

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 328/21

In the matter between:

INDRIN MARIEMUTHOO

Applicant

and

LUNGILE MATSHAKA N.O

First Respondent

**SOUTH AFRICAN LOCAL GOVERNMENT
BARGAINING COUNCIL**

Second Respondent

**CITY OF JOHANNESBURG
METROPOLITAN MUNICIPALITY**

Third Respondent

Heard: 8 December 2023

Delivered: 15 January 2024

(This judgment was handed down electronically by circulation to the parties' legal representatives, by email, publication on the Labour Court's website and released to SAFLI. The date on which the judgment is delivered is deemed to be 15 January 2024)

JUDGMENT

NAIDOO AJ

- [1] The applicant seeks to review and set aside an arbitration award issued by the first respondent (the arbitrator). In his award, the arbitrator held that the applicant's dismissal by the third respondent was substantively fair, but procedurally unfair and awarded the applicant, three months salary as compensation, amounting to R234 000.00.

- [2] The third respondent, (the City) filed a cross review seeking to review and set aside the arbitrator's finding that the applicant's dismissal was procedurally unfair.
- [3] The applicant commenced employment with the City in May 1986. He was appointed as the Deputy Director: Printing since 1 April 2013 which position he still held at the time of his dismissal. He was dismissed on 31 January 2019, after being found guilty of four charges of gross misconduct, which broadly summarised, involve gross negligence/gross dereliction in the performance of his duties, alternatively failure to act in the best interests of the City (charge 1); dishonest misrepresentations to the City Manager (charge 2); financial prejudice to the City and/or fruitless and wasteful expenditure (charge 3) and failing to properly manage and timeously finalise the procurement process for the High Speed Copiers Maintenance Contract (charge 4). The applicant disputed the fairness of his dismissal and referred the dispute to the second respondent.
- [4] The material facts are disclosed in the record and recorded in the award under review. The arbitrator found that the applicant was guilty of charges 1, 2 and 4. The arbitrator concluded that he would not "*endorse a charge emanating from not realising savings*" (charge 3) and so it would appear and this was common cause, that he found the applicant innocent of charge 3.

The arbitrator's reasoning and conclusions

- [5] It is worth setting out the arbitrator's reasoning and conclusions in some detail below, for reasons that become clear later on when one evaluates the remaining grounds of review.
- [6] The arbitrator reasoned that the Executive Adjudicating Committee (EAC) for Bid A525/17, recommended that Mr Sam Dubru (Mr Dubru), the Acting Group Executive Director (AGED) and Treasury Department be authorised to negotiate prices with the service providers to align their prices with the cheapest prices quoted that will standardise copy charges. Mr Dubru sub-

delegated the task of negotiating prices to Mr Tshibalo, the Acting Group Head, who would have the information regarding the tender. Mr Tshibalo testified that he instructed the applicant to put together a negotiation team and run the process. Mr Tshibalo, further nominated the Acting Director: Logistics and Administration, Mr Mboniseni Nemangaani (Nemangaani), to also be a part of the negotiations, because the tender was for the department.

- [7] On 4 July 2018, it transpired that the applicant did not convene a negotiating team as instructed by Mr Tshibalo, but instead, over 4 and 5 July 2018, the applicant re-convened and chaired the Bid Evaluation Committee (BEC) for purposes of price negotiations with service providers. It was discovered during cross examination that the applicant did not provide the BEC members with the written mandate to negotiate prices.
- [8] On 4 July 2018, Mr Nemangaani attended the price negotiation meeting, but the applicant asked him to leave the price negotiation meeting as Mr. Nemangaani was not a member of the BEC. On the same day, Mr. Tshibalo and the Group Head of Supply Chain Management, Ms Thembisa Peele (Ms Peele) informed the applicant that from a Supply Chain Management (SCM) perspective, the BEC was not authorised to negotiate prices with the service providers. The applicant created an impression that he would cease negotiating as the BEC and convene a negotiation team as initially instructed by Mr. Tshibalo. He did not do so and the BEC reconvened on 5 July 2018.
- [9] In re-convening and chairing the BEC for purposes of price negotiations, the applicant acted without the requisite authority, there was no written mandate for the BEC to negotiate prices and the EAC did not mandate the BEC to reconvene for purposes of price negotiations but instead resolved that the AGED and Treasury Department must negotiate prices with the service providers.
- [10] In so far as the applicant relied on the Probity Report, in which according to him, the City Manager gave the BEC the go ahead to undertake price negotiations, the arbitrator found that the applicant could not rely on the

Probity Report as the Probity Report was signed on 23 April 2018, while the EAC meeting was held on 29 May 2018 and the EAC resolution was signed on 18 June 2018. Therefore, the Probity Report predated the EAC Resolution.

