal happens, as arbitrators we are then given an added scope work in determining if the decision to proceed with the disciplinary hearing in the absence of an employee was arrived at fairly and properly.

11 It was also the procedural grounds for his dismissal that applicant sought to explore in the earlier proceedings before me. This position has since changed and applicant put the respondent to prove the dismissal on all grounds.

12 As the arbitrator in this case I had the benefit of hearing the entire case from both parties and besides what I will determine on the issues related to "absentia dismissal", I will be able to dispose of the case even on the merits of the dismissal, employment dismissal arbitrations are heard on a "de novo" basis (De novo is accepted as meaning from the beginning).

BACKGROUND TO THE DISPUTE

13 These are mainly common cause issues and the history of the dispute, parties have in their pre-arbitration minutes greatly assisted this arbitration process by pointing to issues they do not agree and those issues that needed my attention. In compiling the background to the dispute I was assisted greatly by the pre-arbitration minutes and evidence that have not been disputed.

14 In compiling the background to the dispute, I assisted by the pre-arbitration minutes, the evidence and the bundles that have were presented.

15 Applicant was re-employed or reinstated in the Department in 2011, this after he was dismissed and reinstated by a GPSSBC arbitration award in his favour.

16 On his return, the position he held then was unavailable for reasons explained at the arbitration hearing, the respondent settled with him and relocated him to the current Department and the position.

SUBMISSIONS BY THE PARTIES

EMPLOYER/RESPONDENT 'SUBMISSIONS

17 The respondent presented their oral evidence through the testimony of three witnesses (Cedric Bessit, Ishmail Cantitoo & Ms Noxolo Maninjwa).

MR CEDRIC SHAUN BESSIT

18 He was a civil engineer employed by SMEC and was involved at the Leratong inter Modal transport facility project, the project was meant to cater for Taxis, bus and train facilities and was owned by the Gauteng Provincial Government Department of Roads and Transport.

19 In August 2013 SMEC was appointment as the engineer and implementing agent, the role players were the project owner, SMEC (was the project engineer) and Thibololo was the contractor.

20 The role of the implementing agent (SMEC) was the project construction monitor, their role was to assist with monitoring the construction work and verifying work and payments and to also monitor the quality of work. Monitoring the implementing of project included the quality of work,

21 Their contract allows them to certify payments, there were contradictions with the Department and the contractor in relation to their work and the contract between the Department and the Contractor.

22 They certify the work on site and contractor will issue payment certificate and they will then certify the payment certificate and the Department will proceed with payments.

23 The Project was done in phases, SMEC was only appointed for phase 1, phase one involved constructing half of the taxi rank, market store, bus base and part of admin work. The design was initially done by another company.

24 SMEC did not start with the project, they only started in 2013/08 after the project has taken off from the ground, he joined SMEC in 2014. The design was already done and SMEC was appointed to implement.

25 Clever Kativo was the project liaison and that changed in April/May 2014 and Ishmail Canthitoo was assigned as the project liaison, from SMEC side the witness was the project contact person and Mr Modisa was the contact on the contractor side, these were people who were responsible for signing project matters as delegated by the parties they represent.

26 Billing was done monthly and cumulatively, payment certificate will be certified, submitted and paid, the contractor in terms of the contract was not prohibited from dealing with the Department directly.

27 They pay in terms of tender items which have agreed values and could not be amended, payment certificate would be issued in terms of the bill of quantities “BOQ”, the project manager would certify and in this case it would have been Canthitoo. In a normal project the engineer would certify the work, quality and progress. The current contract allowed for the contractor to deal with the employer.

28 Thibololo’s contract with Department did not state or provide for the project management, in the contract of the contractor they agree on the role players Clever, later Ishmail and the Applicant (employer). SMEC was to monitor progress and quality. SMEC’s contract provides for them to supervise the project.

29 They should have been properly appointed by the Department and granted duties in line with their roles but their roles were not properly made up to say the least.

30 Their hands were somehow tide up. In reality or in practise they should have been allocated more prominent supervisory role and should have had clear powers to monitor.

31 His first contact with the applicant happened when applicant contacted them to indicate that Thibololo had been appointed as the contractor and they must meet with the contractor, he understood him to be the direct manager of Clever and Ishmail Canthitoo.

32 Clever was the first contact person and he was followed by Ishmail Canthitoo, Applicant later took over when Ishmail was on leave and that situation remained until the project was halted/stopped.

33 Their work on page 11-12 bundle D are detailed on the page and they did mostly administrative work, this include the activities as indicated on page 13. He was the supervisor in terms of his contract with SMEC and the person to authorise project related matters for the Leratong project.

34 The contractor could ignore them in terms of the contract with the employer. The Contractor could deal with the employer directly, however in terms of their contract they were responsible for certifying the work that has been done before the contractor/employer could take documents for payment or make any payments.

35 In term of the contractor's contract the contractor can go to the employer, Thibolo's contract did not oblige them to do their work and its matters through SMEC, however the employer/Department was obliged in terms of their contract with SMEC was compelled to consult the SMEC/engineer to certify the work of the contractor before payments can be processed.

36 Whichever way the employer would still be required to certify (with SMEC) the work undertaken by the contractor in terms of the agreement between SMEC and the employer. He is aware of the case against the applicant, and he also testified at the disciplinary hearing.

37 Payment 2 certificate on bundle C and documents 103-109 are documents required for payments, the said payment certificate was not paid by the Department because the payment was too large. The certificate came back and was broken down into three separate invoices 2, 3 and 4.

