



THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Not Reportable
Case No: DA27/22

In the matter between:

**STATE INFORMATION TECHNOLOGY
AGENCY SOC LIMITED**

Appellant

and

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

First Respondent

BESS PILLEMER N.O. (ARBITRATOR)

Second Respondent

DANIEL REMIGIO DE FREITAS

Third Respondent

Heard: 9 November 2023

Delivered: 26 March 2024

Coram: Waglay JP, Mlambo JA and Smith AJA

JUDGMENT

SMITH, AJA

Introduction

- [1] This is an appeal against the judgment of the Labour Court, Durban (per Seery AJ), upholding the award by the Commission for Conciliation, Mediation and Arbitration (the CCMA) in favour of the third respondent.
- [2] The appellant is the State Information Technology Agency SOC Limited, (the SITA) a legal entity registered as a state-owned company in terms of the Companies Act.¹
- [3] The CCMA is the first respondent and the second respondent is the commissioner who sat as the arbitrator in the proceedings under review. The third respondent, Daniel Remigio de Freitas, was employed by the SITA as a Senior Procurement Officer until his dismissal on 29 October 2019, pursuant to a disciplinary inquiry. Mr de Freitas was previously employed by the South African Police Services and worked in their Supply Chain Management Department.
- [4] Mr de Freitas was charged with two counts of failure to follow procurement procedures pursuant to a forensic investigation conducted by an external service provider, namely Fundudzi Forensic Services (Pty) Ltd (Fundudzi). The forensic report produced by Fundudzi allegedly found irregularities in certain procurement transactions relating to the KwaZulu-Natal SITA office and a supplier, Phutuma Technologies (Phutuma).
- [5] In respect of the first charge, it was alleged that Mr de Freitas, during the period May 2016 to August 2016, failed to follow SITA procurement procedures regarding a request for quotation (RFQ 1021 – CS – 776 – 2016), in that he appointed Phutuma to install network points for the South African Police Service when the former did not attend a compulsory site briefing. In respect of the second charge, it was alleged that de Freitas, during the period August 2016 to September 2016, failed to follow procurement processes

¹ No. 71 of 2008.

regarding a request for quotations (RFQ 116 -CS -776- 2016), in that he appointed Phutuma to install network points for the Department of Home Affairs even though the former did not quote in accordance with advertised specifications. Because of Phutuma's defective quotation, the Department cancelled the order.

- [6] Mr de Freitas was charged together with the SITA Procurement Manager, Mr Sibonile Mthembu. The latter pleaded guilty and was dismissed. It is, however, common cause that Mr Mthembu was also found guilty of additional and more serious transgressions involving some R15 million.

Proceedings before the CCMA

- [7] Aggrieved by his dismissal, Mr de Freitas referred his dispute to the CCMA for arbitration. The second respondent presided as arbitrator and after hearing the testimony of Mr Amos Senwamadi (the forensic investigator) and Mr Edwin Mashau (SITA Senior Manager) on behalf of SITA and Mr de Freitas, who testified in his own defence, she delivered her award on 9 February 2020.
- [8] In terms of the award, Mr de Freitas's dismissal was declared substantively unfair; SITA was directed to reinstate him retrospectively on terms and conditions no less favourable than those which applied on the date of his dismissal (31 October 2018); SITA was ordered to pay Mr de Freitas's arrear salary in the sum of R606 896.11; Mr de Freitas was directed to report for work within three days of being notified of the award; and SITA was ordered to pay Mr de Freitas's legal costs.
- [9] Mr Mashau's testimony related mainly to the contended breakdown of the employment relationship between Mr de Freitas and SITA. He was unable to shed any light on the events that led to Mr de Freitas's dismissal and claimed that he had signed the award to Phutuma as a mere formality after the latter and Mr Mthembu had signed. His testimony regarding the breakdown of the employment relationship was premised mainly on his assertion that

employees who disregard prescribed procedures can no longer be trusted.

