IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 64/2019

In the matter between:

SOUTH AFRICAN MUNICIPAL WORKERS

UNION OBO MOSOMA **Appellant**

and

GREATER TUBATSE LOCAL MUNICIPALITY **Respondent**

Heard: **22 September 2020**

Delivered: **2 December 2020**

Summary: Bargaining council---Arbitration proceedings---Review of proceedings---Employee dismissed for flouting supply chaim management policy---Municipal manager appointing service providers in terms of s 36 of the Municipal Finance Management Act---Appointments ratified by municipal council--- Arbitrator ignoring evidence that employee could not act contrary to council resolution nor was he responsible for approval of payments---Employee could not be guilty of derelection of duties as no evidence was adduced---Arbitration award set aside.

Coram: Davis JA, Jappie JA and Kathree-Setiloane AJA

JUDGMENT

KATHREE-SETILOANE AJA:

[1] This is an appeal against the judgment and order of the Labour Court (Mahosi J) dismissing the review application against the arbitration award made under the auspices of the South African Local Government Bargaining Council ("Bargaining Council"), in which the arbitrator found that the dismissal of Mr Mosoma ("appellant") by the Greater Tubatse Municipality ("Municipality") was fair. The South African Municipal Workers Union ("SAMWU") acts on behalf of the appellant in the appeal.

Condonation Application

[2] The appellant makes application for condonation of the late filing of the appeal record which was filed 20 days late. His reasons for filing the record late was due to the refusal of the transcribing service to issue the record to SAMWU without payment. SAMWU made payment in late January 2020 and the transcribing service issued the record. It was filed on 31 January 2020 together with this application. The Municiplaity does not oppose the application. I, accordingly condone SAMWU's delay in filing the appeal record.

Background

[3] The appellant was employed by the Municipality in 2005 as an Assistant Manager: Supply Chain. In 2008, he was appointed as Manager: Supply Chain.

[4] As Supply Chain Manager, the appellant was responsible for the procurement processes and reported directly to the Chief Financial Officer ("CFO") of the Municipality. He was also a member of the Bid Adjudication Committee ("BAC"), an internal committee responsible for adjudicating bids and recommending the appointment of service providers to the Municipal Manager. The appellant was the secretary of the BAC. His duties entailed taking minutes and facilitating the meetings. He had no voting rights.

[5] In 2011, the Municipality concluded a memorandum of agreement ("MOA") with the Department of Energy ("the Department") in terms of which the

Municipality was given funds for the electrification of nine defined villages within its district for the period 1 April 2011 to 31 March 2012. In terms of the MOA, a budget of R19 800 000.00 was allocated to the Municipality for the electrification project.

[6] The Municipality invited bids from service providers. The Bid Evaluation Committee ("BEC") evaluated the bids and recommended ten service providers for appointment to the BAC. The BAC considered these recommendations, but recommended only one of the ten service providers for appointment to the Municipal Manager. The other nine did not meet the requirements as they were not accredited or listed on the database of Eskom, which was a primary requirement.

[7] The electrification project required a number of service providers since it was to cover several villages in the Municipal district. The MOA which was for a period of one year from 1 April 2011 to 31 March 2012, provided rigid time-lines from which there could be no deviation. In the light of these constraints, one service provider was insufficient to complete the project. Furthermore, in the event that the project was not completed within the prescribed period, the Department was required to withdraw the grant.

[8] Therefore, when the BAC informed the Municipal Manager of the disqualification of the nine service providers, he referred the bids back to the BAC for reconsideration. The BAC made the same recommendation. On the third occasion on which the Municipal Manager returned the recommendation, the BAC refused to reconsider its recommendation. It, however, advised the Municipal Manager to explore the provisions of the Supply Chain Management Policy to effect the appointment of service providers for the electrification project.

[9] On 28 July 2011, the Department wrote to the Municipal Manager expressing concern about the delay in the completion of the project. It specifically enquired into why "no expenditure was reported to date" and why the project was "behind schedule". The Department cautioned that the Municipality ran the risk forfeiting the funding in question.