- [11] In so far as the applicant alleged that there were missing recordings of the EAC meeting held on 29 May 2018 which paint a different picture from that contained in the EAC resolution, and which point to the BEC being authorised to negotiate prices, the arbitrator reflected on this aspect. The arbitrator's ultimate finding on this score, however, was that the EAC resolution clearly authorised the AGED and Treasury Department to negotiate prices with the service providers and not the BEC.
- [12] In light of the above exposition, the arbitrator concluded that the applicant's conduct amounted to gross insubordination and/or gross negligence and/or gross dereliction in the performance of his duties, alternatively failure to act in the best interests of the City and constitutes a breach of his fiduciary duties towards the City.
- [13] While the applicant raised an inconsistency challenge to the effect that all members of the BEC should be disciplined, the arbitrator referred to the principles endorsed in *Southern Sun Hotel Interests (Pty) Ltd v CCMA and Others*¹ and found that there were differentiating circumstances between the applicant and the other members of the BEC in that, the management of the tender was the applicant's responsibility as the Deputy Director: Printing, he was the Chairperson of the BEC and presented the report to the EAC, he drew the tender specifications and evaluated bids against the specifications, he authored the resubmission report making recommendations that the EAC appoint the AGED and Treasury to negotiate prices and he knew that after resubmission at the EAC, the function of the BEC ceased.
- [14] In relation to charge 4, and as to whether the applicant was responsible for the High Speed Copiers Maintenance Contract, according to the Management

¹ (2010) 31 ILJ 452 (LC).

Committee Meeting minute, the applicant was the official responsible for providing feedback. On 19 January 2018, the applicant gave an update to the Management Committee that the tender for the high speed maintenance copiers would be advertised and was cited as the person responsible. Further, a memorandum was addressed to the applicant regarding the delay in finalising the High Speed Copiers Maintenance Contract tender on 4 June 2018. The applicant responded to this memorandum, by stating: *"we are anticipating to conclude the maintenance contract for the high speed copiers by June 2018."* By the time the applicant was suspended, he had still not concluded the contract.

- [15] The applicant raised two procedural challenges. One related to the Presiding Officer permitting the City to be legally represented and the other related to the appointment of an external Presiding Officer to chair the disciplinary enquiry.
- [16] The arbitrator, concluded in relation to permitting the City legal representation, that the Presiding Officer of the disciplinary enquiry considered all relevant factors and was satisfied that it would be unreasonable to not allow the City legal representation. The arbitrator, therefore accepted that the Presiding Officer's ruling allowing legal representation was reasonable and justifiable. Despite the applicant being aware of his right to be legally represented he elected to be represented by his trade union.
- [17] The arbitrator concluded however, that it had not been demonstrated either at the internal disciplinary hearing or in the arbitration, how it was not possible to appoint a suitably qualified person, employed by the City, to serve as the Presiding Officer and instead for the City to have appointed an external person as a Presiding Officer *"who was more than just suitably qualified, being a practicing attorney"*. This led to the arbitrator's conclusion that it was procedurally unfair to the applicant to have an external person as a Presiding Officer, rendering his dismissal procedurally unfair and entitling him to compensation of three months salary.

