DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.

19 January 23
DATE SIGNATURE

THE JUDICIARY · REPUBLIC OF SOUTH AFRICA ·

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no. JR1467/21

In the matter between:

ANDRIES THEMBA Applicant

and

SOUTH AFRICAN FORESTRY COMPANY SOC LIMITED ("SAFCOL") First Respondent

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION (CCMA) Second Respondent

LETSEMA MOKOENA *N.O* Third Respondent

Date heard: **11 January 2023**

Date delivered: 19 January 2023

JUDGMENT

BALOYI AJ

Introduction

1. It is the third respondent's arbitration award at the center of this application. The applicant is seeking its review and set aside based on the grounds pleaded in its founding and supplementary affidavits. The applicant also filed a substantive application for condonation of the late filing of the review application. The condonation application is not opposed and this was further confirmed by the counsel for first respondent. The applicant served the application prior to the expiry of the six weeks within which the application was to be filed. He, however, failed to timeously file the application with the Registrar of this Court. The filing was only effected four days after the date of expiry of the six weeks period.

2. In view of the slight delay, which is merely about the filing with the Registrar, coupled with an absence of prejudice to any party, this Court's discretion heavily leaned towards the granting of the condonation application. I accordingly granted condonation prior to the commencement of the hearing of the matter on the merits.

Factual Background

3. The applicant and the first respondent entered into an employment relationship on 03 November 2014. He was occupying the position of Log Marketing Manager. He was dismissed on 20 October 2020 after being found guilty on five of the six charges. When the matter was taken for arbitration, focus on four counts (1.1.1 to 1.1.4) of charge 1.1. A final written warning was imposed in respect of charge 1.5 and it was of no consequence in the arbitration proceedings.

4. It is common cause that the first respondent elected not to pursue its case in respect of one of the four remaining charges (1.3). The third respondent was as a result required to determine the matter in respect of three charges (1.1, 1.2, and 1.4). At the end of the proceedings, he found the applicant not guilty on two charges, that is, 1.2 and 1.4. He found the applicant guilty on one charge, specifically on the four counts of charge 1.1. For the sake of convenience, the relevant charge was crafted as follows:

> "1.1 Contravention of the SAFCOL procurement policy
>
> **SAPPI**
>
> 1.1.1 You approved the appointment of Buhlebetfu to transport pulp to Sappi's Mills without the delegated authority and without following the SAFCOL SCM policy.
>
> 1.1.2 You approved the appointment of Khanyi Ilanga to transport pulp to Sappi's Mills without the delegated authority and without following the SAFCOL SCM policy.
>
> **Tzaneng Treated Timbers**
>
> 1.1.3 You appointment of Tzaneng to harvest pulp for SAFCOL without the delegated authority and without following the SAFCOL SCM policy.
>
> **Timrite**
>
> 1.1.4 You appointed Timrite to harvest pulp for SAFCOL without the delegated authority and without following the SAFCOL SCM policy."

5. This application is solely rested on this charge. It is highly notable that all charges point to the contravention of the Supply Chain Management Policy by the applicant. The first respondent is a public entity and its financial administration is governed by Public Finance Management Act (PFMA). The first respondent sourced the services of a forensic

investigator to probe certain transactions made on its behalf under the management of the Log Marketing department that was headed by the applicant.

6. In terms of the findings in the report of the forensic investigation, the applicant was found to have contravened the Public Finance Management Act and recommendations that he be charged were made. The main issue is that in all four counts the applicant appointed third parties to provide services to the first respondent without ensuring that competitive bidding was undertaken. The appointment of these third parties was not carried out in a system that is fair, equitable, transparent, competitive, and cost-effective as set out in section 217 of the Constitution of the Republic.

7. In response thereto, the applicant maintained that the nature of transactions that Log Marketing is tasked with is that of revenue generation. The administration of such transactions is excluded from the application of the PFMA in terms of Annexure A of the Supply Chain Management Policy. Furthermore, the job profile of his position allowed him to negotiate and source buyers of the first respondent's products. This enabled him to generate various memoranda for the approval of EXCO to enable him to transact as such.

8. The evidence tendered on behalf of the first respondent suggests that even with the job profile and the approved submissions, the applicant was required to follow the PFMA and Supply Chain Management Policy and that he failed to produce any delegation of authority to the effect.