[10] Pressed for time to conclude the project, Mr Phala, the Municipal Manager, appointed the nine services providers that were found to be unsuitable by the BAC. He made these appointments in terms of section 36 of the Supply Chain Management Policy ("SCM Policy"). Section 36 of the SCM Policy gives the accounting officer (Municipal Manager) the power to deviate from the official procurement process established in terms of the policy and to procure any required goods or services through any convenient process. Section 36 lists five instances in which it can be invoked, one of them being an emergency. At the time that the Municipal Manager invoked section 36, the Department had already withdrawn part of the funding.

[11] The Municipal Manager through the Executive Committee subsequently informed the Municipal Council of the appointments in a memorandum setting out the reasons for invoking section 36. The Municipal Council duly ratified the Municipal Manager's decision to invoke section 36 of the SCM Policy.

[12] The service providers appointed in terms of section 36 proceeded with the task of electrifying the villages. They submitted invoices to the Municipality for services rendered. The invoices were duly authorised by the Technical Services Department (as the end user) and approved by the Municipal Manager. They were thereafter processed by the Supply Chain Management division and paid out by the Finance Department.

[13] On the discovery of certain discrepancies in the electrification project, the Municipal Council set up a forensic investigation which uncovered purported malfeasance and maladministration in the projects. There were also purported irregularities uncovered in relation to the appointment of service providers. The forensic report was presented to the Municipal Council and approved. It largely implicated the Municipal Manager (Mr Phala), the Chief Financial Officer (Mr Mogofe). It implicated the appellant to a lesser extent.

[14] The Municipal Council resolved that all those involved in the irregularities be subjected to a disciplinary process. The appellant was consequently suspended from duty. He was subsequently charged with misconduct which included gross dereliction of his duties; contravention of the SCM Policy;

contravention of clause 8 of his employment contract, abuse of power and/or procurement process, abuse of power and/or policies and/or regulation and/or legislation; improper management of assets and/or gross dereliction of duties and/or poor performance and/or contranvention of section 63 Municipal Finance Management Act[1] ("MFMA").

[15] The appellant raised various legal challenges relating to the convening of a disciplinary hearing that was heard by SALGBC and eventually the High Court. The appellant refused to attend a disciplinary hearing until finalisation of these challenges. The Municipality failed to accede to the appellant's demands and consequently determined, unilaterally, on the strength of the forensic report, that the appellant was guilty as charged. It subsequently terminated his services.

[16] The appellant referred an unfair dismissal dispute to the SALGBC. Conciliation failed and the dispute was referred to arbitration.

The Arbitration Award

[17] The arbitrator found the appellant's dismissal to be substantively fair and procedurally unfair. He, accordingly, ordered the Municipality to pay the appellant compensation equivalent to four months of his salary for the procedurally unfair dismissal.

[18] In relation to the substantive fairness of the dismissal, the arbitrator found that that appellant was "probably an accomplice to the Municipal Manager's wrongdoing in the irregular appointment of the service providers who were not recommended by the BAC". In relation to the BAC's recommendation of only one of the ten service providers, the arbitrator observed as follows:

> 'Despite the BAC having recommended only one service provider, Yola Consulting to electrify Maretlwaneng village only, the [Municipal Manager] went ahead and appointed other service providers, inter alia Mogalemole Consulting Engineers, Shama Consulting and Project Managers; and Volt Consulting Engineers; hardly within 48 hours after the BAC rejected them as

[1] No. 56 of 2003.

unsuitable and unqualified. It …implausible that such service providers would have attained the requisite skills and proficiency within a 48 hours period…'

[19] On the basis of the testimony of Mr Phasha (member of the BAC) that the appellant was the custodian of the SCM Policy, and that he was responsible for advising the Municipal Manager on the application of such policies, the arbitrator found that "it is highly probable that the [appellant] misled the [Municipal Manager] on this matter." On the issue of the keeping of the assets' register and the management of the Supply Chain Management department, the arbitrator found that the appellant did not manage that department efficiently.[2]