- [10] Mr Senwamadi also had no personal knowledge of the events that led to the charges being preferred against Mr de Freitas and his evidence was based entirely on his interpretation of the relevant documentation and *ex post facto* reconstruction of the events.
- [11] With reference to SITA's Supply Chain Management Policy, he explained that SITA acts as a procurement agency for government departments. SITA would, after receiving a request for assistance from a department, draw up a business plan that would guide the procurement process and sourcing of the required Information Technology services. SITA would thereafter prepare a request for quotation (RFQ) which is then circulated to accredited service providers who deliver their quotes to SITA's provincial office. That office would then evaluate the quotations and appoint the successful service provider. The Senior Procurement Officer is responsible for preparing the submission that outlines the procurement process and must comment on whether mandatory requirements have been met. The Senior Procurement Officer also recommends the service provider to be appointed.
- [12] The Senior Procurement Officer's submission is then placed before the Procurement Manager who, if he or she is satisfied with the submission, signs in support thereof. Finally, the submission is placed before the Provincial Head for final approval or rejection. SITA will then advise the government department of the recommended service provider and costs of the project, to which it adds a 7% mark-up. It is only after SITA had been advised by the department that it is satisfied with the recommended service provider and project costs, that the service provider would be appointed.
- [13] He said that Mr de Freitas, who in his capacity as Senior Procurement Officer was instrumental in the award of the contract to Phutuma, disregarded the injunction in the business case in respect of the RFQ mentioned in charge 1, which required service providers to attend a mandatory site meeting. He consequently irregularly recommended the appointment of Phutuma even

though it did not attend the site meeting. Mr Senwamadi, however, conceded that he had no personal knowledge of Phutuma's failure to attend the meeting and in this regard had relied on an email from one Captain Govender. It was common cause that Phutuma had provided the services mentioned in the first charge to the satisfaction of SAPS and had been duly paid.

[14] Regarding count 2, he said that the quotation submitted by Phutuma did not contain the required specifications, resulting in the Department of Public Works cancelling the order and procuring its own service provider. SITA consequently lost the 7% commission it would have received if Phutuma's quotation had complied with the prescribed specifications. Mr Senwadi, however, conceded that he did not interview any of the departmental officials, or the authors of the documents on which he relied. Neither did he interview Mr de Freitas. He had drawn his own conclusions from the documentation provided to him by SITA. He also conceded that there was no evidence that Mr de Freitas had deliberately disregarded SITA's policy or that he had benefitted in any manner from the award of the contracts to Phutuma.

[15] On his version there were various persons involved in the award of the contracts, namely Mr Mthembu who recommended the awards, Mr de Freitas who signed as the compiler of the report, and Mr Mashau who approved the awards, as well as other functionaries in the Johannesburg SITA Supply Chain Management Department. Yet only Mr de Freitas and Mr Mthembu were charged.

[16] In his testimony, Mr de Freitas denied that SAPS had specified that a compulsory site meeting should be held. He said that SITA did not have a policy that requires mandatory site meetings in respect of every RFQ. He said that he was not furnished with the business case and was consequently not aware of any requirements in respect of site visits. The RFQ, which he did peruse, made no mention of site visits.

[17] He was instructed by Mr Mthembu, who was his superior, to sign the submission award after filling in the bidder details. Mr Mthembu thereafter

signed the document, recommending the submission for approval, and it was eventually approved by Mr Mashau.

- [18] Mr de Freitas explained the SITA procurement procedure by virtue of a document that was submitted into evidence as 'Exhibit E'. That document was also put to Mr Senwamadi during cross-examination and he confirmed the correctness thereof. The procedure involves ten different steps in the procurement process and establishes that several SITA functionaries play crucial roles in the award of contracts to service providers.
- [19] That undisputed document was crucial to Mr de Freitas's defence in respect of both charges and I accordingly quote it here in full.

