# RULING

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| **Case Number** | **GATW 15200-21** |
| **Senior Commissioner** | **Adv. GS Jansen van Vuuren** |
| **Date of Ruling** | **02 March 2022** |

**In the ARBITRATION between:**

**Koliswa Sheburi**
Applicant

and

**Railway Safety Regulator**
Respondent

## DETAILS OF HEARING AND REPRESENTATION

[1] The applicant in this matter is Koliswa Sheburi and the respondent is the Railway Safety Regulator. The dispute in question was set down for arbitration at CCMA Towers in Pretoria on 16 February 2022.

[2] The applicant was represented by Mr K. Munzhelele and the respondent was represented by Ms T. Motsai. Both representatives are attorneys.

[3] The proceedings were recorded digitally.

## BACKGROUND

[4] The applicant (a Legal Adviser) on 30 November 2021 referred an unfair labour practice dispute to the Commission relating to the respondent's alleged refusal to pay certain "benefits" to her. According to documents attached to the applicant's referral these "benefits" constituted salary notch and cost of living increases.

[5] The matter was set down for con-arb on 22 December 2021, but the respondent objected and the dispute could not be resolved.

[6] The matter was eventually set down for arbitration before me on 16 February 2021. The parties tabled signed minutes of a pre-arbitration conference which formulated the issues to be decided as follows:

(a) The question whether the application of a "Personal to Holder provision" to the applicant was procedurally and substantively fair.

(b) The question whether there was any substantive justification **for excluding the applicant from benefits which other employees were entitled to.**

[7] The respondent at the outset raised a *point in limine,* complaining about documents contained in the applicant's bundle of documents and insisted that I should make a ruling in this regard.

**THE RESPONDENT'S POINT IN LIMINE**

[8] Ms Motsai stated that the applicant's bundle of documents contained two confidential offers of employment made to certain employees. These documents disclosed the salary levels linked to the respective employees' job profiles and Ms Motsai submitted that this constituted a contravention of the Protection of Personal Information Act, 2013 (hereinafter referred to as the "POPI Act").

[9] Ms Motsai referred to section 3(1) of the POPI Act which provides that this Act applies to the **processing** of personal information and pointed out that section 1 of the said Act *inter alia* defines **"processing"** as *"dissemination by means of transmission, distribution or making available in any other form".*

[10] The respondent consequently sought an order in terms of which the applicant was ordered to remove the two confidential offers of employment from her bundle of documents.

**THE APPLICANT'S RESPONSE**

[11] Mr Munzhelele replied that the POPI Act was not applicable and based his submission on section 6(1)(e) which provides that this act does **not** apply to the processing of personal information relating to the judicial functions of a court referred to in section 166 of the Constitution. Mr Munzhelele contended that section 166 of the Constitution recognised the CCMA as a court.

[12] Mr Munzhelele furthermore stated that the two confidential offers of employment had been voluntarily made available to the applicant by the employees in question. This was substantiated by emails sent to the applicant. (Mr Munzhelele tabled copies of these emails.)

[13] Mr Munzhelele also claimed that the said employees had, in fact, consented to the applicant tabling their documents at this arbitration. He added that the applicant intended to compare herself with these employees with a view to proving that the respondent had committed an unfair labour practice.

**THE RESPONDENT'S REPLY**

[14] Ms Motsai, in reply, contested the averment that the POPI Act was not applicable and stated that the exclusion in section 6(1)(e) did not apply.

[15] Ms Motsai also pointed out that there was no proof that the employees in question had consented to the use of their personal information. Their emails made no mention of any consent.

**THE PROTECTION OF PERSONAL INFORMATION ACT, 2013**

[16] Section 2 of the **Protection of Personal Information Act, 2013** (i.e. the POPI Act) describes the purpose of the Act, which (according to subsection (2)(a)) includes the following:

"(to) give effect to the constitutional right to privacy, by safeguarding personal information when processed by a responsible party, subject to justifiable limitations that are aimed at-

(i) balancing the right to privacy against other rights, particularly the right of access to information; and

(ii) protecting important interests, including the free flow of information within the Republic and across international borders".

[17] Section 3 of the POPI Act covers the **application and interpretation** of the Act. Subsection (1)(a) provides that the Act applies to the **processing** of personal information *"entered in a record by or for **a responsible party** by making use of automated or non-automated means: Provided that when the recorded personal information is processed by non-automated means, it forms part of a filing system or is intended to form part thereof."*

[18] Section 1 of the POPI Act defines **"processing"** as:

"any operation or activity or any set of operations, whether or not by automatic means, concerning personal information, including-

*(a)* the collection, receipt, recording, organisation, collation, storage, updating or modification, retrieval, alteration, consultation or use;
*(b)* dissemination by means of transmission, distribution or making available in any other form; or
*(c)* merging, linking, as well as restriction, degradation, erasure or destruction of information"

[19] Section 1 of this Act defines a **responsible party** as a *"public or private body or any other person which, alone or in conjunction with others, determines the purpose of and means for processing personal information".*

[20] Section 6(1) of the POPI Act provides that this act does not apply to the processing of personal information-

*"(a)* in the course of a **purely personal or household activity**;
*(b)* ……..
*(c)* ……..
*(d)* ……..
*(e)* relating to the judicial functions of a court referred to in section 166 of the Constitution."