38 The payment certificate was given back to him by the contractor from Thibololo as 2, 3 and 4, who indicated it came back from Mr Marasela and was broken down for the contractor to be paid urgently. It was also stated applicant is waiting for the payment certificates urgently. The original payment certificate 2 amount was over R6.5m. SMEC signed and certified the three payments certificates.

39 On page 60-61-62 are invoice 3 and these are part of the separated invoice 2 invoice 3 is just above 2 million Rands. The total combined amount is on page 74 R6 555 736, 27. The total amount on the separated invoices was higher than the original certificate 2.

40 The three invoices were not verified because he was told applicant was waiting for them, he declined to certify invoice no 5 because it constituted new work.

41 Original invoice 2 was in July 2014 and the separated invoices with certificate no 5 was submitted in the beginning of August 2014, he did not sign certificate 5 because it was new work. He communicated to Marasela and the contractor.

42 He signed invoice 2, 3, 4 and then consulted the applicant, he wrote to Applicant raising concern about certificate no 5 which was presented in a rush-rush manner.

43 Errors in payment certificate can be corrected in the payment certificate that followed the incorrect one, this was allowed in terms of the contract. He wanted to use certificate 5 to correct errors made in 2, 3, 4.

44 He understood applicant to have been aware of the split, he was not present when contractor approached applicant to break-down the payments certificates. SMEC certified the separated invoices as they understood he agreed to the arrangements.

45 On three payment certificates, that he understood they would be fitted within the limitations of the applicant's financial authority.

46 SMEC did not approve certificate 5, they highlighted inflated amounts and the Contractor did not want to adjust the inflated amounts. The contractor signed payment certificate 5, SMEC did not sign because of the inflated amounts. The certificate drifted between the contractor and employer, at some point Mr Cantithoo asked them to sign and they refused to sign it.

47 Certificate 5 was submitted on the 04th August 2014, they needed time (48hours) to engage and verify it and they communicated that, they rejected the certificate 5 because some amounts were changed from the tendered amount in the contract.

48 After the rejection of certificate 5, they communicated to contractor and employer on the reasons. Certificate 5 was rejected more than once and continue to be resubmitted. Daniel Sekutu was the contact from the contractor who submitted the payments certificates.

49 Payment certificate 2 (separated to be payment certificate 2,3,4) contained errors and were paid with the errors, those errors needed to be corrected in payment certificate 5, applicant enquired from his junior why they have not signed certificate 5.

50 He responded to the inquiry in writing and repeated his reasons for not certifying the certificate 5 to the applicant. He raised all the concerns and blending issues that were involved, Canthitoo indicated they should respond to Marasela and that explains why they wrote to Marasela.

51 Marasela engaged them in a manner that suggests he required responses immediately, he understood Marasela to be the Chief Director and the Project Manager. He was also the immediate supervisor of Mr Canthitoo. Payment of certificate 5 was made outside the normal route and was not certified by SMEC or the engineer.

52 Certificate 5 was paid without SMEC certifying it, the contractor could go to Marasela to certify, Marasela was obliged to come to SMEC in terms of their contract with the employer. They did not have to sign anything but the Department was obliged to come to them for verification and certification of the work done.

53 Payment could not be paid without the SMEC certifying it otherwise the payment would be irregular. They were informed it was paid without following the procedure and irregularly.

54 Under cross examination Bessit informed the hearing he is a registered civil engineer and not an accredited engineer, he is registered with the ACSA Engineering SA. He has since left SMEC in 2016 and he is not an independent contractor.

55 In the Leratong Modal facility, SMEC provided amongst other things full-time site construction supervision, project management, professional registered engineering services and resident engineering work on a limited basis. The witness was rendering project management and professional registered engineering work.

56 He concedes and attest in his own words that the service level agreement “SLA” between SMEC SA and the respondent contradicts itself and it was not properly drafted. The drafter also used none existing levels

like the usage of level 4, despite these flaws they still had to comply with the SLA and as disputes maybe cured by the common law and the guidelines of the Engineering Council.

57 SMEC signed the SLA with the contradictory clauses, they had a duty to comply with directives, SMEC was obliged to comply with reasonable instructions from the respondent, and must co-operate in good faith in the provision of services with the respondent and that SMEC duties only arises from the contract "SLA".

58 Bessit as an employee of SMEC was bound by the SLA and any direction, notice to vary scope and nature of the SLA. He concedes that variation may affect the general duties of SMEC as contained in their contract with the Employer.

59 He was not familiar with applicant's duties in the Department and can't comment about applicant's position, his duties in the Department, and can only note what has been brought to his attention as constituting applicant's duties in terms of his contract of employment and annexures.

60 He interacted with applicant in line with the SLA and has no knowledge of the internal workings in the Department.

61 He cannot dispute that applicant's duties entails supporting implementation of transport policies, transport infrastructure projects amongst others.

62 All payments certificate, invoices were interim in their nature, and only the last payment at close of the project would be the final payments. The project did not have the final payment certificate that collate all the payments certification from payment certificate one.

63 All payments made may be adjusted and corrected in the next payment certificate or invoice. All payment certificate will reflect the previous payment certificate and any adjustment that may be applicable, payment certificate 5 did not contain the arrangements on payment certificate 4.

64 He was unaware of applicant's delegated limit and learned same later, Sekhudu brought to him the original payment certificate 2 and told him applicant approved that it be broken down into 2, 3 & 4 in order to fit into applicant's authority. Payment 2, 3 & 4 combined are beyond applicant's delegation, though he did not know the person delegated above the applicant's authority.

65 He agreed as requested because the work related to payment certificate 2 had already been certified and approved. He did not do any verification and it later transpired that the payment certificate was exaggerated.