[20] On the question of the inclusion of the villages of Lefahla and Kutollo in the invitation and notice to bid, which were not in the the MOA, the arbitrator observed:

> 'The [appellant] agreed that he included in the invitation and notice to bid the villages of Lefahla and Kutollo, which were not included in the memorandum of agreement entered into between the [Department and the Municipality]. In justifying the inclusion thereof, the [appellant] testified that such inclusion was approved by a Council resolution, however he later changed tune and averred that same were part of the municipality's IDP. In asserting the inconsistencies on this aspect, the [appellant's] witness Ms. Boshigo testified that she was part of the Council that approved the inclusion of such villages. On the other hand Mr Phala testified that the electrictrification of those two villages was funded by the Mine's Social Labour Plan.'[3]

In addition, the arbitrator held that:

> The [appellant] was aware that as a member of the BAC that certain service providers were rejected since they failed to meet bid requirements and that such service providers shouldn't have been appointed. The [appellant] can't claim inconsistency on the grounds that certain officials at the End-user department were not disciplined for having requested such payments. The

[2] Arbitration Award, paras 22-23.
[3] Arbitration Award, para 24.

> [appellant] may not equate himself to the officials at the Technical Service Department who did not form form part of the BAC. It's an inescapable fact that the [appellant] was the secretary for the BAC, and was conversant with the issues ventilated and agreed upon at such meetings. It will be cynicism to absolve the [appellant] on the basis that he was solely meant to scribe minutes. The issues of inconsistent application of disciplinary action by the respondent doesn't feature anywhere in this matter.'[4]

[21] In relation to the procedural unfairness of the dismissal, the arbitrator found as follows:

> 'In my view, there was nothing wrong done by the [appellant] in challenging the [Municipality's] failure to adhere to the provisions of its disciplinary policy and procedure at the Labour Court. The court pronounced on the appointment of both the external chairperson and the complainant for the [appellant's] disciplinary hearing. [5]
>
> However , for the [appellant] to expect the [Municipality] to stand down the disciplinary hearing pending the finalization of his pending dispute at the SALGBC was unplumbed and baseless. But that's when the [Municipality] should have given the [appellant] an ultimatum to either attend or have his disciplinary hearing continue in his absence. It is trite that in any case where an employee refuses to attend a disciplinary hearing, the employer will be compelled to continue with a disciplinary hearing in the absence of such employee and render a finding at the end thereof. I find that the [Municipality] failed to accord the [appellant] an opportunity to state his case in the form of a fully constituted disciplinary hearing.[6]

[22] The arbitrator found that the dismissal was procedurally unfair[7] but held that the procedurally unfairness (the failure to hold a disciplinary hearing) could be cured by an order of compensation in favour of the appellant.[8]

[23] In relation to the fairness of the sanction, the arbitrator found that the dismissal was an appropriate sanction. In arriving at this conclusion, he took

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[4] Arbitration Award, para 29.
[5] Arbitration Award, para 34.
[6] Arbitration Award, para 35
[7] Arbitration Award, para 36.
[8] Arbitration Award, para 38.

into account the totality of the circumstances under which the misconduct was committed, the importance of the SCM Policy rule which was intended "to protect the economic status and reputation of the Municipality and government at large" that was breached.[9]

[24] The arbitrator accordingly upheld the dismissal of the appellant and ordered the Municipality to pay the appellant compensation in the amount equivalent to four months' remuneration calculated at his salary scale at the time of his dismissal (November 2014) less statutory deductions and tax.[10]

Judgment of the Labour Court

[25] Aggrieved, the appellant launched an application to review and set aside the arbitration award. As indicated, the Labour Court dismissed the review application. In doing so, it reasoned as follows:

> 'In my view, the arbitrator was reasonable in his assessment of the evidence before him . He reached a conclusion that any reasonable decision maker would have reached on the issue of the probabilities of the versions placed before him. The manner in which he analyzed the evidence and the arguments does not support the applicants version that he misconstrued the inquiry he had to conduct or that he ignored materially relevant facts . The [appellant] further failed to establish that the arbitrator conducted the inquiry incorrectly because , as the award reflects, he dealt with the issue before him correctly and he considered all the evidence that was placed before him. What the appellant seeks to do in this application is to bring an appeal against the decision off the commissioner in the guise of a review.'