9. The third respondent had in his award heavily emphasized that the applicant has failed to show any authority relied upon to suggest that the job profile and the EXCO approval may serve as substitutes for the

compliance with Supply Chain Management Policy. He further found that the approval by EXCO did not give him Carte Blanche powers to act without applying the Supply Chain Management processes. These memoranda did not pass the constitutional test. His failure to ensure that there was advertising calling for competitive bidding processes contravened the first respondent's procurement policies in those four counts. He ultimately dismissed the applicant's claim based on the finding that his dismissal was both procedurally and substantively fair.

10. Before this Court, the applicant attacks the third respondent's decision on various grounds amongst others for failing to specify the provisions of the policy that it was alleged he contravened. The evidence tendered by the forensic investigator was at odds with the internal supply chain management. The third respondent failed to appreciate that none of the witnesses who testified against him were employed by the first respondent and they were not best placed with the internal application of the Supply Chain Management Policy within the first respondent. The third respondent failed to consider the exclusion of the application of the SCM in terms of Annexure A of the SCM policy.

11. Furthermore, his target of R800 million per annum and job responsibilities gave him powers that transcended the SCM Policy provisions hence there was an exclusion of the SCM policy process. The third respondent had in fact expected him to disprove the allegations that were never proven whilst this was the first respondent's duty. He found the evidence of both parties to be more argumentative than evidential and gave no reasons for the finding. He failed to take into account that no member of EXCO was called to controvert his version. His decision that an EXCO approved memo did not pass a constitutional test is not based on any authority and has failed to consider that the practice has been going on for years under the watch of EXCO.

12. That SAPPI contracted Buhlebetfu and Khanyilanga to transport pine pulp did not require the application of the third respondent's SCM policy as this was an arrangement between the two companies. The first respondent was only required to be aware that its responsibility to deliver the said pulp to SAPPI has been taken over by SAPPI itself. This transaction together with that of Tzaneng and Timrite did not fall within the ambit of Supply Chain Management Policy considerations.

13. In so far as the procedure is concerned, the applicant felt that the representative of his choice was unfairly disqualified by the disciplinary hearing chairperson to represent him at the disciplinary hearing. This was on account of him being an internal auditor and was expected to be independent. He also considered the third respondent's refusal to issue subpoenas prior to the arbitration as a defect that rendered his dismissal procedurally unfair.

14. The first respondent contends that the memoranda were conditionally approved in that the applicant was only allowed to give effect to same in circumstances where the first respondent was unable to provide transport. He approved the appointments of the service providers without having them vetted by the first respondent. All the transactions caused financial losses to the first respondent as it did not get full value for its products due to the credits that were passed. There is no basis for the review of the third respondent's award. The applicant failed to comply with the Constitution and Public Finance Management Act

Evaluation

15. The arguments raised in support and opposition to the application clearly demonstrated the parties' understanding of the test for review of the

arbitration awards. The test is well settled based on the constitutional grounds of reasonableness[1]. Further application of the test brought about clear guidance to the reviewing Court that its task is not to determine the matter as if it was in the position of the Commissioner. This was clearly articulated in *Fidelity Cash Services v CCMA and Others*[2] where the Labour Appeal Court held at paragraph 98 as follows:

> "[98] It will often happen that, in assessing the reasonableness or otherwise of an arbitration award or other decision of a CCMA commissioner, the Court feels that it would have arrived at a different decision or finding to that reached by the commissioner. When that happens, the Court will need to remind itself that the task of determining the fairness or otherwise of such a dismissal is in terms of the Act primarily given to the commissioner and that the system would never work if the Court would interfere with every decision or arbitration award of the CCMA simply because it, that is the Court, would have dealt with the matter differently. Obviously, this does not in any way mean that decisions or arbitration awards of the CCMA are shielded from the legitimate scrutiny of the Labour Court on review."

16. That the decision of the Commissioner passes the test of reasonableness does not create an impression that the arbitration award should be perfect in all four corners. The ultimate point is whether the decision brought a result that is not unreasonable. This was clearly summed up in *Herholdt v Nedbank Ltd at paragraph 25* as follows:

> "For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by section 145(2)*(a)*(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A

---

[1] In Sidumo & Another v Rustenburg Platinum Mines Ltd & Others [2007] 12 BLLR 1097 (CC) at paragraph 110 the Constitutional Court raised an important question on reasonableness: *i.e.* '*Is the decision reached by the Commissioner one that a reasonable decision maker could reach.*'

[2] [2008] 3 BLLR 197 (LAC).

> result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable."

