IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR1497/21

In the matter between:

RAKESH MAHARAJ **Applicant**

And

TRANSNET SOC LIMITED **First Respondent**

TOKISO DISPUTE SETTLEMENT (PTY) LTD **Second Respondent**

GERALDINE DUNN *N.O.* **Third Respondent**

Heard: **15 February 2024**

Delivered: **23 February 2024**

This judgment was handed down electronically by circulation to the parties and legal representatives by email. The date and time for hand-down is deemed to be 23 February 2024

JUDGMENT

MAKHURA, J

Introduction

[1] This is an application in terms of section 145 of the Labour Relations Act[1] (LRA) to review and set aside an arbitration award issued pursuant to section 188A of the LRA proceedings. In terms of the award, the applicant was dismissed after he was found guilty of 5 allegations of gross negligence. The application is opposed by the first respondent (the company).

Material facts

[2] The facts of the matter are largely common cause. The applicant was employed by the company for 27 years until his dismissal. At the time of his dismissal, he held the position of Senior Manager: Transnet Socio-Economic Infrastructure Development. He held this position for 10 years.

[3] The applicant was charged with 5 allegations of gross negligence in respect of two transactions - the procurement of three agricultural tractors and the school building material. Semphakwe Trading Projects (Semphakwe) was awarded an agricultural tractor contract and SwaziKM Trading (Pty) Ltd (SwaziKM) was awarded the school building material contract.

[1] Act 66 of 1995, as amended.

[4] The first two charges relate to the agricultural tractor procurement awarded to Semphakwe and the remainder of the charges relate to the building material contract awarded to SwaziKM.

[5] The agricultural tractor contract was for the supply and delivery of three tractors to the three district municipalities in KwaZulu-Natal. The bid documents specified that the tractors should be two-wheel drives. However, during the Bid Clarification Meeting, the bid specifications were amended from two-wheel drive to four-wheel drive tractors with air-conditioned cabs. However, for reasons which became known to be budgetary constraints, Semphakwe delivered two-wheel drive tractors without air-conditioned cabs.

[6] The building material contract was for the supply and delivery of building materials for the renovations and upgrading of the King Zwelithini School in Soweto.

The agricultural tractor contract

[7] In respect of the agricultural tractor contract, the first allegation was that the applicant compiled and submitted a memorandum for approval with a budget of R1 740 000.00, that this was done in the absence of approved plans and/or budget, that the tractors procured did not comply with the bid specifications and were not fit for purpose and that this resulted in irregular and fruitless and wasteful expenditure. The second charge was that the applicant purchased or was involved in the transaction of purchasing diesel from Semphakwe in the amount of R17 896.20 without following the procurement process thereby causing the company to incur irregular expenditure.

[8] The applicant does not dispute that during the Bid Clarification Meeting, the bid specifications were amended from seeking two-wheel drive tractors to four-wheel drive tractors with air-conditioned cabs. It is also not in dispute that the original bid was not cancelled and that despite the meeting resulting in the amendment of the bid specifications, the applicant did not cancel the original bid and issue a

new bid with new specifications. The applicant appointed or participated in the decision to appoint Semphakwe to supply and deliver two-wheel drive tractors.

[9] The applicant's evidence was that the planning and funding was not his responsibility. He argued that this was the responsibility of his line manager, Musa Mkhwanazi (Mkhwanazi).

[10] After the delivery of the tractors, the applicant then requested a quotation from Semphakwe for the delivery and supply of diesel, three pumps and storage containers at a cost of R17 896.20. Semphakwe was then appointed to provide this additional work. There was no procurement process followed. The applicant's case was that he was acting on the request of Qwabe and that this procurement was an emergency and unforeseen. He disputed that the expenditure was irregular and argued that Nthuthuzelo Ngqeleni (Ngqeleni) should have stopped the transaction. He also justified the transaction by stating that he applied for condonation after he was advised by procurement to do so and that the application was still pending. Therefore, he submitted, the allegation that he committed the company to an irregular charge expenditure was premature.

The building material contract

[11] The principal allegation in respect of charges 3, 4 and 5 is that the applicant procured or was involved in the procurement of additional work from the appointed service provider, SwaziKM, in the form of provision of security services, grass cutting and construction services without following the procurement process. The allegation goes on further that the additional work cost the company R120 500, which is more than 15% of the original contract value and that this is an irregular expenditure.