The grounds of review (main review application)

- [18] The applicant's review application is premised on two fronts, the first seeks to attack the arbitrator's reasoning and the second seeks to have the award reviewed and set aside on the basis that the arbitrator committed misconduct.
- [19] The applicant contends that the arbitrator committed gross irregularities in the form of latent irregularities in his reasoning in that: the finding that the BEC was not mandated was a finding that no reasonable arbitrator could reach given the lack of the recordings (of the EAC meeting), the fact that one of BEC members who testified, Ms Nicole Das Neves, corroborated the applicant's version that the BEC was mandated by the EAC and the Probity Report and the EAC resolution mandated the BEC. The arbitrator made too much of the evidence of the City that the applicant committed gross insubordination when there was no evidence of an instruction that was defied by the applicant. The arbitrator's conclusion that the applicant was responsible for the High Speed Copiers Maintenance Contract was a finding that no reasonable decision maker could reach as the applicant was not responsible for the tender. The arbitrator ought to have concluded that the City applied discipline inconsistently in not charging the other members of the BEC. Lastly, it is contended that the arbitrator failed to make an adverse finding on the failure of the City Manager to comply with a subpoena to testify at the arbitration.
- [20] The applicant further contended that the arbitrator committed misconduct in that he (a) slept throughout the proceedings, and (b) he created a reasonable perception of bias by descending into the arena at various points and shielded the City's witnesses from being cross examined.

The cross review application

- [21] The City contends that the arbitrator's finding that the applicant's dismissal was procedurally unfair on account of an external Presiding Officer being appointed, is one which no reasonable arbitrator could have arrived at. The appointment of an external Presiding Officer is permitted in clause 7.6.3 of the Disciplinary Code. The City did lead evidence as to why it appointed an

external Presiding Officer. Ultimately, fairness is the consideration, and the applicant received a fair hearing free of institutional influences, by a practicing labour attorney who was impartial, there was no prejudice that the applicant complained of nor did he articulate what unfairness in the procedure was occasioned by the appointment of an external Presiding Officer.

Evaluation : The main review application

- [22] In a matter such as the present, where the applicant relies on what are contended to be reviewable irregularities in the assessment of the evidence, the court must be cautious to ensure that the line between an appeal and a review is not crossed. In *Gold Fields Mining SA (Pty) Ltd v CCMA*², the Labour Appeal Court (LAC) noted that a review court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each factor and then determine whether a failure by the arbitrator to deal with one or more factors amounted to a process related irregularity sufficient to set aside the award. The LAC has cautioned against adopting a piecemeal approach, since a review court must necessarily consider the totality of the available evidence.
- [23] To summarise: the threshold to be met by an applicant in a review application is one of reasonableness. The court is required to apply a two-stage test. The first stage is to determine the existence or otherwise of any error or irregularity on the part of the arbitrator. If the applicant is unable to establish any error or irregularity, that is the end of the enquiry. The second stage is one in which the review court must establish whether despite any reviewable irregularity, the award nonetheless falls within a band of decisions to which a reasonable decision – maker could come to on the available material.

Whether the BEC was mandated

- [24] To the extent that the applicant contends that, the finding that the BEC was not mandated, was a finding which no reasonable arbitrator could have arrived at, this is simply not true. Under cross examination, the applicant was

² [2014] 1 BLLR 20 (LAC) at paragraph 18.

asked whether he had any written approval or mandate which authorised the BEC to negotiate with service providers and he confirmed that he did not.³

[25] In support of his defence as to why the BEC was authorised, the applicant relied on the Probity Report dated 23 April 2018⁴ and on audio recordings of the EAC meeting held on 29 May 2018 which are missing. However, his version must be evaluated against the EAC resolution signed on 18 June 2018, which specifically records in recommendation 2 that the AGED and Treasury Department are authorised to negotiate prices with the service providers. There is no explanation tendered as to why the arbitrator should have ignored the EAC resolution which is clear as to who is authorised to undertake price negotiations in favour of audio recordings of the very same EAC meeting which apparently paint the opposite picture. The applicant is familiar with the SCM policies and accepted that the authorisation for price negotiations must be contained in writing.⁵ He could also not explain why he did not seek to have the EAC resolution corrected despite it (if his version were to be accepted) containing materially inaccurate information.⁶ If the applicant's version were to be accepted, it would mean that seven people signed the EAC resolution (through the different stages that it followed) despite it being materially incorrect. The probabilities do not support this.