**ANALYSIS**

[21] Mr Munzhelele's averment that section 166 of the Constitution recognises the CCMA as a court cannot be accepted. It is trite that the CCMA is not a court of law and the exclusion in section 6(1)(e) of the POPI Act is consequently not applicable.

[22] The respondent's point *in limine* is, in any event, not aimed at the processing of personal information by the CCMA. The respondent seeks to prevent the processing (dissemination) of personal information **by the applicant** during this arbitration and the question is consequently whether the POPI Act is applicable to her in these circumstances.

[23] Section 3(1)(a) of the POPI Act provides that the Act applies to the processing of personal information *"entered in a record by or for **a responsible party** by making use of automated or non-automated means: Provided that when the recorded personal information is processed by non-automated means, it forms part of a filing system or is intended to form part thereof."* It is debatable whether the applicant could be deemed to be a "responsible party", but the personal information about to be introduced as evidence at this arbitration will neither form part of any filing system, nor would it be intended to form part of any filing system. It follows that the Act will not be applicable to the applicant.

[24] Section 6(1)(a) of the POPI Act also provides that the Act does not apply to the processing of personal information in the course of a purely personal or household activity and the presentation of a case by a party at a CCMA arbitration arguably constitutes a purely personal activity.

[25] In the event that I am wrong in holding that the POPI Act is not applicable, attention is drawn to the fact that section 2 makes it clear that the safeguarding of personal information is subject to justifiable limitations aimed at:

(a) balancing the right to privacy against other rights, particularly the right of access to information and

(b) protecting important interests, including the free flow of information.

The applicant's interests will consequently also have to be taken into consideration.

[26] There is, in any event, no indication that the two employees whose confidential information is at stake, had requested the respondent to protect that information and the respondent's authority to bring the

current application consequently has to be questioned. This is not about the integrity of personal information stored by the respondent. It is about information already in the possession of the applicant.

[27] The fact of the matter is that the said two employees had indeed furnished the relevant documents to the applicant. It is true that their emails made no mention of consent, but these employees must obviously have been aware of the fact that the applicant needed the information for a reason. They could, after all, have refused to furnish the documents to the applicant.

[28] The question has to be asked whether the respondent is indeed concerned about the protection of the rights of those two employees and whether this might not be an ingenious ploy to prevent the applicant from tabling evidence which could be damaging to respondent's case.

[29] Mr Munzhelele indicated that the applicant intended to compare her benefits with those of the said two employees in order to prove that the respondent had committed an unfair labour practice. It is, of course, often necessary to compare the benefits and remuneration of employees in order to establish inconsistency, a failure to exercise discretion fairly or even discrimination and this may irritate employers, but the CCMA is expected to afford each party a proper opportunity to state his case. The employee in ***Apollo Tyres SA (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & Others (2013) 34 ILJ 1120 (LAC),*** for instance, had to compare her position with that of others in order to show that the employer had exercised its discretion unfairly. The CCMA will not hamshackle the applicant *in casu* by preventing her from stating her case and presenting relevant evidence.

[30] It is noted from the minutes of the pre-arbitration conference that the parties have agreed that the documents in the bundles are what they purport to be, but that the correctness of the contents has not been admitted. The applicant will consequently have to prove the correctness of the contents and she may have to call the two employees involved to confirm that.

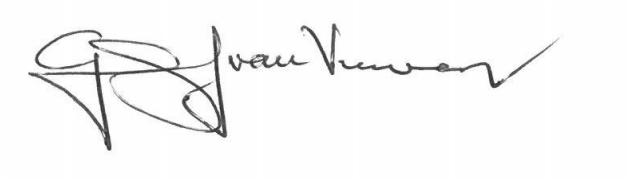
**VIRTUAL PROCEEDINGS**

[31] The minutes of the pre-arbitration conference show that the applicant intends to call witnesses to give evidence online and that the respondent did not have any objection. The parties' attention is, however, drawn to the fact that certain formalities have to be complied with and that arrangements in this regard will have to be made with the Case Management Officer.

**RULING**

(a) The respondent's application for an order in terms of which the applicant is compelled to remove two confidential offers of employment from her bundle of documents is dismissed.

(b) Case Management is directed to obtain the necessary consent forms from the parties and to set this matter down for arbitration online.



Signature: _____

Commissioner: ***Gerhard Jansen van Vuuren***

Sector: ***Transport (private)***