[26] The Labour Court accordingly found that the appellant had failed to establish any basis upon which it could find that the arbitrator's award was reviewable, hence there was no basis to interfere with his award.

Review Test

[27] The test that the Labour Court is required to apply in a review of an arbitrator's award is this: "Is the decision reached by the commissioner one

[9] Arbitration Award, paras 37-38.
[10] Arbitration Award, paras 30-41.

that a reasonable decision-maker could not reach?"[11] To maintain the distinction between review and appeal, an award of an arbitrator will only be set aside if both the reasons and the result are unreasonable. In determining whether the result of an arbitrator's award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and consider whether, if the arbitrator's reasoning is found to be unreasonable, the result is, nevertheless, capable of justification for reasons other than those given by the arbitrator. The result will, however, be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator.[12]

Analysis

[28] The first contention advanced by the appellant in the appeal is that the Labour Court erred in endorsing the finding of the arbitrator that the appointment of the service providers was done contrary to the SCM Policy. In this regard, the appellant contends that: (a) he had no voting rights in the BAC and that the decision of the BAC was taken by the voting members; (b) The BAC advised the Municipal Manager to explore the provisions in the SCM Policy in order to effect the appointment of the other service providers; (c) the Municipal Manager invoked section 36 of the SCM Policy and the appellant was not involved in such advice; (d) The Municipal Council acting on the advice of the Municipal Manager resolved and ratified the appointment in terms of section 36 of the SCM Policy; (e) the letters of appointment of the service providers were issued and signed by the Municipal Manager.

[29] It is established on the evidence that the BAC did, indeed, advise the Municipal Manager to explore the provisions in the SCM Policy in order to effect the appointment of service providers "outside the normal open competitive bidding process".

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[11] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) para 110.
[12] *Herholdt v Nedbank Ltd (COSATU as amicus curiae)* [2012] BLLR 1074 (SCA) paras 12 and 13.

[30] The Municipal Manager submitted a report to the Municipal Council in relation to the section 36 appointments of the service providers and on 17 October 2011, the Municipal Council condoned the decision in the following terms:

> **'Resolved:**
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> That Council noted the urgency of the implementation for electrification projects;
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> That the Council condoned the section 36 appointment of Consultants for implementation of the electrification projects: Mafarafara, Ga-Malepe, Maretlwaneng, Mankele, Mamogolo, Motshana, Moraba, Mokgotho and Lefahla;
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> That the section 36 appointments be reported to Treasury and the Auditor-General for MFMA reporting compliance purposes.'

[31] When the appellant signed the internal purchase requisition forms for payment of the service providers who were appointed in terms of section 36 of the SCM Policy, he acted lawfully as their appointment was sanctioned by the Municipal Council. In this regard, he testified that from a procedural point of view, after a Council resolution condones any section 36 appointments made by the Municipal Manager, letters of appointment and service level agreements (SLA) would then be generated by the Legal Services Department and Technical Services Department.

[32] A payment certificate will thereafter be generated by the service provider concerned for work done, and the Project Manager will verify that the work done and the payment claimed is within budget. He or she will furthermore verify that the service provider was properly appointed either through an open bid process, or in terms of section 36 or section 32 of the SCM Policy. The relevant documents are then sent to the Technical Services Director who then makes a recommendation to the Municipal Manager to approve the payment. Once the Municipal Manager has approved the payment, the Technical Services Director will forward all the relevant documents, such as the appointment letter, SLA Agreement, payment certificate etc, to the Supply Chain Manager who then is required to process an internal purchase

requisition for payment. The Municipal Manager is responsible for the final approval of the payment and not the appellant.