'SITA PROCUREMENT PROCESS

1. Request received from client of services required. Sent to account manager.
2. Business case drafted by account manager with requirements from client and signed by senior manager and HOD of province.
3. Send business case to Head Quarters BAS (Business Assessment Services) to confirm all is in order. Certificate obtained and signed by BAS management.
4. Documentation is sent to Provincial Procurement manager who sends it to the SCM (Supply Chain Management) coordinator to draft a RFQ (Request for Quotation Tender). Once completed, it is sent back to the Procurement Manager to check, sign and confirm its ready to be published.
5. Documentation is sent to the Senior Procurement Officer, [Mr de Freitas] who will forward it to all accredited suppliers, including attachments. It will then be sent to the tender office to publish on the website.
6. On closure of the RFQ/Tender, it is received by the tender office at HQ JHB who will screen the number of responses and disqualify any late response received and if compulsory site meetings are not adhered to.

7. Screening report is signed by the Tender Manager confirming all in order. Documentation then sent to the KZN Provincial Office (SCM co-ordinator) for further processing and evaluation. The documents that are received by the SCM Co-ordinator are the qualifying suppliers' documents. Suppliers that did not meet the requirements as per the tender screen report, their responses will not be sent to KZN province for further evaluation.
8. Once received from the Head Office, tender documentation will be given to the Senior Procurement Officer for further submission/BEE/Pricing. Once complied by SCM, Senior Procurement Officer to send it to Procurement Manager to check if all in order and ready for signatures of a recommender and approval by HOD.
9. Once this has been done, the file is sent to the Provincial Procurement Management Committee., which consists of Management/HOD and warded (sic) to the recommended bidder by the Procurement Committee. Once the above approved documentation has been awarded, it gets sent to the Client Relationship Manager (CRM) to prepare a SITA quotation for acceptance. We then await whether they accept the SITA quote /proposal and in turn will issue an order to SITA for the services to be rendered.
10. A SITA order will be generated to the winning bidder/ supplier for the services to be rendered based on the approved submission adjudicated by the committee.'

[20] Mr de Freitas testified that he was only involved in stages five and eight. The responsibility of checking whether bidders have attended compulsory site meetings is not his but that of the Johannesburg tender office. He said that he was not required to scrutinise the business case in its entirety and was only required to sign that portion that relates to his function.

[21] In respect of the second charge, he said that it was also not his responsibility to check the specifications. He contended that the problem could have been resolved simply by asking Phutuma to submit the specifications or by awarding the bid to one of the other bidders, which would in any event have been lower than the contract eventually awarded by the Department of Public

Works. In this case also, the submission was checked and approved by both Mr Mthembu and Mr Mashau.

- [22] In his award, the second respondent found that it was not clear from the evidence whether Phutuma attended the site meeting. SITA had relied on inadmissible hearsay evidence and, in any event, the responsibility of checking whether a site visit had taken place was not that of Mr de Freitas. In addition, Mr de Freitas was only *'one of the cogs in the wheel of procurement'*, and several other SITA functionaries had played crucial roles in the award of the bid to Phutuma, and *'[e]ven if the Applicant [Mr de Freitas] could and should have investigated further, and failed to do that on this small contract, it is hardly the reason why the contract was awarded, and it does not amount to serious misconduct and certainly is not misconduct that is dismissible'*.
- [23] In respect of the second count, the second respondent found that Mr de Freitas had demonstrated that he did provide Phutuma with the specifications. However, even if he had failed to do so, the mistake should have been picked up by others involved in the process. That type of misconduct would in any event not be dismissible.

The review proceedings in the Labour Court

- [24] The review proceedings brought by SITA in the court *a quo* were based on the following grounds: (a) the arbitrator's award is unreasonable and irrational and no other arbitrator would have made a similar award based on the facts before her; (b) the arbitrator has failed to apply her mind properly; (c) and she misunderstood Mr de Freitas's role in the procurement process and failed to appreciate that he did the evaluations and made recommendations to the Senior Manager, *'who seemed to just rubber stamp them.'*
- [25] The court *a quo* upheld the second respondent's reasoning and findings and found the award to be *'well-reasoned, and based on the admissible evidence led at the arbitration.'*