17. The issue that is subject to challenge in this matter is the upholding of the dismissal based on the guilty finding in respect of the four counts of charge 1.1. All these transgressions are founded on a breach of the Supply Chain Management Policy. As already established above, the first respondent's issues are about the applicant approving the appointment of Buhlebetfu and Khanyilanga by SAPPI. The evidence served before the third respondent suggests that the applicant has appointed these service providers without following the Supply Chain Management processes. The forensic investigator, Mr Zwane, was the first respondent's sole witness on this point. He testified more on what was supposed to happen under normal circumstances. He comprehensively testified that competitive bidding ordinarily starts with advertising and is followed by other evaluation processes prior to appointment.

18. He was challenged by the applicant that these two service providers were in fact appointed by SAPPI based on the EXCO approval. This was in the event of the first respondent failing to provide transport of the pulp to SAPPI which was at liberty to arrange its own transport. Furthermore, the transaction is revenue generation in its nature hence it was excluded from the application of the Supply Chain Management Policy. Despite this, the witness persisted that the procurement should have happened in the ordinary sense. When the witness was called upon to show a provision in the Supply Chain Management Policy that prohibits the EXCO from approving measures enabling its revenue generating department to derive value for its product, the third respondent

interjected, he instead directed the applicant not to ask the witness to show him the provision in question. It should be the applicant who must show the witness such provisions.

19. The controversy around this is that even though the first respondent's case was reliant on the Supply Chain Management Policy, such policy was at that stage not even discovered in the first respondent's bundle. It is not in dispute that it came to record during the testimony of the applicant. At that time the first respondent's case was already closed. The third respondent was probably aware of the shortcomings of determining the matter based on the Supply Chain Management Policy that was not before him when it was critically needed. He decided to take a subjective direction that a memorandum had to pass a constitutional test. He relied on section 217 of the Constitution to let the first respondent escape from its failure to prove its case of breach of Supply Chain Management. His findings cannot be sustainable as the reason for the applicant's dismissal was solely based on the policy.

20. His findings cannot under these circumstances be considered to be those of a reasonable decision-maker. It is notable that he was sitting with undisputed evidence that the transactions underlying the appointment of the service providers by SAPPI were income generation in their nature. As a result, they were clearly excluded from the normal application of the Supply Chain Management process in terms of the policy. It became patently clear that EXCO was aware of this as they gave practical effect to Annexure A of the policy by approving the memoranda in question. There is no evidence tendered for the first respondent challenging the validity or the applicant's interpretation of the memoranda from any EXCO member. The third respondent's failure to take this into account leaves nothing but a clear misconstruction of the nature of the inquiry he faced. This is also conspicuous from his continuous attack on the applicant's

case during the arbitration proceedings and in the award that the applicant believed that the memorandum gave him Carte Blanche powers to do whatever he wanted. Based on the material placed before him, this cannot be the case. He has undoubtedly failed in his duties as Commissioner.

21. The third respondent took the approach of clubbing the four counts together. The underlying issues regarding Tzaneng and Timrite are however distinct from those of SAPPI in respect of Buhlebeftu and Khanylinga. The two common factors in all four counts are the breach of the Supply Chain Management and the passing of credit. The transactions that led to the formulation of the counts on Tzaneng and Timrite did not relate to transport but arose out of the buyback agreements between the first respondent and its customers.

22. Pulp is the top part of the tree and it is part of material sold by the first respondent. The first respondent enters into a buyback transaction with a customer who bought the entire tree with a view of harvesting a log. In essence, pulp belonged to the contractor who bought a log. The First Respondent's payment to the contractor for pulp on a buy back arrangement was effected by way of passing credit to the contractor in question. The practice was in place before the applicant's employment and was continued with after his dismissal. Documentary evidence showing various approvals on yearly basis was placed before the third respondent. He however confined his reasoning to the constitutional test together with what he regarded as the applicant's thinking that he had Carte Blanche powers to procure without following the Supply Chain Management procedures. Once again, the third respondent has failed in his duties, he failed to apply his mind to the issues placed before him.

23. The first respondent's witness conceded that, had he seen the memoranda approved by members of EXCO including the CEO, he would have recommended that everyone who signed them be investigated. This should have raised a red flag to the third respondent if he was properly paying attention to the issues placed before him. The EXCO members occupied higher positions than the applicant. It remains unknown why these memoranda were not disclosed to the investigator or why these EXCO members did not come to testify in support of the first respondent's case. The applicant's claim of the first respondent's inconsistent application of discipline amongst its employees gains credence in this regard, more so, in the absence of any averment in the answering affidavit that action was taken against the EXCO members after the discovery of their aiding and abetting the alleged irregularities.