[33] The appellant testified that he would have been charged with insubordination if he refused to process and sign the internal purchase requisition form, because at the time there was a Municipal Council resolution which ratified their appointment by the Municipal Manager in terms of section 36 of the SCM Policy, and he did not have the authority to defy that. The fear raised by the appellant cannot be ignored, as it was made clear in the testimony of Mr Phasha that when he refused to sign the internal purchase requisition form, he was given an intention to suspend notice for defying the authority of the Municipal Council. According to Mr Phasha's evidence, after he refused to sign the internal purchase requisition, the CFO signed and payment to the service providers in question was effected.

[34] The appellant maintained in his testimony that he was not guilty of any offence as he was not responsible for approving payments to service providers. The Municipal Manager or the CFO approved those payments. He said that the signing of the internal requisition purchase form did not constitute approval of payment, but merely confirmed that the service providers were properly appointed, that their payments were approved by the Municipal Manager or CFO and that the requisite documents were attached for disclosure purposes.

[35] In my view, the appellant's testimony that he would have been charged had he not obeyed the Council resolution cannot be discounted as he was bound by the Council resolution. In *Manana v King Sabbata Dlindyebo Municipality*,[13] (*Manana*) the Supreme Court of Appeal held that once a resolution is adopted by a Municipal Council, its officials are bound to execute it, whatever the view they might have on the merits of the resolution in law or otherwise until such time as it is rescinded or set aside on review.' The Labour Court therefore erred in dismissing, out of hand, the principle articulated in *Manana* relating to the status of a council resolution, as having no application to this matter.

[13] *Manana v King Sabata Dalindyebo Municipality* [2011] 3 BLLR 215 (SCA).

[36] Accordingly, there was no basis on the evidence for the arbitrator to have held the appellant responsible for approving the payments to the service providers that were appointed by the Municipal Manager in terms of section 36 of the SCM Policy.

[37] The Labour Court furthermore erred in confirming the arbitrator's finding that that "it is highly probable that the appellant misled the Municipal Manager". In arriving at this conclusion, the arbitrator gave undue weight to the evidence of Mr Phasha that, as the custodian of the SCM Policy, the appellant was required to advise the Municipal Manager on its application, while ignoring the evidence of Mr Phala (the Municipal Manager at the time). Mr Phala expressly refuted the allegation that he was misled by the appellant. He made it clear in his testimony that the appellant was not involved in his decision to invoke section 36 of the SCM Policy. That was entirely his own decision which was subsequently ratified or "condoned" by the Municipal Council. It was also established on the evidence that the appellant was not involved in drafting the letters of appointment for the service providers. Although the appellant testified that the Municipal Manager (Mr Phala) drafted these letters, it emerged from the testimony of Mr Phala, that the appointment letters were brought to him by the CFO and the Director:Technical Services. There is accordingly no evidence on record that indicates that the appellant misled the Municipal Manager or was complicit in the irregular appointment of the nine service providers in terms of section 36 of the SCM Policy. The arbitrator's conclusion in this regard was not founded on fact but rather on conjecture or speculation.

[38] The arbitrator found that the appellant had failed to report the deviations in terms of section 36 to National Treasury and the Auditor-General. Mr Morathi testified that the appellant had totally failed to report these deviations to National Treasury and the Auditor-General, while Mr Phasha testified that the appellant had only reported them "after an audit query was made and the [appellant] tried to rectify this". Mr Phasha's testimony as well as that of Mr Morathi was inconsistent with the evidence of both the appellant and Mr Phala (the Municipal Manager at the time) that the appellant had submitted a report

detailing the section 36 deviations from the MOA to the National Treasury and the Auditor-General. Their evidence is supported by documentary evidence forming part of the appeal record, which shows that the appellant submitted the deviation report to the National Treasury and the Auditor-Genertal in July 2011. The Municipality failed to adduce documentary proof of the audit query that Mr Phasha alluded to in his evidence. In the circumstances, an arbitrator, acting within the scope of a reasonable arbitrator would have accepted the evidence of the appellant and Mr Phala over that of Mr Morathi and Mr Phasha.