66 All work done are verified and certified by SMEC's site engineer and when the contractor issues a payment certificate and invoice same would have been agreed to on site, SMEC did not have to physically sign the payment certificate, they can certify the work using the email as done on payment certificate 06.

67 He was not aware of applicant's delegation at the time and was unaware of the reasons why the original payment certificate 02 was not paid or was rejected. He learned about the delegation during the previous processes (internal disciplinary hearing).

68 When original payment certificate 2 was broken down and brought to him as 2, 3 & 4, they also brought 5, he refused to pay 5 as no measurements were done. It also later transpired that certificate 2 (2, 3 &4) was also inflated by about R300 000, 00. The excess amounts are not a train smash as they could be corrected in the next payment certificate.

69 The contractor did not want to correct the inflated amount and same according to the witness will amount to corruption. The previous payment certificate overpayment was the real bone of contention otherwise the measurements for payment certificate 5 were ok.

70 The overpayments could be traced to payment certificate 2 were SMEC juniors certified incorrect amounts and in that case they did not check properly.

71 Certificate 6 was approved by email, SMEC did not have to physically sign and nothing prohibits the certification of payment certificate by email.

72 He sent an email to applicant and applicant confirmed he instructed Sekhudu to do the splitting and specifically indicated that has to do with the value of his authority or delegation and to get the contract going, as there has been delays.

73 The contract between SMEC and the respondent was worth around R3.1 m, and their duties were to be neutral and to protect the interest of both parties though the respondent was the entity responsible for their payments.

74 He agrees that they were obliged to comply with directions from the Respondent in terms of their contract, this being in terms of the scope. Applicant was the project manager, program manager and he also manages other projects, applicant was to report regularly on these projects and should be kept aware on developments. He left SMEC in 2016 for other engagements somewhere.

ISHMAIL CANTHITOO

75 The second witness for the respondent was Ishmail Canthitoo, he started his testimony after witness Bessit was unavailable. We completed his testimony and then moved back to Bessit, this was agreed to by both parties.

76 He was the Deputy Director administration, he managed various projects and the Leratong Modal Project fell under him. He reported to Simphiwe Maphumulo who reported to the applicant, he took over the work that was performed by Clever, Clever did not give him any handover and he was mostly assisted by Mr Bessit from SMEC in familiarising with work. When Maphumulo was removed, it meant that he will report directly to the applicant.

77 The new work was completely different, he moved from distributing bycles to a technical environment. He was the project representative/manager and used to attend project meetings and also giving feedback. He played no actual role or made decisions on construction matters but assisted with payments and dispute resolution.

78 He was reporting to the applicant who was fully involved in the project and attended site meetings, SMEC was involved in verification and they depended on SMEC to do invoice verification as in terms of the bill of quantities.

79 After the bidder was appointed, he met with applicant and the construction company, they gave the appointment letter to the contractor, the meeting was his introductory meeting to the contractor.

80 He facilitated the meeting of all the parties, SMEC, Contractor and the Department to plan the hand-over of the site to the contractor, the work-plan was developed and agreed to and presented to SMEC.

81 The claim of work done would be in terms of the bill of quantities and SMEC would be responsible with the verification of the actual work that has been done. The Department would not certify the work as that would have been done by SMEC, their duties were to process the payment.

82 Internally the financial delegations of various employees will direct where the invoice will be taken to for payments and they had 30 days to process and pay. Finance would not accept invoices dated a week late.

83 Invoice 2 should have gone to the DDG, but went to the applicant, the amount exceeded the applicant's authority, applicant signed for it. The R6.3m invoice was on its route to the DDG but was recalled by the applicant, the recalling was communicated to the applicant, the contractor was facing financial difficulties and did not want delays with payment.

84 The split was done by the contractor and certified by SMEC and applicant signed them as they were within his delegation after they were certified, the problem came when SMEC wanted to reverse the overpayment. The reversal started issues between SMEC and the contractor.

85 He was part of the meeting to resolve issues, on the advise of the engineer he refuse to sign invoice 5, applicant wanted them to proceed with it irrespective of the engineer's advise. The matter was within the applicant's delegation.

86 The practise of verification was not common practise, the applicant was the owner of the project and could in his view override the engineer and proceed.

87 Under cross examination, he admitted that, applicant had the prerogative to proceed without SMEC verifying, payment 5 issues were measurements and over claims that were made. Measurements were sorted but overpayments remained outstanding, the over claims came from certificate 2. The payment (2) was certified with errors and those errors continued into other invoices.

88 He also held separate meeting without the applicant's knowledge to try and resolve the issues and in one meeting the contractor agreed to correct the over payments, SMEC persisted with the refusal to sign even when the contractor had agreed to correct the over payments, he was pressured to sign payment certificate 5 by the applicant.

89 The matter escalated to a disciplinary issue (over his refusal to sign payment number 5), he escalated the matter to the HOD, he also started get threatening calls from the contractor. He ended up removing himself from the project and got medical help, from there on he never participated in the project.

90 Though he cannot remember the dates, he knows that applicant telephonically instructed the contractor to split the invoice to fit his financial delegations.

NOXOLO JOYCE MANINJWA

91 Noxolo Joyce Maninjwa also testified for the Respondent, for her part she was the Deputy Director General at the time and a direct supervisor to the applicant and was responsible for the applicant's Directorate.

92 She played a high level oversight role to the Leratong intermodal Project, she was not involved in the day to day running of the project, though matters maybe routed through her office to the HOD, applicant was the responsible person for the project and it fell under his authority.