[26] In argument before the Court, it was contended that the evidence of Ms Das Neves corroborated the applicants and the arbitrator should have taken this into account. It is significant however that Ms Das Neves was a member of the BEC which convened to undertake price negotiations⁷ in circumstances when it is alleged that the BEC was unauthorised to do so. She was called to testify that the BEC (of which she was a member) was authorised, hence, it is not surprising that she would corroborate the applicant. She testified that one would not always act on what Probity does and that this was an opinion.⁸ A conspectus of the Probity Report reveals that it is marked private and

³ Transcript, pg 1506-7.

⁴ Pg 284, CCMA Records File 1.

⁵ Transcript, pg 1506-7

⁶ Transcript pg 1571.

⁷ Transcript pg 1839

⁸ Pg 1847 of the transcript.

confidential and does not make binding resolutions which would have the effect of overruling the EAC resolution, which in any event, came later.

- [27] Ms Das Neves could not explain why the EAC resolution contained the recommendations that it did and stated that she would have to go back to the audio recordings to confirm whether the EAC resolution is correct.
- [28] On a balance of probabilities, the failure of the arbitrator to attach much weight to Ms Das Neves' evidence did not constitute a gross irregularity.
- [29] In argument, it was raised that "*hypothetically*", the arbitrator could not have found that the applicant committed misconduct in re-convening the BEC if he was instructed to convene a team to negotiate prices and his actions in reconvening the BEC had the same effect. The trouble with this argument is that, the applicant denied that he was given an instruction to convene a team to negotiate prices. He argued that it may have been advice which was not an instruction and then shied away from taking the arbitrator or this court into his confidence and disclosing any factual basis that would support a finding that reconvening the BEC was tantamount to putting together a team to convene price negotiations. All that he left the arbitrator to work with, was his assertion that he did not commit misconduct because he was authorised to convene the BEC which authority he obtained from the Probity Report and his version of what was discussed at the EAC meeting (which was contradicted by the EAC resolution). The arbitrator's findings on this score, therefore, fall within the band of decisions to which a reasonable decision – maker could come to on the available material.
- [30] As to whether or not an instruction was given or whether the applicant's conduct amounts to insubordination is of no moment. The arbitrator records in paragraph 127 of the award that the applicant's conduct amounted to gross insubordination and/or gross negligence and/or gross dereliction in the performance of his duties, alternatively failure to act in the best interests of the City and constitutes a breach of his fiduciary duties towards the City. Either of

these findings would support the overall conclusion that the applicant was guilty of the charge leading to the outcome of the award being reasonable.

Charge 4: The High Speed Copier Contract

[31] The arbitrator's conclusion that the applicant is guilty of this charge is supported by his reasoning contained in paragraph 131 to 133 of the award. In correspondence to the applicant, produced by the City to show he was responsible for the contract, the applicant did not raise any dispute therein. The arbitrator's reasoning and conclusion on this charge is unassailable. This was a serious charge of misconduct.

Inconsistency Challenge

[32] The arbitrator properly considered the law and principles in relation to inconsistency and had regard to a number of material differentiating factors between the misconduct committed by the applicant and the rest of the BEC members. These factors are contained in paragraphs 133-136 of his award and are material. The arbitrator's reasoning and conclusion aligns with what was held by the LAC in *Nyathikazi v Public Health and Social Development Sectoral Bargaining Council and Others*.⁹

Failure to draw an adverse inference from the failure of the City Manager to comply with the subpoena.

[33] It is correct that the applicant closed his case without the evidence of the City Manager. However, the applicant does not set out on what basis the arbitrator should have drawn an adverse inference from the failure of the City Manager to comply with the subpoena and/or testify and how this amounted to a gross irregularity, or affected the outcome of the award. The arbitrator committed no reviewable irregularity in this regard.

Misconduct by the arbitrator: (a) sleeping during the proceedings.

[34] The applicant contended that throughout the proceedings, the arbitrator would sleep and not follow arguments and presentations by both parties. This forced

⁹ (2021) 42 ILJ 1686 (LAC).

the legal representatives to constantly request for short adjournments in order to afford the arbitrator an opportunity to freshen up and recover from sleep. The legal representatives did not put this on record so as not to embarrass the arbitrator. In his heads of argument, the applicant relied on *Value Logistics (Personnel Services) (Pty) Ltd v Letsoalo*¹⁰ where the award was set aside on the grounds of the arbitrator having misconducted himself in sleeping during the arbitration proceedings. According to the applicant, the moment it is established that the arbitrator slept during the proceedings, this amounts to misconduct and the award should be set aside irrespective of whether the outcome is reasonable.