[39] The Labour Court erred in simply ignoring this finding of the arbitrator. Had it considered this finding in relation to the evidence that was led at the arbitration hearing, it would have concluded that the arbitrator's finding on this aspect was inconsistent with the established evidence.

[40] The Labour Court furthermore erred in ignoring the finding of the arbitrator that the appellant admitted at the arbitration hearing that he had included, in the invitation and notice to bid, the villages of Lefahla and Kutolla which were not included in the MOA. The arbitrator ignored the evidence that the village of Lefahla was included in the Council resolution approving the section 36 deviations. He also ignored the evidence that the forensic report itself did not implicate the appellant in the decision to include the two villages in the invitation and notice to bid. It only implicated Mr Phala, the Municipal Manager at the time.

[41] The arbitrator also ignored the evidence of the appellant that both villages were part of the Municipal's budget on the electrification project. It also ignored the evidence of Ms Boshigo, the Chairperson of the BAC, who testified that the Municipal Council recommended that the two villages be included in the electrification project since they were sharing borders with the villages that were to be electrified in terms of the MOA. The arbitrator also ignored the evidence of both Ms. Boshigo and Mr Phala (the Municipal Manager at the time) that the appellant did not have the power to include villages in the MOA. On this aspect, the appellant testified that he did not have control of what was advertised in the invitation to tender. He merely

drafted the advertisement/invitation as guided by the Bid Specification Committee and the Technical Services Department as the end-user. The advertisement/invitation was approved not by Mr Phala but rather by his predecessor, acting Mayor, Mr MF Mokoko.

[42] Mr Phala indicated, in his testimony, that the two villages were added to the invitation to bid for the following reasons: Lefahla would have been the only village which was left out of the electrification project in the Municipal district and this would have resulted in protest action by community members. Electrifying Lefahla at the same time as the other villages would have also save the Municipality costs of electrifying it at a later stage. The Municipality decided to use its savings from other electrification projects and later claim those costs back from the Department. Kutullo**,** on the other hand was funded by Social Labour Plan of the mine in the Municipla district and not by the Department in terms of the MOA. The arbitrator erred in simply discounting this evidence. In particular, because there was no counterveiling evidence presented by the Municipality.

[43] Lastly, the Labour Court erred in confirming the finding of the arbitrator that the appellant was responsible for the asset register. If the Labour Court had regard to the evidence on record, it would have established that the forensic report does not implicate the appellant in the failure to keep the asset register. The report implicates the Municipal Manager and the Chief Financial Officer at the time. This is consistent with the evidence of Mr Phala (the Municipal Manager at the time) that the Chief Financial Officer was responsible for the asset register and not the appellant. In corroboration, the appellant testified hat there was an assistant manager reporting directly to the Chief Financial Officer in relation to this function.

[44] The arbitrator found that the appellant failed to manage the Supply Chain Management Department efficiently. He drew this inference from the failure or refusal of the appellant, under cross-examination, to answer a question on whether he managed this division efficiently. The appellant’s refusal to answer this question cannot, without more, make him guilty of the charge of failing to either keep the asset register or manage the Supply Chain Management

Department efficiently. On the whole, the Municipality failed to present any evidence demonstrating the manner in which the appellant failed to manage the Supply Chain Management Department efficiently.