93 Applicant would ensure implementation and that he monitor all controls, applicant was provided with all the resources to ensure that the project is successful.

94 Applicant signed for the project in his performance management contract and according to her applicant delivered on organisation, planning and implementation.

95 The project was not concluded due to land and legal issues with consulting engineers with the Department, these issues were never cleared from the start.

96 SMEC was responsible for managing the day to day running of the project and consult on all matters with the Project Manager. SMEC had the skills and technical know of the work and they were responsible for certifying all payments. They could escalate disputes to the Department through the project manager of the Department.

97 Payment and processing of payments were done by delegated officials in terms of their delegation as directed by the accounting officer in terms of the PFMA and the applicable financial delegation, applicant's

delegation was up to R2 250 000, 00 and her delegations starts were applicant's delegation ended going up.

98 She was aware of the invoice that was beyond applicant's mandate, same was submitted to her office and withdrawn later on, she never really followed up on it or on what happened to it. On payments that are over the applicant's delegation applicant would sign as recommending and the witness will co-sign along applicant's signature approving the payment.

99 She was contacted and spoke to Govender about the splitting of the invoices, the DDG office did not do any investigations on the matter and did not get any report, according to her splitting of invoices to avoid controls is not allowed, she however did not discuss the splitting of invoice 2 and it was never an issue between her and the applicant.

100 Under Cross examination that she would have intervened as the DDG if there were issues in the project, she was appraised about the project in meetings and through reports. She was called in a session with applicant and the HOD and same was about the working relationships.

APPLICANT'S CASE

101 Applicant testified in person and also called Mr Bonga Majola for his submission in defence of the allegations, the charges and supporting a case for his challenge on the dismissal.

BONGA MAJOLA

102 He told this arbitration about himself and the applicant reporting corruption, their reporting escalated to investigations and corrective measures.

103 Bonga also told the arbitration about PFMA compliance procedures and the various investigation procedures.

104 His emphasis was on treasury regulations, guidelines and financial misconduct.

LOYISO LUZUKO MARASELA

105 In his defence applicant informed the arbitration, he has a Bcompt Computer science amongst his qualifications and has worked in various Government Department and Eskom, he is well vexed with construction work and management of properties.

106 His new appointment was not really on competency but he was made to choose between two positions that were available, and he was not really assessed like any other employees who would have been appointed in terms of governing provisions.

107 He was unfairly dismissed and reinstated by the same bargaining council and on his return the entity he worked for was de-established and he settled with the respondent on the current position, for the purposes of this arbitration he worked in Public Transport operations and Public Transport special project and Integration, the Leratong project fell under his functions.

108 Leratong intermodal was one of his special projects and he had signed a performance management contract for its successful completion with his supervisor. His key roles were to manage, implement and co-ordination, when the project was signed they committed themselves to deliverables.

109 When Simphiwe was removed because of her conduct in other matters, Ishmail reported directly to him on the project, when he started in his new roles he found lots of disgruntled employees and most of them did not qualify properly. His Directorate was a dumping ground for disgruntled employees and those who did not qualify by the Respondent.

110 SMEC managed the day to day running of the project and was responsible for signing and approving payments and the respondent will pay in line with its processes and as advised by the engineer. Matters could be escalated to the Department if there are disagreement.

111 When he joined the Chief Directorate the process of appointing the contractor was underway, he started at the letter of appointment, SMEC was already appointed at time. He gave the letter of Thibololo's appointment with Ishmail.

112 SMEC was appointed to do design, review and to supervise, this is normally not a norm, they had earlier appointed another company to do the initial design, there are various forms of supervision, he raised various issues with the nature of SMEC's unusual role. SMEC neglected various aspects of their work.

113 The difference in kind of supervision would be the rights and responsibility, SMEC was appointed in terms of a service level agreement, SMEC could not have been an agent of the respondent, in government such kind of arrangements are not done.

114 The practise and the appointment of SMEC was not a norm in government, normally they appoint a service provider to design and thereafter hand over to contractor. In this case there were two engineers.

115 The project had many issues and amongst them municipality approvals that were not done, land corruption issues and environmental restrictions, the project had to be reconfigured and there were delays occasioned by the challenges he experienced.

116 SMEC pulled out because of the of disputes and allegations of additional work that has not been provided to them.

117 The Department were bound by their contract with the contractor and they were bound to pay within a particular period. After SMEC had certified that work has been done the contractor submit the payment certificate directly to the respondent.

118 Certificate 2 came in July and overflowed into August, when delays were occasioned certificate 5 was already on its way, it is the delays that caused the payment certificate to pile up. The process of payment requires the HOD to sign off and no payment can be released without the HOD signing for the release irrespective of the amount and the delegation.

119 Payments were cumulative and the certification by SMEC was not really clarified in the contract, payment certificate, the RLS documents can be signed by anyone there isn't a designated person to sign and those documents are administrative documents.

120 SMEC refused to sign documents and raised their issues, applicant made notes and decided to sign and pay certificate 5 subject to the results of the blended materials, payments could always be adjusted with the next payments. Though SMEC refused to sign 5, with payment 6 they opted to use emails. His

delegation was not subject to SMEC and he acted on the facts that were presented to him. There were no allegations of the contractor not doing any work.

121 According to applicant SMEC's signing of payment certificate 6 (by email) inherently means they have signed of payment certificate 5 as the payment certificates are cumulative and 6 would include work done under certificate 5.

122 He had had a delegation with full powers and authority and he did not have to consult his supervisor on the project, he also did not need SMEC's authority when making decisions. Invoice 2 original was taking time to be processed. He did not recall payment 2, the splitting was done by the contractor and SMEC, he was consulted and he agreed with the decision as he had the delegation and the authority.