[35] The City contends that there is a vast difference between “sleeping throughout the proceedings, as alleged by the applicant and dozing off at certain intervals. Even if the arbitrator dozed off at certain intervals, he nevertheless considered and assessed all the evidence led by both parties and arrived at rational conclusions insofar as the substantive merits of the applicant’s dismissal is concerned, that any reasonable decision maker could have arrived at in the circumstances. The City relied on the judgment of *SASBO obo Mahlangu v Commission for Conciliation, Mediation and Arbitration and Others*¹¹ (in which the Court (after referring to *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others*¹² (“*Gold Fields*”) concluded that:

‘...the applicant must make out a case showing that the alleged sleeping by the commissioner during the arbitration proceedings resulted in a mistrial of issues and/or failure by the commissioner to resolve the substantial dispute between the parties.’

¹⁰ [2014] 10 BLLR 1018 (LC).

¹¹ JR1142/15) [2019] ZALCHB 52 (20 March 2019) at para 24.

¹² *Goldfields* (Id fn 2) at paragraph 14.

- [36] In *Gold Fields*¹³, the LAC found, in effect, that in order to succeed with a review for misconduct, the applicant must establish both the act of misconduct and that the outcome of the award was unreasonable.
- [37] In *Gordon v JP Morgan Equities SA (Pty) and Others*¹⁴ Steenkamp J held that the fact that the arbitrator did fall asleep is not the end of the enquiry. If the arbitrator only momentarily lost concentration, the employee may not have been prejudiced. The court analysed the record and concluded that it did not appear from the record that the arbitrator had nodded off for more than a few seconds or perhaps minutes of evidence. This momentary lapse did not deprive the employee of a fair hearing.
- [38] While the arbitrator's conduct in relation to dozing off at times does warrant criticism, the applicant did not place the arbitrator's conduct on record or complain during the proceedings that his right to a fair hearing was impacted. There is also no statement in the founding affidavit as to when and how often this would occur, and it certainly could not have been throughout the proceedings considering the applicant's contentions that the arbitrator descended into the arena especially in so far as the applicant's case was concerned. The arbitration proceeded over 17 days between 13 September 2019 to 14 December 2020 both virtually and physically. A perusal of the record (which is approximately seven lever arch files) indicates that the evidence was free flowing. There are copious handwritten notes taken by the arbitrator. The award reveals that the salient evidence was captured correctly and in the correct sequence. There is no indication of a mistrial of the issues, the arbitrator understood the issues he was required to determine and he carried out his functions in material aspects.
- [39] In *Gordon v JP Morgan Equities SA (Pty) and Others*¹⁵ Steenkamp J cited an obiter remark by the SCA in *Sager v Smith*¹⁶ where the following was said:

¹³ Id fn 2.

¹⁴ [2018] 1 BLLR 39 (LC).

¹⁵ Ibid.

¹⁶ 2001 (3) SA 1004 (SCA) at para 19.

‘Although it is not necessary to decide the matter it is interesting to note briefly how the problem has been dealt with in other jurisdictions. In (1997) 71 *Australian Law Journal* 745, a case note was published which said that the English Court of Appeal had held that when a judge fell asleep, it was the duty of counsel to wake him or her up, not just to note an appeal point for later. The same result was reached in Queensland in *Stathooles v Mt Isa Mines Ltd* [1997] 2 Qd R 106 at 113. See (2001) 75 *Australian Law Journal* at 4-5.’

- [40] The applicant has not established (on the basis of the record or the award) that the arbitrator committed misconduct or for that matter that this resulted in a mistrial of the issues or a failure to resolve the substantial dispute between the parties such that it would warrant setting aside the entire award.

Misconduct by the arbitrator: (b) descending into the arena.

- [41] It was contended by the applicant that the arbitrator shielded the City's witnesses from cross examination and descended into the arena.

- [42] After having had the benefit of reading the papers and the record, I do not find merit in this complaint raised against the arbitrator. There is nothing in the record, to show that there was undue interference by the arbitrator in the arbitration proceedings and with the witnesses' testimony. There is therefore no indication that the arbitrator abandoned the rules of natural justice or that he conducted himself in a manner that could be seen to be irregular or biased. I can therefore find no gross irregularity that exists in relation to this ground of review.