Proceedings in the Labour Appeal Court

- [26] In argument before us, Mr *Nxusani*, on behalf of SITA, criticised the court *a quo*'s finding that the latter did not rely on direct evidence but rather on unproved documents. He argued that the court failed to distinguish between original and authenticated documentary evidence and those that were required to be proved by direct evidence. The document on which Mr Senwamadi relied were prepared and signed by Mr de Freitas. He did not challenge the authenticity or admissibility of those documents, or so Mr *Nxusani* argued.
- [27] He argued furthermore that those documents cannot constitute hearsay evidence since Mr de Freitas had circulated the RFQ and also had a duty to peruse the documents before circulating them to the suppliers. In any event, even if the documents did constitute hearsay evidence, the court should have considered whether they were nonetheless admissible in terms of section 3 of the Law of Evidence Amendment Act.²
- [28] Regarding the issue of the requirement for a mandatory site visit, Mr *Nxusani* argued that the court *a quo* gave undue weight to the fact that SITA did not have a policy regarding that issue. There was no need for such a policy since the business case would indicate whether a site visit is required in a particular bid and if so, that requirement would be specified in the RFQ, as was the case in this instance.
- [29] According to Mr *Nxusani* the court *a quo* similarly misdirected itself by attaching undue weight to the fact that SITA also did not have a policy regarding bid specifications. He submitted that the evidence established that Mr de Freitas was aware of the specifications and had circulated same to the service providers. He had emphasized the compulsory nature of those specifications in an email but nevertheless caused a company to be appointed that did not comply with the specifications.

² No. 45 of 1988.

- [30] The court *a quo* also wrongly disregarded relevant documents on the basis that they constituted inadmissible hearsay evidence. However, those documents were also prepared and circulated by Mr de Freitas and could accordingly not constitute hearsay evidence. However, even if they did, the court was enjoined to consider whether they should be admitted in terms of the Law of Evidence Amendment Act.
- [31] In addition, he criticised the court *a quo*'s finding that Mr de Freitas was only 'one cog' in the SITA procurement process and was only involved in two of the ten stages, even though the evidence established he was a Senior Procurement Officer whose main duty was to implement the SITA Supply Chain Policy. The court *a quo* also misdirected itself by having regard to Exhibit E. That document was prepared by Mr de Freitas, had no official status, and could accordingly not override the duly adopted SITA policy.
- [32] To my mind, none of these contentions are sustainable, and I demonstrate below that they are not supported by the evidence.
- [33] The Constitutional Court in *Sidumo v Rustenburg Platinum Mines Ltd and Others*³ held that section 145 of the Labour Relations Act⁴ is now suffused by the constitutional standard of reasonableness, and the question that needs to be answered in a review in terms of that section is: '*[i]s the decision reached by the commissioner one that a reasonable decision-maker could not reach?*' Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action, which is lawful, reasonable and procedurally fair.'
- [34] The function of this court – as was that of the court *a quo* – is thus not to judge the correctness of the arbitrator's decision but rather to determine whether, having regard to the totality of the evidence that served before her,

³ 2008 (2) SA 24 (CC), at para 111

⁴ No. 66 of 1995.

the decision is '*one that a reasonable decision-maker would make.*'⁵

- [35] Before I consider the arguments advanced on behalf of SITA, I must first deal with an issue that may well be dispositive of the case. It is the following. SITA attempted to establish that Mr de Freitas has deliberately contravened its procurement procedures. It is that nature of misconduct which, if established, would attract the sanction of dismissal in terms of the SITA Disciplinary Code.
- [36] However, the evidence did not establish such deliberation on the part of Mr de Freitas and neither Mr Sewamadi nor Mr Mashau was bold enough to make that assertion in their testimonies. There was also no evidence that Mr Freitas had benefitted in any manner from the award of the bids to Phutuma. Therefore, at best for the SITA, even assuming the correctness of arguments advanced before this court, Mr de Freitas would have been guilty of a lesser offence that would attract a series of progressive sanctions before dismissal could be justified.
- [37] In many respects SITA was the author of its own problems by virtue of the way in which it adduced evidence in support of its allegations against Mr de Freitas. It elected not to present any direct evidence but relied solely on the testimony of a forensic investigator (Mr Senwamadi) who himself had no personal knowledge of the events that led to the charges against Mr de Freitas. Mr Senwamadi relied entirely on his own reconstruction of events based on his interpretation of documents, the admissibility of which had been squarely put in issue by Mr de Freitas. The documents were neither original nor authenticated and the parties had only agreed that they '*are what they purport to be.*'
- [38] The Supreme Court of Appeal in *Rautini v PRASA*⁶, interpreting a similar agreement, held that the phrase does not equate to admission of the contents of documents and parties are thus not exempt from proving the originality and