123 Before a breach on section 44 and 45 of the PFMA can be established to have been committed a particular investigation is prescribed by the PFMA, that investigation was not done in his case Govender's investigations was not in line with the prescribed process.

124 The documents provided at the arbitration were payment packs extracts and lacking, the entire payment packs should have been submitted to the arbitration, these were also issues at the disciplinary hearing and he insisted and requested full documents from the employer. The emails were copied and pasted to look as if they form the same trail.

125 Not a lot came out of cross-examination.

ANALYSIS OF EVIDENCE AND FINDINGS

THE PROCEDURAL DISPUTE BETWEEN THE PARTIES

126 Applicant was dismissed in the absence of his cross-examination, he was absent for his cross examination in the main, his examination in chief was also not completed at the disciplinary hearing. He claims he was unwell due to poor health. The issues related to his ill health absences was a matter discussed and ruled on at the disciplinary hearing. The issue is also a subject matter of this arbitration for my attention,

guidance and a ruling on the fairness of the chairperson's conduct in continuing with the hearing in applicant's absence.

127 Applicant was charged in terms of clause 7 of the sms-handbook for Senior Managers, the sms-handbook procedures provides for a process before terminating the employment of employees covered in terms of the sms-handbook.

128 Accordingly the dismissal of the applicant was dependent the fulfilment of a pre-dismissal condition being a proper compliance with disciplinary procedures and this amongst others involve hearing the case against the applicant, applicant's response and his defence to the allegations.

129 Applicant's hearing was continued with in the absence of his completed evidence and it would appear his contribution and responses were not taken into account by the chairperson when making a final decision on his guilt.

130 Clause 4.1 & 4.2 of the Chairperson's findings states that:

4.1 "In my view, it would be unfair to place any weight on the evidence led by the employee which was not tested".

4.2 "Accordingly, I will place no value on such evidence particularly were accepting the evidence will be prejudicial to the employer".

131 The above suggests that applicant's evidence did not account for his defence, his evidence was not considered for the purposes of making the determination on his guilt, the critical part that I am obliged to make a determination on is if the prejudice was a fair prejudice or not under his circumstances.

132 I must also make a determination if the contractual obligation of the employer should be deemed to have been fulfilled, the applicant in their closing arguments referenced that "*where a party to a contract, in breach of his duty, prevents the fulfilment of a condition upon the happening of which he would become bound in obligation and does so with the intention of frustrating it, the unfulfilled condition will be deemed to have been fulfilled against him".*

133 The respondent placed before me the ruling of the chairperson and the records of the hearing leading up to the decision to proceed with the disciplinary hearing in the absence of the applicant's completed examination.

134 This appears to have affected the entire evidence of the applicant. The employer's evidence against the applicant was in effect unopposed.

135 At this arbitration, applicant was the only person to testify about the happenings at the disciplinary hearing and particularly the part dealing with his inability to attend the disciplinary hearing to complete his evidence.

136 Applicant also procured a medical report from Samuel Makgetla a clinical Psychologist (from Clinix Tshepo-Themba Private Hospital), he attended to the applicant after he was referred by Dr K Montingoe a Specialist Psychiatrist (Clinix Tshepo-Themba Private Hospital).

137 Both doctors were also authors of some of the medical certificates that applicant presented at the disciplinary hearing seeking postponements. There were occasions were these medical certificates were accepted and the hearing was postponed.

138 Applicant testified that he procured the report for the purposes of this arbitration, at the disciplinary hearing he had agreed to the employers' requirements to call his doctors, and the doctor/s had agreed to testify about his inability to attend the proceedings, the approach to the doctors was never made by the employer and the chairperson though they insisted and preferred on that process.

139 The crux of the ruling on continuing with the hearing was that the certificate did not indicate that applicant was incapable of attending his hearing and defend himself against the charges. The medical report suggests that applicant would not have been in a proper state of health and mind to attend and continue with his inquiry.

140 It would appear that had the Chairperson and the initiator followed up on the process they required the doctor would have given evidence on the applicant's state of heath and that would have assisted the chairperson's decision making process.

141 It is my view that the conclusion reached by the chairperson may have been different had the approach to have the doctor give evidence followed up. The doctor would have confirmed what he wrote to this arbitration and applicant may have been granted the benefit of recovering before completing his evidence, this was done before by the same chairperson at some point she rescinded her own ruling on the same grounds.

142 This process may have been done by requesting the doctor to provide a written statement or report as done at this arbitration, from the report it would appear that it may not have been appropriate to continue with the hearing in view of the applicant's deteriorating health condition.

143 It follows as my conclusion that applicant's entitlement to a fair procedure was compromised, violated and he was not fairly treated in as far as procedures were concerned. The deemed fulfilment of the employer's obligation in the circumstances does not arise.

<u>SUBSTANTIVE DISPUTE BETWEEN THE PARTIES</u>

144 The substantive case against the applicant is in terms of nine charges, three charges (charges 6, 8 &9) were abandoned, the chairperson found the applicant guilty of all the charges that were pursued before her, accordingly applicant was found guilty of charges 1, 2, 3, 4, 5, & 7.

145 Charge 1 accuses applicant of financial misconduct and contravening section 44 and 45 of the PFMA[1], he is alleged to have misconducted himself in the following manner:

138.1 ***"In that, on or about 4th of August 2014, you knowingly and unlawfully approved payments totalling R6 555 836, 27 to Thibololo Construction, which amount exceeded your delegated authority of payment approvals which restricts your authority as a Chief Director up to a maximum of R2 250 000, 00***.