[12] The applicant's primary argument was that he was exonerated by the Nexus Forensic Investigation Report, which found him not culpable for the additional work procured from SwaziKM, that is, the grass cutting, provision of security

services and construction services. The company's evidence on these charges was led through Namaswazi Masange (Masange), the owner of SwaziKM. Masange testified that the applicant requested her to provide additional work to the scope of the project. SwaziKM does not provide any of these services and had to source third parties to execute the work. The applicant told Masange to find and appoint a service provider to provide security services. He informed her that she would invoice the company for security services and then pay the service provider. In all additional works, Masange was informed by the applicant who to appoint and how the payment of these additional works should be invoiced.

[13] The additional works cost the company R120 500.00 more than the contract amount. The applicant disputed that this expansion of the scope of the project was irregular and further disputed that the additional works cost the company more than 15% of the original contract amount.

<u>The award</u>

[14] Dealing with charge 1, the commissioner found that before the request for quotation was issued, there should be an approved budget for the project. She found that there was no budget approved for the tractor project and no plan and approved model in place. She found further that the change in the bid specification from two-wheel drive tractors to four-wheel drive tractors with air-conditioned cabs during the Bid Clarification Meeting constituted a material amendment to the bid specification and that the bid should have been cancelled and a new RFQ issued.

[15] The commissioner further found that the transaction was irregular and that the expense was fruitless and wasteful. The basis for this conclusion was that the tractors were underutilised and as a result, the project did not yield optimal results. The commissioner concluded her findings in respect of charge 1 as follows:

> 'I find that based on the overwhelming evidence presented by the Employer that there was no approved agriculture farming procurement or funding projects by Transnet to purchase the tractors. There was no proper planning or research done regarding the type of tractors required, the purpose, the manner, the costs associated with the implementation of the farming projects and the management of the tractors and farming projects.'

[16] On charge 2, the commissioner noted the applicant's defence that he received verbal authorisation from Ngqeleni. She however found that this is not compliant as the applicant procured the diesel without following the procurement procedures. She concluded that the applicant was grossly negligent.

[17] Regarding charges 3, 4 and 5, the commissioner noted that there was no attempt to comply with the procurement procedures and found that the additional works or extension of the scope of the project was done to circumvent the procurement policies of the company. Further, the extension of the scope of the project exceeded 15% of the original contract amount and therefore in breach of the Procurement Procedures Manual. The commissioner rejected the applicant's argument that the procurement department should have stopped the transaction. She found that it was not possible for procurement to stop the transaction when the service had already been rendered.

[18] The commissioner also addressed the applicant's defence that the forensic investigation report exonerated him of the three charges. The forensic investigation concluded that the applicant could not have prevented the R120 500.00 incurred on the additional works and that the expense was an emergency and unforeseeable. The commissioner found that the applicant had sufficient time to plan, manage and control the project.

<u>The grounds for review</u>

[19] The applicant attacks the findings of guilt and sanction. He advances five grounds why the award should be reviewed and set aside.

[20] First, he argues that the commissioner failed to establish whether or not he was aware of or could reasonably have been aware of the rule allegedly breached and whether the rule was consistently applied. Second, the commissioner failed to attach sufficient weight to his limited role in the decision-making process, his limited powers and that he was acting on his supervisor's instruction. In amplification, the applicant submits that he was under the impression that his superior had finalised and signed the plan. These two grounds are dealt with together as *'the limited accountability ground'*.

[21] Third, the commissioner is alleged to have failed to consider and/or attach sufficient weight to the fact that the forensic investigation report concluded that he was not responsible for the expenses referred to in charges 3, 4 and 5 as they involved unforeseen circumstances and expenditure (*the forensic investigation report ground*).

[22] Fourth, the applicant argued that he had applied for condonation in respect of the transactions referred to in charges 2 to 5 (*the condonation application ground*).

[23] Fifth, the applicant argued that the commissioner failed to properly consider the issue of whether the sanction of dismissal was appropriate. He argues that the commissioner failed to consider whether the trust relationship had irretrievably broken down, whether the continued relationship was intolerable, his length of service with a clean disciplinary record, his personal circumstances, that he was a first offender and that he showed remorse (*the sanction ground*).

<u>The review test</u>

[24] The Constitutional Court has set out the test for the review of arbitration awards.[2] The Court held that arbitration awards would be reviewable when the award is one *'that a reasonable decision-maker could not reach'*.[3]

[25] The Labour Appeal Court in *Fidelity Cash Management Services v Commission for Conciliation, Mediation and Arbitration and Others*, held that this is a stringent test:[4]

> 'The test enunciated by the Constitutional Court in Sidumo for determining whether a decision or arbitration award of a CCMA commissioner is reasonable is a stringent test that will ensure that such awards are not lightly interfered with. It will ensure that, more than before, and in line with the objectives of the Act and particularly the primary objective of the effective resolution of disputes, awards of the CCMA will be final and binding as long as it cannot be said that such a decision or award is one that a reasonable decision maker could not have made in the circumstances of the case. It will not be often that an arbitration award is found to be one which a reasonable decision-maker could not have made.'