- [43] In the absence of any reviewable irregularities or misconduct for that matter, the grounds for review stands to be dismissed. Further, on an assessment of all of the evidence, the outcome of the arbitration proceedings, i.e. that on a balance of probabilities the City had proved that the dismissal of the applicant was substantively fair, falls within a range of decisions to which a reasonable decision-maker could come on the available evidence.

The cross review.

[44] Clause 7.6.3 of the Disciplinary Procedure provides that:

“Should it not be possible to appoint a suitably qualified person, employed by the Municipality, to serve as the Presiding Officer due to a lack of suitably qualified persons, or where Presiding Officers are threatened or intimidated, the Municipal Manager or his authorised representative may appoint a suitably qualified external person, not employed by the municipality, to serve as the Presiding Officer.” What is key to the interpretation of this clause is the words “suitably qualified” which according to clause 7.6.2 of the Disciplinary Procedure means “a person sufficiently competent to preside over a disciplinary hearing.”

[45] In the disciplinary hearing, the City applied for legal representation and this was granted by the Presiding Officer. The arbitrator when determining whether the decision to grant legal representation to the City was fair or not, self-evidently accepted the City had demonstrated that there was a lack of suitably qualified persons internally *to act as Prosecutor*. It is therefore, unreasonable for the arbitrator to conclude that the City did not demonstrate that there were no suitably qualified persons, internally *to act as Presiding Officer*.

[46] The arbitrator concluded (in paragraph 137 of the award) that in assessing whether legal representation should have been permitted in the disciplinary hearing that, our courts have held in various instances that procedural fairness in respect of disciplinary enquiries relates to the observance of the principles of natural justice. The arbitrator however, failed to apply the same reasoning in determining whether the principles of natural justice were observed as a result of the appointment of an external Presiding Officer. In short, the Disciplinary Code permitted the City to appoint a suitably qualified/sufficiently competent external person as the Presiding Officer and the City did adduce facts in support of this decision, which were the same facts accepted by the arbitrator in determining that an external practicing attorney be permitted to represent the City. The Disciplinary Code gave the City this discretion.

[47] The Labour Appeal Court in *Highveld District Council v CCMA and others*¹⁷ dealt with the consequences of a deviation from a Disciplinary Code in a pragmatic manner. The LAC held:

‘... The mere fact that the procedure is an agreed one does not, however, make it fair. By the same token, the fact that an agreed procedure was not followed, does not in itself mean that the procedure actually followed was unfair’ ...’

[48] The applicant has failed to set out why he was prejudiced by the appointment of an external Presiding Officer or demonstrated how this impacted on his right to a procedurally fair hearing.

[49] Contrary to the arbitrator’s finding on the score, evidence was led as to why the City appointed an external Presiding Officer, which is also recorded in paragraph 65 and 142 of the award.

[50] The City has demonstrated that the arbitrator failed to properly assess the evidence before him in relation to whether the dismissal was procedurally fair. This was a gross irregularity. On a conspectus of the material before him, the arbitrator’s finding that the applicant’s dismissal was procedurally unfair, is a decision which no reasonable decision maker could have arrived at and falls to be reviewed and set aside.

Costs

[51] Finally, in so far as costs are concerned, the court has a broad discretion in terms of section 162 to make an order for costs according to the requirements of the law and fairness. This court ordinarily does not make orders for costs against aggrieved employees who in good faith pursue legitimately filed grievances against their employers. I would accept, in the applicant’s favour,

¹⁷ [2002] 12 BLLR 1158 (LAC) at 1162 at para 16.

that this matter falls into that category and intend therefore to make no order as to costs.

[52] In the premises the following order is made:

Order

1. The main review application is dismissed.
2. The cross review application is upheld and the arbitration award is substituted with a finding that the applicant's dismissal was procedurally and substantively fair.
3. There is no order as to costs.

P. Naidoo

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant: Mr Luthuli of Bongani Khanyile Ka Luthuli Attorneys

For the respondent: Adv C Orr SC

Instructed by: Bowman Gilfillan Inc