146 Evidence presented by the employer which evidence is common cause between the parties suggests that what the employer took as approval was not paid as presented, this invoice was later withdrawn and split

[1] Public Finance Management Act 1 of 1999

into smaller payments that fits the applicant's authority. I will deal with the splitting of invoices/payments in this award on charge 2 later.

147 Further evidence that both parties agrees to suggests that the payment documents were presented by the applicant to his supervisor Ms Maninjwa for approval and from there on the documentations were to be taken to finance for payment, all payments within applicant's delegation goes for payment after applicant has approved or signed them.

148 It would appear that what the charges suggests, as approval was not approval but a recommendation otherwise same would not have been sent to Manijwa with a request for her approval. The evidence presented by Maninjwa confirms that what applicant did was just a recommendation and she would have signed alongside applicant's signature approving the transaction.

149 It is my conclusion that applicant was not guilty of approving a transaction beyond his financial delegation, applicant should not have been found guilty of charge one. He did not unlawfully authorise a transaction that was over his delegation, his attendance to payment 2 (original) was supported and also met the approval of his supervisor Ms Maninjwa.

150 If it were applicant's intentions to illegally approve certificate 2, he would not have presented it to his supervisor for approval, the subsequent splitting of payment certificate 2 is another matter that is dealt with in this award under separate merits and evidence.

151 Charge 2 accuses applicant of deliberately splitting payments and the charge is loaded as follows:

144.1 ***"In that you deliberately split payments relating to Thibololo construction under payment certificate 2,3 and 4 of which the cumulative value was R6 555 836, 26 into sums of R2 234 556. 18, R2 136 398. 76 and R2 250 000, 00 respectively and in doing so wilfully, deliberately and unlawfully circumvented the delegated financial authority which restricts your payment approval authority of an amount not exceeding R2 250 000, 00"***.

152 I have referred to payment 2 original which was about the amount referred to in charge one, this payment's documentations were sent by the applicant to the office of her supervisor who had the authority to approve all amounts beyond applicant's financial delegation, applicant sought to have her supervisor to approve the payment. This did not materialise and evidence placed before me suggests that there were delays in getting Ms Maninjwa to approve and this affected the contractor's operations financially.

153 I have also ruled that applicant could not be found guilty of approving amounts beyond his financial delegations in terms of charge 1, his actions were not of approval but a recommendation.

154 His referral of the payment to higher authority it's a clear demonstration that he lacked the necessary authority to approve the payment, applicant supervisor Ms Maninjwa concurred with his version as stated in this award.

155 What has been presented to me suggest that the Construction work for the Leratong Intermodal facility was approved and agreed at an amount around R69 m, the construction process and payments are paid in terms of what parties termed "a milestone" and as agreed in terms of the bill of quantities "BOQ"

156 SMEC was contracted to oversee the work and as an agent approving the work done and payments both the witnesses of the respondent and the applicants agrees that the service level agreement signed between SMEC and the respondent was somehow unusual, applicant referred to this contract as being out of norm/s.

157 When a particular milestone has been reached, the contractor prepares a payment certificate and all necessary documentations relevant for payments, the payment certificate will be signed off by SMEC who certifies the work and the payment. Evidence presented by Bassit suggests that:

157.1 SMEC did not have to physically sign the documents

157.2 Certification can be done by any form including by email.

157.3 SMEC did not really have the authority to stop the employer from paying without its approval.

157.4 Nothing prevents the contractor to deal directly with the employer

157.5 A departmental person handling a payment would have to refer to SMEC for certification before processing.

157.6 Applicant's contract related to his responsibilities as the project manager was not subject to any approval by SMEC.

157.7 His uncontroverted evidence and the evidence presented by his supervisory confirms he was given the authority to manage his projects and was vested with decision-making powers on the projects.

158 Applicant was not the person to generate and initiate a payment certificate such was presented to him after same has been agreed by SMEC and the Contractor, the Contractor was responsible for the generation of the payment certificate, he had no authority to generate or to dictate the form and content of a payment certificate.

159 It follows that he cannot purposefully or deliberately split a payment certificate that has been generated by the contractor and consented to by the engineer SMEC. What happened with payment certificate 2 original which became certificate 2, 3 &4 is in my view and as informed by the evidence the following.

159.1 The payment certificate 2 was signed off and sent to applicant in its original form.

159.2 Applicant processed it and sent it through to his supervisor for approval.

159.3 The certificate 2 was withdrawn and came back as split into three being (certificate 2, 3 & 4).

159.4 The broken down amounts fitted applicant s delegation and he signed them.

159.5 There were discussions about then certificates including emails between the parties.

160 It appears in my view that the splitting of the payment certificate 2 original into 2, 3 & 4 was an idea conceived by the contractor and the engineer and they then consulted with the applicant. Applicant agreed to the arrangements and this is also apparent on the email he directed to the persons that were involved.

161 In my view he had the authority to make such a decision after the Contractor and SMEC had agreed on it, It does not appear that SMEC was deluded into signing the certificates, they were part of the plan, the three certificates were properly sign although SMEC later admitted they contained errors and these were errors that SMEC sought to correct with payment certificate 5.

162 Applicant's evidence to the effect that he had the authority to take decision concerning the project was largely unchallenged and was to a degree validated by his supervisor Ms Maninjwa, it does not appear this

authority was exercised with devious or dishonest intent but for the benefit of the project that applicant was managing, contracted and authorised to take decisions.