⁵ *Securitas Specialised Services (Pty) Limited v Kabelane and Others* (2021) 42 ILJ 833 (LAC), at para 20.

⁶ [2021] ZASCA 158 (8 November 2021).

authenticity of discovered documents to ensure their admissibility as evidence and to ensure that the authors of discovered documents are called as witnesses. As mentioned, the record shows that the admissibility of those documents was pertinently challenged by Mr de Freitas.

- [39] Mr Senwamadi's testimony, insofar as he relied on those documents, thus amounted to inadmissible hearsay evidence. It is also clear from the record that the second respondent raised that issue with SITA's legal representative, and replying to a question as to whether SITA would be relying on hearsay evidence, he said: *'No. not really, because we'll deal with that aspect.'* In the event, the issue was never addressed and neither was any application made for the admission of the hearsay evidence in terms of the Law of Evidence Amendment Act.
- [40] Mr de Freitas, on the other hand, was the only witness who could testify based on first-hand knowledge of the events. He was able to demonstrate that his assertion that when he signed the documents, it was not evident that a site visit was mandatory. In this regard he pointed out various alterations to the documents and that the relevant boxes which would have indicated a mandatory site visit were not ticked.
- [41] Mr *Nxusani's* criticism of the second respondent for relying on Exhibit E is also misplaced. That document was not submitted in opposition to the SITA policy but was rather Mr de Freitas's attempt to explain the procurement process. What is important though is the fact that Mr Senwamadi did not dispute the correctness of that explanation.
- [42] The evidence thus established that Mr de Freitas was - as was correctly found by both the second respondent and the court *a quo* - only one of several SITA functionaries involved in the preparation of submissions, assessment of bids and due diligence scrutiny to ensure compliance with procurement policies and procedures. Mr Senwamadi was unable to explain why Mr de Freitas was singled out for prosecution. There was no admissible evidence to gainsay Mr de Freitas's assertions to the effect that he complied with the SITA

procurement policies in all respects.

[43] In addition, the evidence established that SITA did not have a policy regarding compulsory site visits, and that it was uncertain who had imposed the requirement or that Phutuma did not attend the site meeting. Similarly, in respect of the second charge there was no prescribed format for the quotation Phutuma had submitted to the Department of Public Works. Mr Senwamadi's testimony in this regard was also based on inadmissible hearsay evidence.

[44] In my view the second respondent's reasons for the award were compelling and reasonable and supported by the evidence before her. The court *a quo* thus correctly found that there was no basis on which it could interfere with the award.

[45] The second respondent also provided compelling reasons for her decision to award costs to Mr de Freitas, and in my view, it is only fair that such an order should issue in respect of the costs on appeal as well. The review application, as well as the appeal to this court, were ill-considered and had no reasonable prospects of succeeding.

[46] In the premise the following order is made:

Order

1. The appeal is dismissed with costs and the order of the court *a quo* is confirmed.

SMITH AJA

Waglay JP and Mlambo JA concurring.

APPEARANCES:

For the Appellant:

Adv Nxusani SC

Instructed by Sifiso Chili & Associates

For the Third Respondent:

Mr B Purdon

Instructed by Purdon & Munsamy Attorneys

LABOUR APPEAL COURT