[26] The Supreme Court of Appeal (SCA) further explicated on the *Sidumo* test in *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae),*[5] finding that the mere fact that a commissioner erred does not imply that the award is reviewable – the award will only be reviewable if the arbitrator's failings resulted in the award ultimately being unreasonable.[6]

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[2] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22; (2007) 28 ILJ 2405 (CC).
[3] Ibid at para 110.
[4] [2007] ZALAC 12; (2008) 29 ILJ 964 (LAC) at para 100.
[5] (2013) 34 ILJ 2795 (SCA); [2013] ZASCA 97.
[6] Ibid at para 12; see also *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others* [2013] ZALAC 28; (2014) 35 ILJ 943 (LAC) at paras 16 – 21; *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer* [2015] 4 BLLR 394 (LAC); [2014] ZALAC 82; *Head of the Department of Education v Mofokeng and Others* [2014] ZALAC 50; (2015) 36 ILJ 2802 (LAC) at paras 30 – 33.

[27] In *Makuleni v Standard Bank of South Africa Ltd and Others*[7], the LAC reminded this Court of what the review test is about or not:

> '[4] ... The court asked to review a decision of commissioner must not yield to the seductive power of a lucid argument that the result could be different. The luxury of indulging in that temptation is reserved for the court of appeal. At the heart of the exercise is a fair reading of the award, in the context of the body of evidence adduced and an even-handed assessment of whether such conclusions are untenable. Only if the conclusion is untenable is a review and setting aside warranted.'[8]

<u>Evaluation</u>

[28] The applicant was a senior manager with 27 years of service. His last 10 years of service was in the position of Senior Manager: Socio-Economic Infrastructure Development. Though not a supply chain management official, he has acknowledged that he has a fair understanding of procurement procedures. The first respondent is a state-owned company, funded by public monies and subject to *inter alia* its own procurement procedures and other policies, the Public Finance Management and its Regulations and the Treasury instructions.

[29] The Transnet Procurement Procedures Manual (Manual) regulates and incorporates procedures for General Procurement and Construction Procurement. Chapter 7 deals with demand planning and management. Clause 7.1.2 provides that demand planning is the first step in the procurement process where the business needs are assessed, the specifications are precisely determined, the requirements are linked to the budget and the supplying industry has been analysed and constraints identified and assessed. The Manual requires an annual procurement plan for capital and operational expenditure and services and planned maintenance. Clause 7.5 provides that:

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[7] [2023] ZALAC 4; (2023) 44 ILJ 1005 (LAC).
[8] Ibid at para 4.

> 'Once the end users (operations) have identified their individual annual business needs and there has been approval of the budget by Finance and any other applicable approvals … the end user must forward their approved requirements for the forthcoming financial year to Procurement…'

[30] It is common cause that the applicant was the end-user in respect of the two projects – the agricultural tractor and building material contracts. As the end-user, he knew or should reasonably have known his responsibilities.

[31] On 5 October 2018, the applicant signed a memorandum to the General Manager, his line manager, in terms of which he requested approval to go to the market for agricultural farming equipment. This was a request to procure the three agricultural tractors. He stated that the allocated budget was R1 740 000.00 excluding VAT and that the funds would be available in the Socio-Economic Infrastructure Development (SEID). This tender was awarded to Semphakwe.

The limited accountability ground

[32] The applicant's gripe with the findings in respect of charges 1 and 2 is two-fold – first, he was not involved and had no role in the planning and costing phase of the project, was not accountable and responsible for the negligence that occurred and that his superiors should take the responsibility. Second, he was only following his superiors' instructions, which, as he testified, were made verbally.

[33] Charge 1 deals with the applicant's conduct in the agricultural tractor contract. The applicant is alleged to have been involved and has played a role in the transaction. It is alleged that he compiled and submitted the memorandum already referred to above, that the memorandum was compiled and submitted even though there were no approved plans and budget and no research and planning done in respect of amongst other costs associated with the

implementation of the project and the management of tractors. It is further alleged that he procured the tractors that were not fit for purpose. In conclusion, the company alleged that it incurred irregular, fruitless and wasteful expenditure.