24. With all the above factors in respect of the relevant counts in the charge and the inconsistent application of discipline on the part of the first respondent, the only conclusion to arrive at is that the dismissal of the applicant was substantively unfair.

25. When coming to the challenge of the procedural fairness of the dismissal, the applicant raised two issues. The first one is a complaint about the chairperson's refusal to allow a representative of his choice to represent him. The desired representative was one Mr Thanduxolo Xuza who was an internal auditor. The third respondent recorded in his award that the representative had out of his own accord elected not to represent the applicant. This is at odds with the disciplinary hearing chairperson's evidence before the very third respondent. He specifically testified that he made a ruling that in terms of the internal audit charter, the internal auditors need to be impartial. He postponed the matter to enable the applicant to find another representative.

26. The third respondent appeared to have found a shortcut to brush aside this issue by distancing the disciplinary chairperson from ever making a decision that resulted in Mr Xuza's exclusion from the matter. In the disciplinary chairperson's own words during the arbitration proceedings, the following was placed before the third respondent:

> "...Then we started to – the HC practitioner started. [indistinct] Business Partner in this case, started to explain that the selected, or the representative that Mr Themba is intending to make use of, he cannot make use of that representative. The HC business partner, in this case Mr Azaria Nkosi, he also sent me a what do you call it, sort of like an audit, an internal audit charter or policy, whereby it clearly indicates that the auditors need to be impartial.
> Therefore, I said based on the information that is in front of us, we cannot continue any further. Secondly, we need to give Mr Themba enough time to go and look for another ... [indistinct]"

27. This clearly demonstrates the third respondent's abdication of his duties. He did not pay attention to the case placed before him in this respect. The material placed before him is that the chairperson made a ruling to have Mr Xuza excluded and postponed the matter to enable the applicant to find another representative. The first respondent's case on this point ended here. There is no evidence that the disciplinary hearing chairperson heard both parties' submissions on this issue and made a ruling based on what was fairly placed before him. This issue was not ventilated to get the context of it. Proper consideration of the matter points to the fact that the chairperson of the disciplinary hearing only considered what the first respondent sent to him and instantly ruled to disqualify the applicant's desired representative. This was done without hearing submissions on this point. A proper assessment reveals that the chairperson perpetuated the unfairness on the applicant. The dismissal should on this point alone be found to be procedurally unfair.

28. The second point on procedural unfairness is certainly unusual. It is directed at the third respondent. He is accused of refusing to issue the subpoenas to secure the attendance of certain individuals to testify in support of the applicant's case. The applicant is relying on a trail of email correspondence which includes communication from the third respondent that it will not be necessary to subpoena those persons as the first respondent had agreed to make those persons available. This did not satisfy the applicant as he claimed to be prejudiced by this communication from the third respondent.

29. Mr Higgs for the applicant battled to explain on what basis is this a procedural aspect of the dismissal. The events in question arose out of events that took place after the dismissal. He ultimately changed his tune and opted to regard this as a reviewable irregularity that goes into the merit of this application. It is not clear whether this was a ruling separate from the arbitration award. The award does not have a finding to the effect either. If it was a ruling, the applicant's papers should have had a prayer to the effect. Be that as it may, it is inconceivable to have a dismissal declared procedurally unfair based on the Commissioner's decision. Procedural unfairness of the dismissal can only be committed by the employer. On this note, I find no merit to this point.

30. In conclusion, based on what is placed before this Court, the applicant has made a case for the review and set aside of the third respondent's arbitration award. The application should under these circumstances succeed. The applicant sought retrospective reinstatement. There is nothing militating against reinstating the applicant. This Court has no reason to deny him the relief sought.

Costs

31. Both parties sought costs against each other. In view of the employment relationship being on the brink of restoration, it will not be in the interest of both parties to make a cost order. It will therefore not be within the confines of law and fairness to make a cost order.

Order

32. In the premises, the following order is made:

1. The arbitration award issued by the third respondent under case number MPMB2369-20 is reviewed and set aside.

2. The arbitration award is substituted with an order that the dismissal of the applicant is found to be both procedurally and substantively unfair.

3. The first respondent is ordered to reinstate the applicant to his position retrospectively to the date of dismissal within 14 days of this order.

4. There is no order as to costs.

MM BALOYI AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant: Mr C Higgs of Higgs Attorneys

For the first respondent: Adv. F Sangoni
Instructed by Jassat Dhlamini Attorneys