163 It has not been demonstrated how the breaking down of payment 2 original into payment 2, 3 & 4 had compromised and affected a particular milestone in the BOQ and how in agreeing to such an arrangement applicant committed a misconduct.

164 I must add that no evidence was led at the arbitration to suggest malicious intentions by the applicant in doing his work. One would have expected Ms Maninjwa to have assisted this arbitration with such information, to the contrary she told the arbitration she saw no grounds for any corrective measures in applicant's work.

165 I conclude that I find Applicant not guilty of charge 2, the evidence presented and considered entirely does not convict applicant of this form of misconduct.

166 On charge three applicant was found guilty of financial misconduct, the chairperson reasoned her findings on the following:

> "*the employee approved for payment the claims by Thibololo which were over-inflated notwithstanding that this was brought to his attention by SMEC. The employee's conduct was inconsistent with his duties in terms of clause 14 of the Financial delegation which provides that approval of expenditure should only be done after the satisfactory service has been rendered. This rule also applies to goods delivered. By ignoring SMEC advise on the inflated items, the employee contravened his legal obligation to guard against incurring fruitless and wasteful and/or irregular expenditure. Therefore, I find him guilty of the charge*".

167 Charge three relates to payment certificate 3 and 4, evidence placed before me does not suggests that applicant ignored SMEC, in fact payment certificate 2 original was broken down into 2, 3 and 4, I have concluded in this award that the break-down of these certificates was done by agreement between SMEC and the Contractor in consultation with the applicant.

168 The project was a milestone project and any errors of a particular payment is corrected with the next invoice, the errors and overpayment were identified post the payment of the three payments and SMEC wanted those to be corrected using payment certificate 5.

169 If payment certificate 3 and 4 had errors and over payments, the error was the responsibility of SMEC and the Contractor, SMEC was responsible for verifying the work that has been done and certify payments, in any case Besset told this arbitration those issues were not a train-smash as they could always be corrected later within the duration of the contract. The alleged refusal by the Contractor to correct over payment using payment certificate was in my view a different matter for another process and arguments.

170 This arbitration was informed by Ishmail that various meetings were held to address the issues and it became an all-out dispute/fight between SMEC and the Contractor. SMEC told this arbitration that their other main reason for refusing to sign payment certificate 5 even after the contractor has agreed to correct the over payments were due to legal advice that they got.

171 The legal advice alleges fraud, the issue of legal advises as reasons for not doing their obligations in terms of the SLA was only told at this arbitration, one would have expected SMEC to have consulted the parties they were engaged with, I am just imagining Ishmail getting out of his way arranging all sorts of fruitless meetings, fruitless in that SMEC was never going to sign anything.

172 It is not clear why they preferred not to consult with other parties and particularly the respondent who they had a contract with, that consultation becomes necessary especially if one considers that SMEC claims the Department representative was obliged to come to them for verification, certification and payment of any invoice.

173 SMEC told the arbitration they were not obliged to physically sign any payment certificate and payment certificate 5 remained unsigned and unattended to in as far as SMEC's SLA obligations were concerned, and payment 6 was "email-authorised", Bessit told this arbitration he was under no obligation to physically sign any payment certificate.

174 If I accept that their email certification is appropriate, the certification of payment 5 remains unclear and the milestone correction of invoices remains compromised. In my view their certification of payment certificate 6 legally validates and clears payment certificate 5.

175 I conclude that, Applicant is not guilty of charge 3, the claim that applicant approved an over-inflated payment by Thibololo in my view does not arise given the evidence that has been presented at this arbitration.

176 Charge 4 finds applicant guilty of approving payment certificate 6 without SMEC's certification, SMEC told me they contract did not oblige them to certify by signing. Undisputed evidence by the applicant suggests that SLA did not provide were SMEC was to do their certification.

177 SMEC decided not to sign any certification, I assume this was after they received legal advice not to sign due to alleged, it maybe that they were defying their own SLA with the respondent, in any event the SLA was having its issues on not really meeting the standards and norms, both applicant and Bessit some-how agrees the SLA agreement was unusual.

178 Applicant was not bound by SMEC's certification and he was authorised to take decision, he had a project in his profile and in terms of his contract obliged to carry out and meet his contractual obligations. SMEC was not disregarded they stopped certifying due to the reason stated in this award and primarily because of the legal advice.

179 Applicant cannot be found guilty of charge 4, there was no obligation to recover any money from the contractor, evidence submitted suggests that the milestone invoices corrects themselves as the project moves on.

180 I have already addressed issues related to payment certificate 4, 5 & 6 and SMEC's authority was not disregarded, applicant as explained in this award took decisions where he needed to and he was authorised to make such decision. Payment certificate 6 has been addressed under charge 4 and payment certificate 4 & 5 were addressed in charge 2.

181 I do not find the applicant guilty of charge 5, I have in my analysis explained the reasons and the evidence that led to this conclusion.

182 I will deal with section 44 and 45 of the PFMA later in this award. So far I have not really find its applicability, but as it was the basis for the applicant's charges and dismissal it is only fair to demonstrate that such was considered and not ignored in this award.

183 Charge Seven accuses applicant of gross dishonesty as follows:

"in that you manipulated payment authority on certificate 6 whereby the signatories contained in the approval document were not authorised to have co-signed the said document thus deliberately and wilfully misrepresenting the signatories thereon to be authorised signatures to effect an undue payment".

184 Internally within the respondent it has not been placed before me who were the authorised signatures and where they derive their authorities. We were made aware by Maninjwa that applicant was authorised and resources to manage the project and could direct and mandate subordinates to carry out tasks in the Leratong intermodal project.