[34] The commissioner found that before the RFQ could be issued, the end-user, in this case the applicant, should have an approved budget. However, the applicant proceeded to issue an RFQ without the approved budget. She found further that there was no procurement demand plan for the project. The commissioner concluded that:

> ‘In the absence of an (approved) budget [the applicant] cannot claim that the two-wheel drive tractors were cheaper and therefore within the budgetary constraints. By trying to pin the blame on Mkhwanazi is also disingenuous. As a senior manager trained on procurement procedures, [the applicant] was grossly negligent by initiating the tender without approval of the expense. The material change to the tractor specifications was irregular and prejudiced other bidders. This is an irregular procurement practice and contrary to the PPM.
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> …
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> I find that based on the overwhelming evidence presented by the Employer that there was no approved agricultural farming procurement or funding projects by Transnet to purchase the tractors. There was no planning or research done regarding the type of tractors required, the purpose, the manner, the costs associated with the implementation of the farming projects and the management of the tractors and farming projects.’

[35] The first part of charge 2 relates to the purchase of diesel from Semphakwe without following procurement procedures. The company procured diesel, pumps, grease and storage at an additional cost of R17 896.20. In addition, the applicant is charged for causing the company to incur irregular expenditure. I was

referred to an email dated 26 April 2019, sent by Semphakwe to Ngqeleni attaching a quote. Ngqeleni then forwarded the email to the applicant. The applicant argued that the commissioner failed to take this into account and that this shows that it was Ngqeleni who procured additional services. Unfortunately, this argument ignores the fact that the applicant's involvement in the procurement of these additional services from Semphakwe was never disputed.

[36] The commissioner found that as a consequence of the applicant's negligent conduct as an end-user to plan for the project, no provision was made for diesel. Although the applicant sought to dispute that the procurement of diesel was effected without following procedures, the evidence overwhelmingly established that no procurement procedures were followed. The applicant's version that he received verbal approval to purchase the diesel was rejected by the commissioner as uncorroborated. In any event, whether he received verbal instruction or not does not, in my view, make the transaction regular. The commissioner concluded that the applicant was guilty of gross negligence and of committing the company to an irregular expenditure.

[37] The applicant was the end-user of the project. He was a senior manager of an important portfolio – Socio-Economic Infrastructure Development. Whilst he may have not been trained in procurement procedures, he had a fair understanding of procurement, as evidenced by his ability to compile an RFQ and preparation of memorandums to get approval to go to the market. Despite his knowledge of the non-compliance or what he should have reasonably known to be non-compliant, he prepared a memorandum and issued an RFQ on the agricultural tractor contract in the absence of an approved budget and that there was no demand planning. This poor or non-planning meant firstly that the tractors procured were not fit for purpose and secondly, that there was no provision made in the bills of quantities for diesel, pumps, grease and storage.

[38] Is the commissioner's decision on the two charges above one that a reasonable decision-maker could not reach? The test is not about what I think the

commissioner should have found. It is certainly not about whether I agree with the commissioner or not. It is whether the decision she reached is one that a reasonable decision maker confronted with the same evidence and facts, could not reach. I am not persuaded that the applicant has satisfied the test. There is no basis for this Court to interfere with the commissioner's decision on the above charges. This ground must therefore fail.

The condonation application ground

[39] The company's case was that it incurred irregular expenditures in the amount of R17 896.20 and R120 500.00 respectively. It is common cause that the appointment of the service providers for these works was in contravention of the procurement procedures as no RFQs were issued and therefore there was no competitive bidding.

[40] On 1 May 2020, the Acting Group Corporate Affairs addressed a memorandum to the Chairperson of the Procurement Committee requesting the chairperson to recommend condonation for the irregular expenditure incurred in contravention of the legislation and procurement procedures in respect of the tractor procurement and building material contracts The memorandum records that the company incurred the following irregular expenditure – R120 500.00 for the building material procurement and R17 896.20 for the tractor procurement. The expenditures were reported to Internal Control on 5 August 2019 and 12 November 2019 respectively.

[41] The applicant's argument was that charges 2, 3, 4 and 5 were premature because the condonation applications in respect of the two transactions had not been finalised. There is no merit in the argument. The fact that the company had to apply for condonation, which was done many months after the conclusion of these transactions, is an acknowledgement that there has been non-compliance with procedures.

[42] The commissioner found the expenditure expenses to be irregular. The purpose of the condonation application was to report the transactions and to request the National Treasury for approval or overlooking of the irregular expenditures. It does not exonerate the applicant of his decision to procure services without following procedures. It is the employer's prerogative to discipline its employees. This review ground stands to fail.