[45] Lastly, the Labour Court found that “the Municipality was faced with irregularly appointed service providers which may have resulted from conceivably corrupt conduct of its own employees as opposed to validity of a contract or its resolution”. This finding is not supported by any the evidence. Crucially, no evidence was led by the Municipality, at the arbitration hearing, to show that the conduct of the appellant (or for that matter the Municipal Manager at the time) constituted corrupt conduct. Notably, and as is apparent from Mr Phala’s evidence the Municipality settled its misconduct case against him. The Chief Financial Officer was also not found guilty as the Municipality was unable to prove its case against him. Yet it persists in the case against the appellant on the very same charges.

[46] What is more, it was established on the evidence that the purported irregular appointments of the service providers were never challenged in a court of law. The service providers concluded the work on the electrification project which they were appointed to carry out, and were subsequently paid. Their contracts were never cancelled nor did the Municipality claim the payments back. Furthermore, the appointment of the service providers and payment vouchers were disclosed to, and audited by, the Auditor-General, and there was no determination that they amounted to unauthorised, fruitless and wasteful expenditure as alleged by the Muncipality.

[47] At the arbitration hearing, the appellant claimed inconsistency of disciplinary action on the grounds that the Municipality had not disciplined certain other members of the BAC and BEC for initiating and requesting payments for the service providers appointed by the Municipal Manager. The arbitrator dismissed this contention out of hand by stating that “the [appellant] may not equate himself to the officials at the Technical Services Department who did not form part of the BAC”.

[48] There is merit in the appellant's contention. He seems to have been singled out as a member of the BAC (on the basis that he was aware of its decision disqualifying the nine service providers) and disciplined for signing the internal purchase requisition form for purposes of payment of the irregularly appointed service providers. Yet other members of the BAC, such as Mr Bruce Mohlaba, Director:Technical Services, and Mr Malungane Eugene, Project Manager (also a member of the BEC), initiated and signed the payment certificates that were approval by the Municipal Manager and ultimately paid by the Finance department. They would have been just as aware of the BAC decision rejecting the nine service providers, as was the appellant yet they were not charged. It is equally perplexing why the former Municipal Mayor (Mr MF Mokoko) who approved the invitation to bid (which included Lefahla and Kutollo villages) and members of the Bid Specification Committee and the Technical Services Department who guided the appellant in drafting the invitation to bid were not disciplined. The arbitrator's finding that the inconsistent application of disciplinary action did not feature in this matter was, therefore, completely out of sync with the evidence and appellant's argument based thereon.

[49] The arbitrator's failure to properly apply his mind to the evidence that was led in the arbitration hearing is a reviewable irregularity that justified interference on review by the Labour Court. But for this irregularity which was material to the outcome of the arbitration, the arbitrator would have arrived at a different decision . The Labour Court, in my view, endorsed the findings of the arbitrator without giving any consideration to the evidence that was led at the arbitration hearing. Had it paid closer attention to the evidence, the Labour Court would have readily recognised that the arbitrator's decision that the appellant's dismissal was substantively fair, is a decision that a reasonable arbitrator would not have come to on the totality of the evidence before him/her.

[50] I consider the appellant to be entitled to reinstatement. There is no evidence on the record which points to reinstatement being impractical or inappropriate in the circumstances.

[51] For all these reasons, the appeal must succeed.

Costs

[52] The appellant is represented by SAMWU in the appeal. SAMWU also represented him in the review application. I accordingly consider it fair and just not to make a costs order against the Municipality in either the review application or the the appeal.

Order

[53] In the result, I make the following order:

1. The appeal is upheld with no order as to costs.

2. The order of the Labour Court is set aside and replaced with the following order:

‘1.The dismissal of the applicant is substantively and procedurally unfair.

2.The applicant is reinstated from date of his dismissal;

3. There is no order as to costs.’

F Kathree-Setiloane AJA

Davis JA and Jappie JA concur:

APPEARANCES

FOR THE APPELLANT: Mr F Baloyi

Instructed by Maenetja Attorneys

FOR THE RESPONDENT: IM Shonge Attorneys

Instructed by IM Shongwe Attorneys