185 We were informed that Clever, Maphumulo were removed from the project and replaced. Ishmail was made to report directly to the applicant evidence submitted by Ishamil indicates he refused to sign for payment certificate because it was not signed by SMEC, though SMEC approved it by email.

186 His refusal escalated into what applicant refers to as insubordination and this was communicated to him (Ishmail), he later became ill and was not coming to work, that seems to have been the end of his role. He attests that he was not really qualified in this role and had to change from a bycle distribution environment to a technical environment. It also came to light that he was the only choice that applicant had at the time.

187 Applicant's evidence informed this arbitration there was no designated person to sign for what he termed receipt of the payment certificates or goods and services, people employed to execute the Ishmail role did not have the function to verify any work. The verification was the exercise of SMEC.

188 SMEC cancelled their role and applicant had a Thibololo contract in his hands with obligations to fulfil, I have confirmed his authority in this award, he was in my view entitled to delegate any of his resources to attend to any particular aspects of the binding roles.

189 I do not find applicant guilty of charge 7.

190 Much of the violations related to section 44 and 45 are claimed in the arguments from the legal representative, the respondent did not really lead any evidence on this aspect, what was placed before me which was not contradicted was from the applicant who informed the arbitration that before any violation could be concluded there must be a procedure to establish that and the procedure involves a prescribed investigation.

191 The Govender Investigation report was challenged as not meeting the prescribed requirements of the PFMA, and no evidence was placed before me to validate its legality. The claim of Govender investigation report's invalidity is in my view correct.

192 The prescribed investigation was not complied with by the respondent, the chairperson's conclusion that applicant violated section 44 & 45 was a futile conclusion in the absence of a PFMA investigation and a report.

193 In view of these it cannot be said that there was a violation of section 44, 45 of the PFMA.

194 The above completes my attendance of the arbitration hearing between the parties, I have in brief stated my findings, the findings takes into account the entire case presented to me, in the whole, I find Applicant not guilty of any charges. This being charge 1, 2, 3, 4, 5 & 7, It was not my duty to deal with charges that have been withdrawn.

195 In the whole the Respondent did not lead any oral evidence from the relevant employer witnesses, in the case of South African Social Security Agency v NEHAWU obo Punzi and Others[2], the learned Judge Rabkin-Naicker ruled in a matter involving a Commissioner accepting documentary evidence and allowing parties only to present written statements, the ruling states as follows:

> *"In the absence of such stated case, oral evidence should be led on the material facts in dispute at arbitration in terms of the LRA. Commissioners and arbitrators should not condone an agreement between the parties that no oral evidence be led unless such a stated case has been agreed, on which they may draw legal conclusions".*

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2 (C233/14) [2015] ZALCCT35; (20150 36 ILJ 2345 (LC) (30 APRIL 2015)

196 The context that finds relevance in this case is the no leading of evidence on the disputed issues by the respondent, I have referred to the evidence led by Bessit who was not an employee of the respondent, Ishmail who was the subordinate of the applicant. A relevant witness was Ms Noxolo Joyce Maninjwa, she told this arbitration applicant did nothing wrong, this being my characterisation of her submissions in the main.

197 I also find that applicant was treated unfairly in as far as procedures leading to his dismissal were concern, I am directed to make an award and a relief that applicant is entitled to taking into consideration the circumstances of his case.

198 Both parties were legally represented at this arbitration and at the disciplinary hearing, before me they agreed that costs should follow the results, meaning the successful party should be awarded cost. I also see no reason why such should not be the case.

199 In the main and in settling this matter, i find nothing that convinces me to depart from ordering the primary relief prescribed in the Labour Relations Act, and I award as follows:

AWARD

200 ***The dismissal of the applicant (Employee) Loyiso Marasela on the 30th November 2015 by his employer "The Respondent" (Gauteng Department of Roads & Transport) is found to be unfair on both procedure and substantive merits.***

201 ***I order the Respondent, Gauteng Department of Roads & Transport to reinstate the applicant, Loyiso Marasela with effect from the 01st December 2015 with no loss of benefits and/or remuneration.***

202 ***Applicant must report for work on the 01st March 2021 at the usual place of his work and if this has changed at the new premises of his employer.***

203 ***The respondent, Gauteng Department of Roads and Transport is also ordered to pay Applicant, Loyiso Marasela his salaries and benefits for the entire period of his unfair dismissal, this would be for 5 (five) years and three (3) months, being from December 2015 – February 2021. At the time***

of his dismissal applicant was earning a salary of R1 058 145, 00 (One Million Rands, Fifty-Eight Thousand Rands and One Hundred & Forty-Five Rands), this is in terms of the pre-arbitration minutes between the parties.

204 ***This salary would have escalated over the years through salary adjustments in the public service, the respondent is ordered to take this into consideration when paying applicant what I have ordered and quantified in this award.***

205 ***The respondent is ordered to pay applicant his salaries in the amount of R5 555 261, 25 (Five Million Rands, five hundred & fifty five Thousand Rands & Twenty-Five Cents. The salaries to be paid to the applicant must include all the escalations and adjustments for the period 30th June 2015-28 February 2021, any dispute on the amount payable or quantum can be referred to me for determination.***

206 ***The amount ordered in this award must be paid to the applicant within a period of 10 days or before the 01st March 2021.***

207 ***The respondent is also ordered to pay applicant his legal costs for this arbitration, as prescribed in terms of the rules of the GPSSBC.***

Done and dated at Pretoria on this the 13th Day of February 2021,

Panelist/s: Lufuno Ramabulana

GPSSBC