The forensic investigation report ground

[43] The applicant's case is that the commissioner failed to consider and/or attach sufficient weight to the fact that the forensic investigation report concluded that he was not responsible for the expenses referred to in charges 3, 4 and 5. The forensic investigation report concluded that:

> 'Maharaj could not have prevented the additional R120 500.00, for the following reasons:
>
> - Trainee artisans could not have foreseen the exact quantity of materials upfront and timeous
> - There were already time pressures, given the launch date of 5 April for the dignitaries
> - There was a shortage of material to complete the renovations of the school in time.'

[44] The applicant submitted that he is not suggesting that the report was binding on the commissioner or that the commissioner must have deferred to it. It was submitted that it took about 8 months to investigate and finalise the report and therefore the commissioner should have placed significant weight on the report and the conclusion.

[45] The substance of this argument is that the commissioner should have deferred to the report. This is a fundamental misunderstanding of the purpose of an

investigation process and report. The applicant wants to elevate an investigation report into an outcome of a properly constituted disciplinary tribunal. The conclusion contained in the investigation report is no more than an expression of opinion which is not binding on any party involved, more so a chairperson of the disciplinary hearing or in this case, a commissioner appointed in terms of section 188A of the LRA. The chairperson of the disciplinary hearing or the commissioner is not required to defer to such an opinion, or finding. The applicant's argument is unsustainable and stands to be rejected.

[46] In any event, the investigation did not cover charge 4. The allegations in charge 4 are serious. The applicant's conduct in procuring the three additional services in respect of the building material contract amounted to outsourcing the company's supply chain management responsibilities to a third party, SwaziKM and in the process, circumventing the company's policies. The commissioner found, regarding the procurement of construction and security services, that his conduct exposed the company to potential risk because these service providers were not assessed or verified (at least by the company) that they are compliant with the industry specific regulatory requirements.

[47] The applicant took issue with the findings that he was trained in procurement processes and that he was unreliable. However, it was not shown how these alleged latent irregularities had a distorting effect on the decision reached by the commissioner. Therefore, the applicant has failed to satisfy the review test on the grounds of irregularity.

The sanction ground

[48] Although the applicant submitted that he stands by his review grounds, a large part of his oral submissions was dedicated to the issue of sanction. The applicant's case is that the misconduct allegations at best should attract the sanction of a final written warning. In his supplementary affidavit, the applicant argues that:

> '… the Third Respondent failed to consider adequately, as she was obliged to, whether the trust relationship had broken down irretrievably, whether progressive discipline or dismissal for a first offence was appropriate, whether continued employment was intolerable, and the extent to which my personal circumstances, my cooperation and genuine demonstration of remorse, length of service of 27 years and my clean disciplinary record mitigated a sanction of dismissal.'

[49] In addition, the applicant submitted that he was never suspended. I am mindful of the fact that the applicant did not specifically plead this issue and that the company did not have the opportunity to address it in its answering affidavit. These being motion proceedings, the applicant is constrained to argue his case as pleaded in his affidavits.

[50] The commissioner considered the nature of the charges and the irregularity of the transactions which resulted in the company incurring irregular expenditure. She found that the misconduct was serious and breached the trust relationship. She considered the applicant's seniority and his experience working on projects. Further, the commissioner found that the applicant did not show remorse and therefore the principle of progressive discipline is not applicable.

[51] The applicant's submission that he showed remorse is inconsistent with the facts of this case. I accordingly reject it. The applicant either tried to shift the blame or simply disputed the obvious facts, such as the three additional works which meant that the company had to call Masange as a witness. His argument that he should not have been charged with certain allegations further demonstrates a lack of appreciation for his conduct and the consequences thereof.

[52] The commissioner has in view considered and engaged the factors that the applicant accuses her of not considering. I am therefore satisfied that the commissioner has considered the relevant factors in the enquiry into the appropriateness of sanction and did not commit any irregularity in the proceedings. This review ground fails.

Conclusion

[53] There is no basis to interfere with the commissioner's decision on the merit of the allegations and sanction. Therefore, the applicant's review application stands to fail. The company has not pleaded any facts to warrant this Court deviating from the trite legal principle that costs do not follow the result.

[54] In the premises, the following order is made:

Order

1. The application is dismissed.

2. There is no order as to costs.

M. Makhura

Judge of the Labour Court of South Africa

Appearances:

For the Applicant	:	Adv. S Swartz
Instructed by	:	Mooney Ford Attorneys
For the First Respondent	:	Adv. Z Navsa
Instructed by	:	Bowmans